

Professor Bryan Horrigan is Louis Waller Chair of Law and Associate Dean (Research), Faculty of Law, Monash University, Melbourne.

Commonalities, Intersections, and Challenges for the Scrutiny and Interpretation of Legislation in Trans-Tasman Jurisdictions and Beyond

Bryan Horrigan¹

What unites the Anglo-Commonwealth community of governmental participants and public stakeholders in scrutiny and interpretation of legislation is greater than what divides it by different jurisdictional borders, constitutional architecture, and politico-legal cultures. This article addresses the nature and scope of cross-jurisdictional commonalities and emerging challenges in the interplay between scrutiny and interpretation of legislation. It concentrates upon the Trans-Tasman region, with some comparative reference to the UK, Canada, and elsewhere. In particular, it highlights the implications for scrutiny and interpretation of legislation that arise from an overlay of rights-enhancing architecture through a charter or bill of rights ('human rights law') or other institutional need to consider internationally recognised human rights. It also explores recent Australian parliamentary and judicial developments that have comparative significance for rights-protection in other jurisdictions too.

Common Audiences, Mechanisms, and Dimensions of Legislative Scrutiny

Regulatory Community for Scrutiny Work

Scrutiny of legislation occurs at different points and from different perspectives along the timeline of a statute's conception (ie policy-making), birth (ie drafting), life (ie enactment), renewal (ie amendment and reform) and death (ie repeal). This timeline includes phases of policy and legislative planning and approval, legislative drafting and pre-enactment scrutiny, post-enactment scrutiny and judicial interpretation, and extra-parliamentary scrutiny and law reform. The levels of

scrutiny engaged in by different institutional actors at different points on this timeline illustrate that the work involved in scrutiny of legislation across jurisdictions is neither one-dimensional nor confined to one institutional actor alone.

The members of what might be called the regulatory community for legislative scrutiny across jurisdictions include its parliamentary participants (ie its policy-makers and law-makers, legislative drafters, and parliamentary committees and staff). It includes other governmental participants and audiences too, such as departments of state and their portfolios, courts and other official decision-makers, law reform agencies, and even members of scrutiny or select committees in other jurisdictions who consult one another's reports. Finally, it also includes non-governmental participants and audiences, such as external consultants for dedicated scrutiny committees, citizens who make submissions to inquiries conducted by parliamentary committees, lawyers who advise clients on prospective legislation, and particular community stakeholders who are affected by the outcomes of law-making processes.

In the 21st century era of human rights laws across multiple Anglo-Commonwealth jurisdictions, the integrated work of drafting, scrutinising, and interpreting legislation with sensitivity for human rights concerns is a new and evolving part of contemporary democratic government. It involves departments of state with oversight of rights-sensitive legislation and policy administration, parliamentarians making statements about legislation's compatibility with human rights, and public servants administering laws that are properly sensitive to human rights concerns. It also involves law-makers scrutinising laws for their implications for human rights, courts interpreting legislation consistently with legally protected human rights, and citizens whose rights and liberties are affected by these institutional processes.

Technical Scrutiny of Legislation Versus Evaluation of Policy Merits

At its most basic level, the technical scrutiny of legislation involves evaluation of proposed or existing laws against designated benchmarks for good law-making processes and outcomes. The nature and purpose of technical scrutiny of legislation attracts a broad consensus across common law jurisdictions in both hemispheres.²

Speaking from a UK perspective, Professor David Feldman says that '(o)ne can therefore characterise the scrutiny process as being to examine legislation, to assess it against published criteria, and to report, leaving it to the [Parliament] to decide what to do about the report'.³ He adds that 'scrutiny takes place at three main levels: scrutiny of policy or purpose; scrutiny of the mechanisms for achieving objectives; and scrutiny of drafting'.⁴ On another view, these multi-dimensional aspects of scrutiny work involve 'substantive matters' (eg consistency with human rights and other scrutiny-based standards), 'procedural matters' (eg compliance with governmental drafting requirements, and adequate stakeholder consultation and parliamentary timelines for scrutiny purposes), and 'informational matters' (eg

regulatory and other impact assessments, and governmental explanations of departures from scrutiny-related standards).⁵

Professor Feldman emphasises that scrutiny standards must be ‘chosen and applied so as to be largely unaffected by political, or at any rate party-political, considerations’.⁶ Similarly, writing with practical experience of New Zealand’s parliamentary committee system, Tim Workman defines ‘technical scrutiny’ as follows:⁷

At the broadest level, technical scrutiny is not concerned with the policy that is to be achieved, but with the quality of the legislation that is proposed to achieve it. Technical scrutiny is a process by which legislation is measured against various standards to check that it meets acceptable objective legislative standards.

This supports the view of a former chair of the Australian Senate Scrutiny of Bills Committee that the role of a legislative scrutiny committee is ‘one of technical scrutiny in which it examines the justice, the fairness or the propriety of the way in which regulatory measures are determined and imposed’, rather than ‘the political acceptability of the policy being pursued’.⁸ The need and scope for policy consideration of subordinate legislation by legislative scrutiny committees remains a matter of debate.⁹

This Anglo-Commonwealth consensus on the nature and purpose of technical scrutiny reflects the broad distinction between non-partisan technical scrutiny of laws, on one hand, and the substantive assessment of particular policies and laws on their merits, on the other. However, even with adherence to technical scrutiny and deference to parliament as a whole on the policy merits of legislation, other policy dimensions of legislative scrutiny are also emerging.

Over time, a particular legislative scrutiny committee or other organ of government with the function of providing scrutiny-based guidance might develop a standard position on particular types of legislative mechanisms that are problematical from a scrutiny perspective, for example. Such a value-based position might be described as a ‘policy’ but might not be a matter of party-political controversy at all. Its promulgation to others within the policy-making and law-making processes can assist in institutional awareness-raising and internalisation of scrutiny standards within government, and thus ‘help to achieve the ends [of] careful, informed, rational, principled, consistent and systematic scrutiny and a high quality of legislation’.¹⁰

Recently, in its self-review of its future role and direction, the Australian Senate Standing Committee for the Scrutiny of Bills (‘SSCSB’) flagged a matter in its interim report for further consideration — namely, ‘the issue of whether to extend its “traditional approach” of focusing purely on technical scrutiny to include some policy consideration’.¹¹ In its final report in mid-2012, the SSCSB accepts that its function ‘involves focusing primarily on technical scrutiny issues’, and that this means that ‘the detail of the policy of any particular bill is primarily relevant only to

the extent that it provides context for each provision'.¹² At the same time, the SSCSB denies that its scrutiny is undertaken in 'a policy vacuum', and intimates its endorsement of suggestions that it should build upon its past practice of 'undertaking forays into particular areas of policy concern through appropriate inquiries ... and developing its own legislative policy on scrutiny issues'.¹³

A different order of policy consideration is also emerging in Australian and other jurisdictions whose human rights laws (or other rights-based laws) envisage either limits on rights generally or to specific rights through parliamentary or judicial action. For example, in line with comparative and international human rights jurisprudence, the Victorian Charter of Human Rights and Responsibilities Act 2006 ('Victorian Charter') accepts that its designated human rights can be legally subject to 'such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including [a designated list of factors]'.¹⁴ Similarly, some of the rights (eg free speech) in the European Convention for the Protection of Human Rights and Fundamental Freedoms as enshrined in the Human Rights Act 1998 (UK) ('HRA UK') contain inherent qualifications by reference to pressing national, democratic, and other countervailing interests.

The justification of limits to human rights can be a deeply controversial matter of legal policy, let alone political, moral, and legal philosophy, regardless of whether that decision is made by the executive, legislative, or judicial branch of government.¹⁵ Even without a general human rights law, the limits upon rights under particular rights-focused laws (eg anti-discrimination laws) can raise acute questions about the appropriate institutional roles and relationships between different organs of government in settling balances between competing individual and collective interests under rights-based statutory schemes. A recent example of this 'balancing' exercise occurs in the Queensland Court of Appeal's analysis of justified measures and competing socio-economic interests in the context of prohibitions of racial discrimination and equal protection from non-discrimination, in *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury*.¹⁶ Questions can justifiably be asked about the capacity and expertise of courts to undertake this kind of line-drawing exercise about human rights.

Dedicated Scrutiny Committees, Other Parliamentary Committee Models, and Extra-Parliamentary Scrutiny

One Australian innovation has been the use of parliamentary committees charged specifically with the function of technical scrutiny of legislation. Currently at the Commonwealth level of government and in four other major Australian jurisdictions (ie NSW, Victoria, WA, and the ACT), the exercise of technical scrutiny of legislation is performed by dedicated scrutiny committees, although with variations in the scope of their nominated scrutiny-based functions and standards.¹⁷

However, even within the one legislature, different legislative committees might engage in different aspects of the technical, substantive, and other dimensions of legislative scrutiny. This occurs even in jurisdictions with dedicated legislative scrutiny committees. Moreover, portfolio-based and specialised scrutiny committees within parliament are not the only organs of government to conduct technical or policy-orientated scrutiny. Organs including offices of legislative drafting, the attorney-general's department, and cabinet itself have crucial scrutiny-related roles of various kinds at different stages of the law-making process.¹⁸

Indeed, scrutiny-related concerns about potential effects upon basic rights and freedoms or other aspects of the rule of law are proper matters for comment in the briefing material to inform cabinet discussion and approval of legislation proposed by the government of the day.¹⁹ Cabinet memoranda that incorporate analysis of legislation's impact upon human rights are essential tools early in the policy-making and law-making process, especially in jurisdictions with a constitutional or statutory human rights law.²⁰

After the Queensland parliamentary committee system's review and subsequent reformulation by the Parliament of Queensland (Reform and Modernisation) Amendment Act 2011 (Qld),²¹ Queensland no longer has a dedicated Scrutiny of Legislation Committee. Instead, the technical and other dimensions of scrutiny work are reallocated to portfolio-based parliamentary committees (including scrutiny of laws against 'fundamental legislative principles'). These parliamentary committees are assisted by a central administrative unit as a repository of parliamentary and other scrutiny expertise.

New Zealand has been described as having an 'extensive select committee system' with supplementary institutional entry points for technical scrutiny (eg Legislation Advisory Committee, Law Commission, and Parliamentary Counsel), reinforced by a national bill of rights and associated rights-protecting infrastructure.²² In this way, scrutiny of laws in the New Zealand parliamentary committee system has been underpinned by the interaction between select committees and the technical scrutiny of the Legislation Advisory Committee, with detailed scrutiny-related guidance such as that provided by the *Legislation Advisory Committee Guidelines on Process and Content of Legislation*.²³

Developing an enhanced scrutiny-focused and rights-protective institutional culture has ripple effects for the business of government. Detailed scrutiny standards that are formalised in legislation or other official terms of engagement offer models for good policy development and implementation as well as legislative drafting.²⁴ Governmental mechanisms such as pre-enactment measures of rights-sensitive scrutiny and ministerial accounting for legislation's compatibility with designated human rights standards can lead to 'the emergence of a bureaucratic and political culture that considers unacceptable the pursuit of a Bill that is so profoundly in tension with [human rights] values that it would require a report of inconsistency'.²⁵ Similarly, the development and adoption by parliamentary and extra-parliamentary

actors of enhanced standards for legislative scrutiny can ‘feed into and therefore improve the pre-parliamentary stages of policy formulation and drafting’, leading to ‘both better legislation and the facilitation of post-legislative scrutiny’.²⁶

Commonalities in the Standards for Legislative Scrutiny

Multi-Level Areas of Focus for Scrutiny Work

The possible standards for scrutiny in common law systems embrace legislation’s accordance with law-making processes and requirements, fundamental rights and liberties (including human rights), the integrity of parliament, and other systemic aspects of government, democracy, and the rule of law. For example, one academic analysis of scrutiny-related standards emanating from the UK House of Lords Constitution Committee Reports for the period 2001-2005 categorises them in terms of ‘procedural requirements’ (eg adequate timelines for parliamentary scrutiny), the ‘rule of law’ (eg non-use of Henry VIII clauses or retrospective laws), ‘protection of individuals’ (eg compliance with internationally recognised human rights, and freedom from undue state intrusion or intervention in people’s lives), and the ‘democratic system’ (eg electoral system integrity and public service impartiality).²⁷

As a baseline, standards for legislative scrutiny under the rule of law can include one or more of the following areas of focus:

- (1) conformity with good legislative drafting practices and processes;
- (2) compliance with other designated criteria for legislative scrutiny;
- (3) respect for the legislature and other institutions of democratic government, eg:
 - (i) separation of powers;
 - (ii) appropriate institutional delegation of powers;
 - (iii) appropriate institutional checks on power; and
 - (iv) integrity of the judicial process;
- (4) constitutionality of legislation;
- (5) consistency and coherence of legislation with existing national (and sub-national) law and policy;
- (6) compatibility of legislation with international law;
- (7) rights-focused legislative scrutiny (including reference to internationally recognised human rights); and
- (8) alignment with desirable policy means and ends (including matters of proportionality).

This list prominently highlights human rights and freedoms, as well as other individual rights and liberties, given that human rights and freedoms form one set of individual rights and liberties under the law. However, reference to internationally recognised human rights in scrutiny work is not necessarily confined to jurisdictions that have a human rights law. The protection of all such rights and liberties from undue encroachment and removal by government is commonly regarded as an important feature of contemporary democracy. As former Chief Justice of Australia, Sir Anthony Mason, suggested towards the end of the 20th century, the

contemporary conception of liberal democratic government ‘extends beyond simple majoritarianism to the protection of fundamental rights and respect for the dignity of the individual’.²⁸ A comprehensive and unanimously accepted catalogue of substantive rights and liberties for scrutiny purposes nevertheless remains elusive. In its recent self-review of its future role and direction, the SSCSB rejected calls for updated terms of reference to include a specific ‘list of rights’.²⁹

Three Examples of Commonality — Australian, Victorian, and Queensland Parliaments

Standards of technical scrutiny are common across jurisdictions, although contained in a variety of statutory, parliamentary, and other forms. Consider, by way of illustration and comparative modelling, the operative terms of reference at two different levels of government in Australia for dedicated legislative in each of three jurisdictions. The SSCSB’s terms of reference are established under Senate Standing Order 24 as follows:

At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Many of these elements and others are reflected in the benchmarks for legislative scrutiny in Victoria. Under Victoria’s Parliamentary Committees Act 2003 (Vic), the functions of its Scrutiny of Acts and Regulations Committee under section 17 include the following:

- (a) to consider any Bill ... and to report to the Parliament as to whether the Bill directly or indirectly –
 - (i) trespasses unduly on rights or freedoms;
 - (ii) makes rights, freedoms or obligations dependent on insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent on non-reviewable administrative decisions;
 - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy ...;
 - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information ...;
 - (vi) inappropriately delegates legislative power;

- (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
- (viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities; ...

Queensland legislation must be scrutinised through the prism of legislatively established benchmarks for good legislation in the Legislative Standards Act, with this function now being performed by portfolio-based parliamentary committees instead of the abolished Scrutiny of Legislation Committee. The first three provisions in Queensland's statement of 'fundamental legislative principles' in section 4 of the Legislative Standards Act are worth setting out in full here, for ease of comparison and contrast:

4 Meaning of fundamental legislative principles

- (1) For the purposes of this Act, fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.
- (2) The principles include requiring that legislation has sufficient regard to--
 - (a) rights and liberties of individuals; and
 - (b) the institution of Parliament.
- (3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation--
 - (a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - (b) is consistent with principles of natural justice; and
 - (c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
 - (d) does not reverse the onus of proof in criminal proceedings without adequate justification; and
 - (e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
 - (f) provides appropriate protection against self-incrimination; and
 - (g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
 - (h) does not confer immunity from proceeding or prosecution without adequate justification; and
 - (i) provides for the compulsory acquisition of property only with fair compensation; and
 - (j) has sufficient regard to Aboriginal tradition and Island custom; and
 - (k) is unambiguous and drafted in a sufficiently clear and precise way.

What are the important commonalities here in these three jurisdictional benchmarks for scrutiny?³⁰ All of them are officially formalised as standards of scrutiny for parliamentary purposes, with the two sub-national examples being entrenched in legislation. In terms of the important dimension of rights-focused scrutiny, all refer explicitly to substantive individual rights and liberties, implicitly including but not limited to fundamental human rights and freedoms. All locate scrutiny within an

underlying framework of substantive rights and freedoms under existing constitutional, statutory, and common law. In appropriate circumstances, they would all justify reference for scrutiny purposes to relevant rights, liberties, and freedoms under municipal and international law, at least for comparative purposes.

All of these benchmarks have a focus that also extends beyond individualised rights and liberties, to embrace at least some institutional features of parliament and the broader system of government under the rule of law. All single out additional criteria for special mention, such as references to appropriate administrative power and review. All contain in-built qualifiers and evaluative elements in particular criteria, such as references to something that does not ‘trespass *unduly*’ on rights and liberties, something that is done with ‘*adequate* justification’, and something that offers ‘*appropriate* protection’ (emphasis added). In short, they exhibit significant degrees of modelling across jurisdictions, notwithstanding differences in their sources and terminology.

Interactions Between Rights-Conducive Scrutiny and Interpretation of Laws

Common Cross-Jurisdictional Mechanisms for Rights-Based Scrutiny and Interpretation

While scrutiny of legislation from rights-based perspectives is standard in many common law jurisdictions, the introduction of human rights laws and associated parliamentary and extra-parliamentary infrastructure for rights-protection adds extra dimensions to such scrutiny. National human rights laws of a constitutional or statutory character exist in the UK, New Zealand, Canada, South Africa, and elsewhere within and beyond the common law world. In two Australian jurisdictions (ie Victoria and the ACT), legislation must be scrutinised by dedicated parliamentary scrutiny committees through the enhanced rights-based filter of human rights laws (ie the Victorian Charter and the Human Rights Act 2004 (ACT) (‘HRA ACT’) respectively).

After the passage of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) (‘HRPSA’), there is a new Parliamentary Joint Committee on Human Rights (PJCHR) to examine the compatibility of legislation with Australia’s international human rights obligations. In short, now that there are three Australian jurisdictions with scrutiny-based requirements that draw upon internationally recognised human rights, as well as constitutional or statutory human rights laws in New Zealand, the UK, Canada, and elsewhere, there are shared jurisdictional and modelling issues in managing the interplay between scrutiny and interpretation of legislation.

At the same time, many people in the community and even some working in law and government might not yet appreciate the full extent of cross-jurisdictional commonality that is emerging in mechanisms for rights-focused scrutiny and interpretation of legislation. Indeed, it is now possible to list at least 10 key

institutional rights-focused mechanisms,³¹ each of which exists in one shape or another in a number of jurisdictions, as follows:

- (1) a dedicated legislative scrutiny committee with a rights-related function (that explicitly or implicitly embraces human rights as well as other rights and liberties) and/or a legislative human rights committee with a scrutiny-related function (eg the UK³², Canada³³, Commonwealth of Australia (SSCSB³⁴ and PJCHR³⁵), Victoria³⁶, and the ACT³⁷);
- (2) other parliamentary and extra-parliamentary mechanisms for rights-orientated scrutiny of laws (eg the UK, New Zealand, Canada, and all Australian jurisdictions, as discussed earlier in this article);
- (3) a formal human rights law of a constitutional or statutory character, with a catalogue of at least some internationally recognised human rights (eg the UK, Canada, New Zealand, South Africa, Victoria, and the ACT³⁸);
- (4) ministerial or other parliamentary statements of legislation's compatibility with designated human rights (eg the UK, Canada, New Zealand, the Commonwealth of Australia (HRPSA), Victoria, and the ACT³⁹);
- (5) provision for legislative override, derogation, or other means of prevailing over designated human rights (eg the UK, Canada, Victoria, and the ACT⁴⁰);
- (6) rights-limiting criteria for use by one or more arms of government in publicly justifying legislative departures from designated rights listed in a jurisdiction's human rights law, by reference to reasonable limits in a free and democratic society under the rule of law (eg the UK (for specific rights), Canada, New Zealand, South Africa, Victoria, and the ACT⁴¹);
- (7) judicial capacity to make rulings on the interaction between a statute in question and designated rights under a jurisdiction's human rights law (eg the UK, New Zealand, Victoria, and the ACT⁴²);
- (8) rights-sensitive provisions for statutory interpretation by courts under a human rights law (eg UK, New Zealand, South Africa, Victoria, and the ACT⁴³);
- (9) a mandated capacity or need to refer to comparative and international law where relevant to interpret legislation in accordance with designated human rights (eg the UK, South Africa, Victoria, and the ACT⁴⁴); and
- (10) other rights-sensitive rules and presumptions of statutory interpretation by courts, including the principle of legality, as discussed further below (eg the UK and all Australian jurisdictions).

Rights-Sensitive Interpretative Provisions Under Human Rights Laws

The existence of rights-conducive interpretative provisions in human rights laws in the UK, New Zealand, Victoria, and the ACT makes such provisions an important point of comparison and contrast across Anglo-Commonwealth jurisdictions. The UK Human Rights Act says in section 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'. The New Zealand Bill of Rights Act says in section 6: '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'.

In the Australian context, the Victorian Charter of Human Rights and Responsibilities says in section 32(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' under the Victorian Charter. Similarly, section 30 of the ACT Human Rights Act now says: 'So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights'. In short, despite some key differences in their legal language, judicial interpretation, and underlying constitutional context, there is also a significant degree of transnational modelling apparent in the terminology of these rights-sensitive interpretative provisions.

At this stage of Anglo-Commonwealth human rights jurisprudence, there is an ongoing debate about the extent to which such interpretative provisions enlarge or limit the range of permissible rights-conducive interpretations of legislation, with the highest courts in the UK, Australia, and New Zealand already seized of such issues.⁴⁵ In short, the argument is over courts being able to go beyond conventional means of statutory interpretation to reconstruct legislation in rights-friendly ways. Here, a fault line lies exposed between judicial exercises in statutory construction according to conventional techniques and remedial reinterpretation of legislation to achieve rights-compatibility.⁴⁶ High-level judicial authority across Anglo-Commonwealth jurisdictions also differs on the extent to which these interpretative provisions encapsulate or travel beyond the principle of legality as a judge-made norm of statutory interpretation.⁴⁷

In this context, the landmark 2011 decision by the High Court of Australia in *Momcilovic v The Queen*⁴⁸ offers much of relevance for Australian and overseas modelling purposes in the scrutiny and interpretation of statutes for their human rights implications. Indeed, the *Momcilovic* case also provides another example of the highest courts in comparable jurisdictions successively grappling with common problems — in this case, the effect of a human rights law and its protection of the fundamental presumption of innocence upon drug offence laws that reverse the onus of proof for an accused person found in possession of illegal drugs.⁴⁹

Common Implications and Comparative Lessons in the Aftermath of Momcilovic

The implications of *Momcilovic v The Queen*⁵⁰ for the scrutiny and interpretation of legislation must be understood against the broader background of the multiple state and federal issues considered in that case. At trial, the defendant was convicted and

sentenced for drug possession and trafficking, based upon prohibited drugs found in the home she shared with her partner. The Victorian Court of Appeal held that the relevant Victorian drug offence laws clearly placed a legal onus of proof upon an accused person to show that they were not in possession of drugs, and that this result contravened the human right enshrined in the presumption of innocence in the Victorian Charter.

Accordingly, the Victorian Court of Appeal exercised the power under section 36 of the Charter to make a formal declaration of inconsistency between a Charter right and the relevant drug laws reversing the onus of proof.⁵¹ However, this declaration did not absolve the defendant of criminal liability, although her sentence was reduced. In allowing the appeal, the High Court overturned the decision of the Victorian Court of Appeal and ordered a new trial.

The appeal to the High Court in the *Momcilovic* case presented the Court with its first opportunity for detailed analysis of a human rights law. While focused directly upon the human rights law in only one Australian jurisdiction (ie Victoria), its reasoning also has relevance for the ACT's human rights law, any future human rights laws in other Australian jurisdictions, and equivalent human rights laws in other countries, given the extent of cross-jurisdictional modelling canvassed above. In addition, the Charter's provision for enhanced rights-based scrutiny of legislation by reference to Charter-protected rights was mentioned by a number of High Court judges in the *Momcilovic* case, as part of the package of institutional mechanisms for rights-protection in the processes of making and interpreting laws.⁵²

The High Court's decision canvasses a sweeping range of issues about the validity of institutional rights-focused mechanisms in the Charter, the limits of judicial power under the Australian Constitution, the inconsistency of equivalent State and Commonwealth criminal laws, the appellate jurisdiction of the High Court, and the impact upon statutory interpretation of both rights-sensitive and rights-limiting provisions in human rights laws. For example, the High Court as a whole was not prepared to hold that a judicial ruling of incompatibility between legislation and Charter rights was itself an exercise of judicial power under the Australian Constitution, whatever consequences it might otherwise have under Victorian law.

In terms of clarity and certainty of precedential guidance for later cases, the High Court's *Momcilovic* decision is a disappointing one. No four judges could agree on all aspects of the validity, scope, and interaction of the two crucial provisions potentially relevant for statutory interpretation — namely, the rights-sensitive interpretative provision in section 32 and the rights-limiting provision in section 7.⁵³ Nor could the High Court judges agree on how closely section 32 tracked or departed from the principle of legality.⁵⁴ Interestingly, three out of seven High Court judges (ie Justices Gummow, Hayne, and Heydon) would have invalidated at least some Charter provisions, and one of them (ie Justice Heydon) would have invalidated the whole Charter. However, six of the seven judges at least affirmed that section 32 does not detract from the primary task of ascertaining the intended

purpose of legislation through the techniques of statutory interpretation endorsed by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*⁵⁵ and its progeny.

At the same time, it is also now clear from the *Momcilovic* decision that Australian human rights laws are significantly different from their UK, New Zealand, Canadian, and South African counterparts, not only in some of their terminology but also in their constitutional underpinnings, which limits their amenability to the transnational model of ‘institutional dialogue’ between the judicial, legislative, and executive arms of democratic government on human rights matters.⁵⁶ As noted by two High Court judges in the *Momcilovic* case, none of the human rights regimes in the UK, Canada, South Africa, New Zealand, and Hong Kong involves a sub-national statutory human rights law within a federal structure under a written constitution, thus making them ‘imperfect analogues’ for comparative purposes.⁵⁷ At the very least, such systemic points of distinction reinforce the need to take proper account of the constitutional and other jurisdictional differences surrounding equivalent rights-focused legislative provisions across jurisdictions when transposing lessons or guidance from one jurisdiction to another.

From Momcilovic to the Principle of Legality

Whatever else it leaves open about the operation of human rights laws, *Momcilovic* establishes that provisions such as those in the Charter for interpreting laws in purposive and rights-sensitive ways set a background context for statutory construction by reference to designated human rights that parallels to some degree the context for statutory construction by reference to common law rights under the principle of legality. For example, Chief Justice French describes the effect of the Charter’s interpretative provision in section 32(1) and its extent of correspondence with the operation of the principle of legality as follows, following high-level UK judicial comments to the same effect about the equivalent provision in the UK’s Human Rights Act: ‘It requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms’.⁵⁸

The principle of legality features as a basic norm of statutory interpretation in the UK, Australia, New Zealand, and elsewhere in the common law world. It requires clear and unmistakable legislative intention to affect legally established rights and freedoms. Australian courts have recently given it new impetus. In the High Court’s decision in *Electrolux Home Products Pty Ltd v Australian Workers’ Union*,⁵⁹ Chief Justice Murray Gleeson provides a contemporary and much-cited exposition of the principle of legality, as follows:

The presumption [against modification or abrogation of fundamental rights] ... [is] an aspect of the principle of legality which governs the relation between Parliament, the executive and the courts. The presumption is not merely a common

sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which the statutory language will be interpreted. *The hypothesis is an aspect of the rule of law.*

As a result, the principle of legality means that courts construe legislation on the basis that ‘Parliament must squarely confront what it is doing and accept the cost’ in political terms if its law-making adversely affects basic rights and liberties.⁶⁰ This aspect of the rule of law cuts both ways. Its corollary is that judges who deploy the principle of legality ‘do not find ambiguity where there is none and recognise clear and unambiguous language when it is presented to them for interpretation’, in recognition that the presumption is rebuttable and varies in strength according to the rights, statutory language, extent of rights-encroachment, and societal context in question.⁶¹

In contemporary Australian law, the principle of legality therefore operates concurrently as a displaceable presumption of statutory interpretation, a working assumption about judicial interpretation of legislation that other organs of government are taken by courts to know when those other organs deal with legislation, an important regulator of the relationship between courts and legislatures, and overall a vital aspect of the rule of law and its democratic preconditions. It therefore forms part of the systemic interplay between the executive, legislative, and judicial arms of democratic government in their respective institutional rights-conducive roles. As part of this system, the exercise of scrutinising legislation must take account of how the system governs the way in which legislation will be interpreted. Conceived in this way, the principle of legality is more than simply another judge-made rule of construction.

In practice, where legislation has more than one possible meaning and courts therefore have ‘constructional choices’ available to them, the principle of legality operates to steer statutory interpretations towards an outcome that adequately respects legal rights and liberties under the justice system.⁶² For example, judges can invoke the principle of legality to interpret legislation so that it does not authorise official directions to people at high-profile public events to cease acts of protest that merely cause annoyance or disturbance to others, but which otherwise fall within the bounds of legitimate exercises of free speech.⁶³ Similarly, the principle of legality has recently been invoked by the High Court in contexts that raise issues about retrospectively altering the law governing people’s obligations and liabilities,⁶⁴ attempting to oust the jurisdiction of courts to exercise judicial review of governmental decisions,⁶⁵ controlling the public openness of courts and related rights through suppression orders and court hearings in private,⁶⁶ exposing prisoners to double jeopardy and increased sentences without threshold conditions of judicial error,⁶⁷ and achieving ‘equal justice’ and parity of sentencing in criminal matters.⁶⁸

The principle of legality is not without its critics. Some commentators view it as a residual heritage of institutional battles between courts and legislatures over judicially imposed limits on legislative power under common law constitutionalism. Others view it as biased in the rights it protects, given the common law's privileging of the economic, proprietary, and contractual rights of the wealthy and powerful,⁶⁹ or else limited in the range of rights embraced, given the gap between common law rights recognised by the law and internationally acknowledged human rights and freedoms.

Even the nomenclature of 'legality' has been criticised as inappropriate and apt to mislead, on at least two grounds. It has potentially confusing parallels with the distinction between 'legality' and 'illegality'.⁷⁰ In its contemporary form and resurgence, the principle of legality also risks distracting attention from 'a well-established interpretative principle' of wider import — namely, that the common law's methods for ascribing legislative intention (and the judge-made rules and presumptions that give effect to it) accept that Parliament wants generally accepted legal rights and principles to continue applying unless the contrary intention is clearly and unmistakably 'spelt out' in what Parliament has passed into law.⁷¹

At the same time, distinctions are now made between disturbing common law principles in general and abrogating fundamental rights and liberties in particular.⁷² Clearly, the contemporary approach to statutory interpretation contains a series of checkpoints before a judge can safely conclude that legislation is meant to have an adverse effect upon existing rights, freedoms, and liberties. The modern reinvigoration of the principle of legality by the High Court therefore makes unlikely in the immediate future any judicial backtracking from the principle's elevation beyond a mere presumption of statutory interpretation to an institutional safeguard of democratic and other rights under the rule of law.

From Legality Back to Scrutiny

Both courts who interpret legislation using the principle of legality and parliamentary committees who scrutinise legislation for its rights-related consequences must also focus upon legislative meaning within a background framework and tools for statutory interpretation that position this task within a broader search for legislative purpose, context, and intention.⁷³ For those engaged in drafting, scrutinising, and interpreting legislation, broader questions arise here about the interaction between purposive interpretation of legislation, relevant norms of statutory interpretation (including the principle of legality and any rights-protective interpretative provisions), and uniform national scheme legislation as a whole. On former NSW Chief Justice Jim Spigelman's account, for example, the context for interpreting legislation according to its purpose arguably includes meeting the needs of harmonious and interlocking laws across jurisdictions nationwide. This approach has correlative implications for construing legislation according to rights-sensitive interpretative provisions in human rights laws that themselves incorporate reference

to the overriding purpose of the legislation in question, in circumstances where not all Australian jurisdictions have human rights laws.⁷⁴

The work of judges in upholding the principle of legality also has a directly reinforcing effect upon the scrutiny and passage of legislation. The High Court signalled this reciprocal outcome in *Coco v The Queen*, in accepting that ‘curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights’.⁷⁵ In his 2009 address to the bi-annual Australia and New Zealand Scrutiny of Legislation Conference, Chief Justice French assessed the respective rights-enhancing strengths and weaknesses of pre-enactment scrutiny of Bills, post-enactment scrutiny of Acts, and judicial interpretation of legislation under the principle of legality as follows:⁷⁶

The interpretive approach required by the ‘principle of legality’ arises after the event of enactment and necessarily responds to the particular case before the court. Generally speaking, the resolution of the question of interpretation which comes before the court in such cases will go no further than is necessary to resolve the case at hand, although it may have implications for further similar cases. Pre-enactment scrutiny by the parliament with a view to ensuring minimum impact of legislation, primary or delegated, upon fundamental human rights and freedoms is to be preferred. There is also much to be said ... for post-enactment scrutiny of legislation in operation.

Finally, as there is much overlap between the range of rights now recognised under international and national law across Anglo-Commonwealth jurisdictions, some convergence or recasting of the principle of legality and the presumption of consistency with international obligations might yet occur, further in the direction of accommodating internationally protected human rights.⁷⁷ In turn, this raises methodological questions that flow from the nature and limits of rights under international human rights jurisprudence, including possible interactions between rights-sensitive presumptions of statutory interpretation and the varieties of proportionality analysis that increasingly inform qualifications on constitutionally protected freedom of political speech and rights-limiting provisions of human rights laws.⁷⁸ These possible future developments might also be influenced by the enhanced role for international human rights instruments as reference points for scrutiny of legislation, in light of the introduction in Australia of the new rights-protective mechanisms considered next.

Scrutiny and the New Australian Parliamentary Joint Committee on Human Rights

The 2012 introduction of a new Parliamentary Joint Committee on Human Rights (‘PJCHR’) adds not only to the mechanisms for scrutiny of legislation at the national level, but also to the institutional options for rights-protection across jurisdictions as a matter of comparative modelling. The PJCHR’s existence and

functions are regulated by the Human Rights (Parliamentary Scrutiny) Act 2011 ('HRPSA'), which came into effect on 4 January 2012. Most importantly for present purposes, the HRPSA establishes institutional architecture — including the PJCHR and parliamentary statements of compatibility — to enable scrutiny of proposed Bills, existing Acts, and disallowable legislative instruments for their compatibility with seven major international human rights instruments to which Australia is a party.⁷⁹ Accordingly, the HRPSA defines 'human rights' for its purposes to mean 'the rights and freedoms recognised or declared by the following international instruments':⁸⁰

- (1) the International Convention on the Elimination of All Forms of Racial Discrimination;
- (2) the International Covenant on Economic, Social, and Cultural Rights;
- (3) the International Covenant on Civil and Political Rights;
- (4) the Convention on the Elimination of All Forms of Discrimination Against Women;
- (5) the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment;
- (6) the Convention on the Rights of the Child; and
- (7) the Convention on the Rights of Persons with Disabilities.

Any member of parliament who introduces a Bill must also cause a 'statement of compatibility' to be prepared and presented to the parliament.⁸¹ This statement 'must include an assessment of whether the Bill is compatible with human rights', but no further criteria for making or presenting such assessments are stipulated. The Australian Government's position is that 'it is not necessary to prescribe the content of statements as the purpose of statements and their place in Parliamentary debate is clear'.⁸² The day after the HRPSA came into effect, the Federal Opposition and the Australian news media began measuring publicly controversial governmental legislation against the government's own new institutional benchmarks for human rights scrutiny.⁸³

How might this new Australian parliamentary architecture on rights-protection affect the multiple interactions between parliamentary scrutiny of legislation and judicial interpretation of legislation? First, there are important transitional issues for this new committee, the SSCSB, and courts applying norms of interpretation concerning legislative consistency with international law and human rights. In particular, questions remain about the potential overlapping roles of the PJCHR and the SSCSB, at least to the extent of correspondence between the PJCHR's focus upon internationally recognised human rights and the SSCSB's focus upon legislation's impact more broadly upon individual rights and liberties.

The problem of overlap here is two-fold. Both committees have a rights-focused scrutiny role, but one (ie the SSCSB) draws upon a broader base of legal rights than the other (ie PJCHR) and also has a range of scrutiny functions that extend beyond

strict questions of rights. This overlap informs both the SSCSB's own 2011–2012 inquiry into its future role and direction and the PJCHR's own early review of its operative definition of human rights.

For at least the first 12 months of its operation, the primary catalogue of human rights for the PJCHR's attention consists of the human rights covered by the designated international human rights instruments. The Australian Government intends that this position is reviewed by the PJCHR after the first year of its operation, to 'enable the Committee to consider, in view of its experience with the new requirements, whether these treaties provide the most appropriate definition for the development of rights-compatible legislation and policy in Australia'.⁸⁴

In its mid-2012 final report on its self-review, the SSCSB envisages complementary roles for itself and the PJCHR. It views the interaction between the two committees in the domain of rights-based scrutiny as an unfolding work-in-progress, indicating the SSCSB's agreement with the caution about it being 'politically and legally desirable to avoid a situation in which the committee and the PJCHR are ever covering the same ground on questions of how human rights matter for scrutiny purposes'.⁸⁵

Secondly, the main question of 'compatibility' with which the PJCHR is charged — namely, legislation's compatibility with designated international human rights obligations — covers more politico-legal ground than that covered by a court faced with the task of interpreting Australian legislation in the light of both international law and the interpretative rules governing its relevance in domestic statutory interpretation. Unlike an Australian court, the PJCHR is not primarily focused upon legislation's relationship to existing Australian law, but rather upon the obligations of Australia as a country under international law, although there is some overlap where internationally recognised rights have been implemented domestically in rights-based legislation. In short, the PJCHR's task is more open-ended than the interpretative task of an Australian court, not least in the sense that its assessment of 'compatibility' is neither exhausted nor confined by legal analysis of consistency with existing national law.

The range of human rights presently within the PJCHR's brief covers a wide range of political, civil, socio-economic, cultural, and other rights. Inherent in the notion of statements of compatibility under the HRPSA's framework is the correlative idea that limits on rights must be transparently identified and justified as part of this enhanced parliamentary scrutiny process. This encompasses assessing what will justify a particular adverse impact upon human rights by reference to the rights of others or the common good of society.⁸⁶ It potentially raises acute policy evaluation issues of the kind usually disengaged from technical scrutiny of legislation, as canvassed earlier in this article.

Thirdly, the parliamentary material generated under the HRPSA can become relevant in judicial interpretation of legislation. The use of such extrinsic material in

statutory interpretation represents an important intersection in the work of the legislative and judicial arms of government. This covers relevant international human rights instruments referred to in legislation,⁸⁷ PJCHR reports on a Bill's compatibility with Australia's international human rights obligations,⁸⁸ ministerial second reading speeches on a Bill with human rights implications,⁸⁹ explanatory memoranda accompanying such a Bill,⁹⁰ and Hansard's record of parliamentary debate about it.⁹¹ The Australian Government's stated intention is for statements of compatibility under the HRPSA to be included ordinarily in a Bill's explanatory memorandum.⁹²

At the same time, non-compliance with the HRPSA's requirements cannot be used to challenge the validity of legislation in court.⁹³ Nor is an Australian court bound to agree with (or give legal effect to) any statement of compatibility.⁹⁴ In other words, a court might interpret legislation as possibly having a rights-limiting effect and then proceed to apply whatever interpretative and other rules are legitimately at the court's disposal, notwithstanding any opinion expressed by a parliamentarian in the statement of compatibility about the legislation's 'compatibility with human rights'.

Finally, the HRPSA serves to focus parliamentary attention upon legislation's treatment of human rights under international instruments to which Australia is a party, even if they have not been fully enshrined in national legislation in their own right. Accordingly, as foreshadowed earlier, the passage of the HRPSA might yet be used by courts (or at least urged by parties in litigation) to develop and even recast relevant judge-made norms of statutory interpretation in line with international human rights jurisprudence.⁹⁵

Concluding Remarks

The common challenges for a cross-jurisdictional community of people involved in scrutiny work are conventionally conceived in the following terms. How do we develop appropriate standards and tools for the increasingly sophisticated work of legislative scrutiny, especially in light of the emerging interaction between rights-based scrutiny of legislation, human rights laws, and rights-sensitive interpretation of legislation? How do we ensure that national and other uniform legislative schemes properly accommodate adequate technical scrutiny of laws by all jurisdictional stakeholders? How do we solve enduring problems such as the adequacy of explanatory material, availability of governmental information, and timeliness of scrutiny work under the pressure of parliamentary sitting times? How do we manage the balance between technical and policy-orientated scrutiny?⁹⁶ And so on.

However, other and more systemic cross-jurisdictional challenges are also emerging. One such challenge concerns how democracies evolve to accommodate enhanced expectations of public engagement and accountability in the system of government, including its legislative scrutiny processes. In short, democratic

governance is being reconceptualised in some quarters through the prism of multi-level and multi-sectoral oversight of the use and abuse of public power, engaging people in democracy beyond periodic visits to the voting booth.⁹⁷

If, for example, democracy today is defined as much by institutional respect for fundamental democratic rights and freedoms as it is by law-making through elected representatives, the work of scrutinising and interpreting legislation for its impact upon individual rights and liberties both manifests and reinforces these contemporary democratic impulses. Viewed in that light, suggestions that governments should increase the frequency of public exposure drafts of legislation and develop more opportunities for public input into parliamentary scrutiny work, for example, cannot simply be dismissed as suggestions that unnecessarily involve outsiders and increase delays in the law-making process for a system founded on rule by elected representatives.

Arguably, many of the rights-protective mechanisms canvassed in this article contribute further to this evolution in contemporary democratic governance. For example, the Australian Government views the PJCHR as a mechanism for ‘dialogue’ between the Australian Parliament and people and hence an advancement in ‘participatory democracy’.⁹⁸ A corresponding characterisation of the HRPSA’s rights-protective architecture is that it creates a shift ‘toward a culture of increased public justification — or *contestation* — surrounding key issues of human rights protection’.⁹⁹ Similarly, the SSCSB’s enhanced approach to parliamentary and extra-parliamentary communication in its mid-2012 report contributes to enhanced intra-governmental and public engagement with scrutiny work, with its recommendations about inter-committee reporting dialogue, expanded website and database access, and published positions and checklists on scrutiny matters.¹⁰⁰

Finally, this broader democratic engagement involving all arms of government and the community is clearly at work in the interplay across jurisdictions between legislative scrutiny based upon human rights, international human rights instruments and jurisdictional human rights laws, and rights-sensitive judicial interpretation of laws. In these ways and others analysed in this article, the interaction between scrutiny and interpretation of legislation not only protects people’s rights but also serves the people’s democracy too. ▲

Endnotes

¹ This article revises and updates the author’s presentation to the 2011 biannual Australia–New Zealand Scrutiny of Legislation Conference at Parliament House in Brisbane. It also amplifies some broader themes initially expressed in Horrigan, 2006. The author thanks the two anonymous referees for their helpful and constructive comments.

² For recent cross-jurisdictional academic analysis of legislative scrutiny, see eg: Argument, 2011; Pearce, 2009; Horrigan, 2006; Oliver, 2006; and Hiebert 2005a and b.

³ Feldman, 2002: 332–333.

- ⁴ Feldman, 2002: 336. Feldman also identifies (at 329–330) different sources of scrutiny standards in constitutional and public law, standards matching legislation to its purpose, requirements of the rule of law, and human rights jurisprudence.
- ⁵ Oliver, 2006: 219–220.
- ⁶ Feldman, 2002: 328.
- ⁷ Workman, 2010: 180.
- ⁸ Commonwealth, *Parliamentary Debates*, Senate, 4 June 1997, 3528 (Senator Cooney), quoted in: Commonwealth, *Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia*, 1996, p. 4 [1.16].
- ⁹ Eg Pearce, 2009; cf Argument, 2011.
- ¹⁰ Oliver, 2006: 239.
- ¹¹ SSCSB, 2011: [1.9].
- ¹² SSCSB, 2012: [3.23].
- ¹³ SSCSB, 2012: [3.23] and [3.30].
- ¹⁴ Section 7(2).
- ¹⁵ Eg Finnis, 2011: 44–46.
- ¹⁶ [2010] QCA 37. Interestingly in this context, with regard to the judicial interface with contemporary legal globalisation, Chief Justice Pat Keane from the Federal Court of Australia argues that ‘(t)he challenges to our traditional conception of judicial power which can be expected to confront courts obliged to give effect to internationally recognised rights, once they are incorporated into domestic law, are illustrated by the recent decision of the Queensland Court of Appeal in *Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37: see Keane, 2010: 5–6.
- ¹⁷ Although WA is included here for this purpose, the terms of reference for its Legislation Committee are considerably more circumscribed than those in the other listed Australian jurisdictions. The model provided by the SSCSB in scrutinising legislation has not been adopted in South Australia, Tasmania, or the Northern Territory, although those Australian jurisdictions (and others) have parliamentary scrutiny of subordinate legislation: Hicks, 2012.
- ¹⁸ In Queensland, for example, the Office of Parliamentary Counsel has a statutory role in advising departments of State on legislative drafting in compliance with ‘fundamental legislative principles’ (Legislative Standards Act, section 7(g)), and the Queensland Cabinet Handbook requires Cabinet to approve any proposed legislation departing from them.
- ¹⁹ The author acknowledges the anonymous referee’s reminder of this important scrutiny-orientated role.
- ²⁰ Eg Hiebert, 2005a: 71.
- ²¹ Amending the Parliament of Queensland Act 2001 (Qld).
- ²² Workman, 2010.
- ²³ Workman, 2010.
- ²⁴ Sampford, 1994.
- ²⁵ Hiebert, 2005a: 71.
- ²⁶ Oliver, 2006: 246.
- ²⁷ Oliver, 2006: 241–242.
- ²⁸ Mason, 1996: 303.
- ²⁹ SSCSB, 2012: [3.20].
- ³⁰ For further comparison and contrast of the Australian and UK positions here, see: Oliver, 2006: 230–231.
- ³¹ Other commonalities exist in the rights-consistent obligations placed upon public authorities and the scope of rights-based judicial review and other remedial measures, for example, although attention here is focused upon the interplay between scrutiny and interpretation of legislation.
- ³² Joint Committee on Human Rights.
- ³³ Standing Senate Committee on Human Rights.
- ³⁴ Senate Standing Order 24.
- ³⁵ HRPSA, section 7.
- ³⁶ Victorian Charter, section 30.
- ³⁷ Human Rights Act 2004 (ACT) (‘HRA ACT’), section 38.

- ³⁸ HRA UK; Canadian Charter of Rights and Freedoms (Part I of the Constitution Act 1982, under Schedule B of the Canada Act 1982 (UK) ('Canadian Charter'); New Zealand Bill of Rights Act 1990 (NZ) ('NZBORA'); Constitution of the Republic of South Africa 1996 (Chapter 2 — Bill of Rights) ('South African BOR'); Victorian Charter; and HRA ACT.
- ³⁹ HRA UK, section 19; Department of Justice Act RSC 1985 cJ-2, section 4.1(1) (Canada); NZBORA, section 7; HRPSA, section 8; Victorian Charter, section 28; and HRA ACT, section 37.
- ⁴⁰ HRA UK, sections 14–15; Canadian Charter, section 33; Victorian Charter, section 31; and HRA ACT, section 40B(2).
- ⁴¹ HRA UK, Schedule 1 (Articles 7, 8, 9, 10, and 11); Canadian Charter, section 1; NZBORA, section 5; South African BOR, section 36; Victorian Charter, section 7; and HRA ACT, section 28.
- ⁴² HRA UK, section 4; judicially asserted in New Zealand in *Moonen v Film and Literature Board of Review* [1999] NZCA 329, given the rights-limiting provision in section 5; Victorian Charter, section 36; and HRA ACT, section 32.
- ⁴³ HRA UK, section 3; NZBORA, section 6; South African BOR, sections 39 and 233; Victorian Charter, section 32(1); and HRA ACT, section 30.
- ⁴⁴ HRA UK, section 2; South African BOR, section 39; Victorian Charter, section 32(2); and HRA ACT, section 31.
- ⁴⁵ Eg *Ghaidan v Godin-Mendoza* [2004] UKHL 30 (in the UK); *R v Hansen* [2007] NZSC 7 (in New Zealand); and *Momcilovic v The Queen* [2011] HCA 34 (in Australia).
- ⁴⁶ Debeljak, 2011.
- ⁴⁷ Eg *Momcilovic v The Queen* [2011] HCA 34 per French CJ at [51], but cf Heydon J at [387] and [450]; see also *Ahmed v Her Majesty's Treasury* [2010] UKSC 2 per Lord Phillips at [112].
- ⁴⁸ [2011] HCA 34.
- ⁴⁹ Similar contexts were the subject of rulings by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103, the UK House of Lords in *R v Lambert* [2001] UKHL 37, and the Supreme Court of New Zealand in *Hansen v The Queen* [2007] NZSC 7.
- ⁵⁰ [2011] HCA 34.
- ⁵¹ *The Queen v Momcilovic* [2010] VSCA 50.
- ⁵² In particular, see: *Momcilovic v The Queen* [2011] HCA 34 per Gummow J (with Hayne J agreeing) at [146]; per Crennan and Kiefel JJ at [524]; and per Bell J at [679].
- ⁵³ The unhelpfulness of the High Court's *Momcilovic* reasoning for Victorian courts, in attempting to work through its implications for the interplay between Charter rights and Victorian legislation, is evident from the Victorian Court of Appeal's subsequent analysis of *Momcilovic* in *Slaveski v Smith* [2012] VSCA 25 at [20]–[25]. For other criticism of *Momcilovic*'s precedential guidance, see: Dixon, 2012: 77–78.
- ⁵⁴ Dixon, 2012: 77–78, referring to *Momcilovic v The Queen* [2011] HCA 34 per French CJ at [51]; Gummow J (with Hayne J concurring) at [170]; Heydon J at [442] and [447]–[454]; Crennan and Kiefel JJ at [565]; and Bell J at [684].
- ⁵⁵ [1998] HCA 28; (1998) 194 CLR 355.
- ⁵⁶ In particular, see: *Momcilovic v The Queen* [2011] HCA 34 per French CJ at [95] ('The metaphor of "dialogue" ... is inapposite.');
- Gummow J (with Hayne J concurring) at [146] ('References to "dialogue" ... are apt to mislead.');
- and Crennan and Kiefel JJ at [534] ('A "dialogue" is an inappropriate description of the relations between the Parliament and the courts ...').
- ⁵⁷ *Momcilovic v The Queen* [2011] HCA 34 per Gummow J at [146] (with Hayne J concurring on this point).
- ⁵⁸ *Momcilovic v The Queen* [2011] HCA 34 per French CJ at [51].
- ⁵⁹ [2004] HCA 40 at [21]; (2004) 221 CLR 309 at 329; emphasis added.
- ⁶⁰ As expressed by Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms* [2002] 2 AC 115 at 131, in terms substantially endorsed in *Momcilovic v The Queen* [2011] HCA 34 at [43] and [47] per French CJ.
- ⁶¹ Spigelman, 2005: 776–778.
- ⁶² *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19 at [30]–[32].
- ⁶³ *Evans v State of New South Wales* [2008] FCAFC 130.
- ⁶⁴ *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19.

- ⁶⁵ *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476.
- ⁶⁶ *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; and *Hogan v Hinch* [2011] HCA 4.
- ⁶⁷ *Lacey v Attorney-General of Queensland* [2011] HCA 10.
- ⁶⁸ *Green v The Queen; Quinn v The Queen* [2011] HCA 49.
- ⁶⁹ For further criticism along these lines, see: McLelland, 2009: 6; Devlin, 1976: 13–14; and Pearce and Geddes, 2006: [5.23]. A parallel criticism can be made of the common law bill of rights identified in Spigelman, 2008.
- ⁷⁰ See Bennion, 2002: 703, and 948–953. For a recent judicial criticism of this ilk in the Australian context, see: *Momcilovic v The Queen* [2011] HCA 34 at [444] per Heydon J.
- ⁷¹ Bennion, 2002: 665, 703.
- ⁷² Pearce and Geddes, 2006: [5.23]; and Spigelman, 2005: 777 and 781.
- ⁷³ Gleeson, 2009.
- ⁷⁴ On all of these points, see: Spigelman, 2008: 65–69.
- ⁷⁵ *Coco v The Queen* [1994] HCA 15 at [12] per Mason CJ, Brennan, Gaudron, and McHugh JJ.
- ⁷⁶ French, 2009a: 14.
- ⁷⁷ Lacey, 2005:87. The intertwined effect of these two presumptions has already occurred in New Zealand (ie *Zaoui v Attorney-General* [2004] NZSC 31 at [44]); see also: McLelland, 2009; and Meagher, 2012. Speaking extra-judicially, Chief Justice French contemplates a greater ‘interface’ between international human rights norms and the principle of legality in French, 2009b. For a New Zealand perspective on the infusion of international human rights law in common law interpretation through the principle of legality and other means, see: McLean, 2004.
- ⁷⁸ Meagher, 2011: 464–466, and 468–475.
- ⁷⁹ HRPSA, section 7.
- ⁸⁰ HRPSA, section 3(1).
- ⁸¹ HRPSA, sections 8(1) and 8(2).
- ⁸² ‘Human Rights Check for New Laws’, Media Release by the Attorney-General (Nicola Roxon), 4 January 2012 (‘Roxon MR’).
- ⁸³ Eg ‘The Malaysia Solution Ducks Rights Scrutiny’, *The Australian*, 5 January 2012, p 4.
- ⁸⁴ Roxon MR.
- ⁸⁵ SSCSB, 2012: [3.15], quoting and agreeing with the author’s submission to the inquiry on this point.
- ⁸⁶ Roxon MR.
- ⁸⁷ Acts Interpretation Act 1901 (Cth) (‘AIA’), section 15AB(2)(d).
- ⁸⁸ AIA, section 15AB(2)(c).
- ⁸⁹ AIA, section 15AB(2)(f).
- ⁹⁰ AIA, section 15AB(2)(e).
- ⁹¹ AIA, section 15AB(2)(h).
- ⁹² Roxon MR.
- ⁹³ HRPSA, section 8(5).
- ⁹⁴ HRPSA, section 8(4).
- ⁹⁵ For other early analysis of the HRPSA and PJCHR, see: Kinley and Ernst, 2012; Dixon, 2012; and Meagher, 2011 and 2012.
- ⁹⁶ For further discussion of some of these problems, see: Evans and Evans, 2008: [2.35]–[2.36] and [2.47]–[2.51], focusing on Australian jurisdictions with charters of rights and correlative scrutiny mechanisms.
- ⁹⁷ On this overarching theme, see: Gutmann and Thompson, 2004 (on ‘deliberative’ democracy); Keane, 2010: xxxiii (on ‘monitory’ democracy); and Horrigan, 2010 (on inter-related orders of governance, regulation, and responsibility).
- ⁹⁸ Attorney-General’s Second Reading Speech for the Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth), 30 September 2010.
- ⁹⁹ Dixon, 2012: 79
- ¹⁰⁰ SSCSB, 2012: [3.30], [7.11] (Recommendation 13), and [7.25] (Recommendation 14). For further cross-jurisdictional analysis of useful scrutiny checklists and other scrutiny tools, see: Hiebert, 2005; and Oliver, 2006.

References

- S. Argument, 'Legislative Scrutiny in Australia: Wisdom to Export?' (2011) 32(2) *Statute Law Review* 116
- F. Bennion, *Statutory Interpretation*, 4th edn, 2002, LexisNexis Butterworths, London
- J. Debeljak, 'Who is Sovereign Now?: The Momcilovic Court Hands Back Power Over Human Rights that Parliament Intended It to Have' (2011) 22 *Public Law Review* 15
- Lord Devlin, 'Judges and Lawmakers' (1976) 39 *Modern Law Review* 1
- R. Dixon, 'A New (Inter)national Human Rights Experiment for Australia' (2012) 23 *Public Law Review* 69
- C. Evans and S. Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act*, 2008, LexisNexis Butterworths, Australia
- D. Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (2002) *Public Law* 323
- J. Finnis, 'Human Rights and Their Enforcement', in J. Finnis (ed.), *Human Rights and Common Good*, (Collected Essays: Volume III), 2011, Oxford University Press, Oxford
- R. French, 'Adding Value to Law-Making', Australia and New Zealand Scrutiny of Legislation Conference, 2009 (2009a)
- R. French, 'Oil and Water? — International Law and Domestic Law in Australia', 7th Annual Brennan Lecture, Bond University, 2009 (2009b)
- M. Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26
- M. Groves, 'Treaties and Legitimate Expectations — The Rise and Fall of Teoh in Australia' [2010] *Judicial Review* 323
- A. Gutmann and D. Thompson, *Why Deliberative Democracy?*, 2004, Princeton University Press, Princeton
- B. Harris, 'Government "Third Source" Action and Common Law Constitutionalism' (2010) 126 *Law Quarterly Review* 373
- L. Hicks, 'Survey on the Work of the Senate Standing Committee for the Scrutiny of Bills', Rule of Law Institute of Australia, 2012
- J. Hiebert, 'Rights Vetting in New Zealand and Canada: Similar Idea, Different Outcomes' (2005) 1NZJPIIL 63 (2005a)
- J. Hiebert, 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review' (2005) 35 *British Journal of Political Science* 235 (2005b)
- B. Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models, and Practices Across Government, Law, and Business*, 2010, Edward Elgar Publishing Ltd (UK)
- B. Horrigan, 'Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making', in T. Campbell, J. Goldsworthy, and A. Stone (eds), *Protecting Rights Without a Bill of Rights*, 2006, Ashgate, Aldershot (UK)
- J. Keane, *The Life and Death of Democracy*, 2009, W.W. Norton and Company, New York
- P. Keane, 'The Prospects for an International Legal Order', Keynote Address for the Global Courts Conference and Workshop, 2010, Sydney
- D. Kinley and C. Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights', *European Human Rights Law Review*, Issue 1 2012, 58–70
- Legal and Constitutional Affairs Legislation Committee (LCALC), Report on the Human Rights (Parliamentary Scrutiny) Bill 2010 [Provisions] and Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 [Provisions], Commonwealth of Australia, Canberra, 2011
- W. Lacey, 'The Judicial Use of Unincorporated International Conventions in Administrative Law: Back-Doors, Platitudes and Window-Dressing', in H. Charlesworth, M. Chiam, D. Hovell, and G. Williams (eds), *The Fluid State: International Law and National Legal Systems* (2005), Sydney: The Federation Press
- A. Mason, 'Reflections on Law and Government', in P. Finn (ed.), *Essays on Law and Government*, Volume Two, 1996, LBC Information Services, Australia
- J. McLean, 'From Empire to Globalization: The New Zealand Experience' (2004) 11 *Indiana Journal of Global Legal Studies* 161

- R. McLelland, 'Remarks at the Castan Centre Human Rights Conference 2009', State Library of Victoria, 2009
- D. Meagher, 'The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) and Common Law Rights Interpretation', Australian Association of Constitutional Law Victorian Seminar Series, 2012, Melbourne
- D. Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449
- D. Oliver, 'Improving the Scrutiny of Bills: The Case for Standards and Checklists' (2006) *Public Law* 219
- D. Pearce, 'Legislative Scrutiny: Are the ANZACS Still the Leaders?', Australia and New Zealand Scrutiny of legislation Conference, 2009
- D. Pearce and R. Geddes, *Statutory Interpretation in Australia*, 6th ed, 2006, Butterworths
- C. Sampford, 'Fundamental Legislative Principles: Their Meaning and Rationale' (1994) *Queensland Law Society Journal* 531
- Senate Standing Committee for the Scrutiny of Bills (SSCSB), *Interim Report 2011*, Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee, Canberra
- Senate Standing Committee for the Scrutiny of Bills (SSCSB), *Final Report*, Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee, Canberra, 2012
- J. Spigelman, *Statutory Interpretation and Human Rights*, 2008, University of Queensland Press, Brisbane
- J. Spigelman, 'The Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769
- T. Workman, 'Technical Scrutiny of Bills in New Zealand' (2010) 25 *Australasian Parliamentary Review* 179