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CONTENTS

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HUMAN RIGHTS: INTERPRETATION, DECLARATIONS OF INCONSISTENCY AND THE LIMITS OF JUDICIAL POWER

The Hon Sir Anthony Mason AC KBE*

I Introduction

It is an honour and a pleasure to deliver this, the 2010 Robin Cooke Lecture. Lord Cooke of Thorndon (better known to me as Sir Robin Cooke) was an outstanding lawyer and judge, highly regarded not only in New Zealand but also internationally. He served on the Judicial Committee of the Privy Council for many years and, uniquely for an Australasian judge, in the House of Lords. He also had close links with Cambridge University. Yet in this part of the world he will be remembered very largely for his work as President of the New Zealand Court of Appeal. I came to know him as a good friend and to admire him in that capacity.

We were non-permanent Justices of the Hong Kong Court of Final Appeal. I know that there he brought to bear his great learning and his broad vision of the law's place in the world and it is the wish of the legal community of Hong Kong that it should be associated with the remarks that I make about Robin Cooke. My closest contact with him was a fellow judge of the Supreme Court of Fiji in the period 1995-1999. In that year, our association with the Court came to an end due to events beyond our control.

By then he had been elevated to the House of Lords. Except in one respect, he remained unchanged by his elevation. The exception related to his signature on judgments, which changed from "Robin Cooke" to "Cooke of Thorndon". Noticing this, I asked my colleague Sir Gerard Brennan, who had just joined us on the Court in Fiji, whether I should change my signature from "AF Mason" to "Mason of Mosman", Mosman being a suburb of Sydney, as Thorndon is of Wellington. Sir Gerard considered his response briefly and then replied: "No. They will think you are a second-hand car dealer". No one would have thought that of Robin Cooke.

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* Sir Anthony Mason is a former Chief Justice of the High Court of Australia and currently sits as a non-permanent Justice of the Hong Kong Court of Final Appeal. This speech was delivered for the annual Robin Cooke Lecture on 16 December 2010.

As the title to my lecture suggests, my remarks are directed first to the interpretive provision in the New Zealand Bill of Rights Act 1990 (the Act), s 6, and secondly, to the question whether the Act confers power on the Court to make a "declaration of incompatibility" (to adopt the expression used in s 4 of the Human Rights Act 1998 (UK) (the HRA) which confers specific authority for the making of such a declaration) or a "declaration of inconsistent interpretation" (the expression used in s 36 of the Victorian Charter of Rights and Responsibilities Act 2006 (the Charter), Victoria's counterpart to s 4). In discussing these questions, I admit to some hesitation as I do not profess to be an expert in New Zealand law. These days I find Australian law sufficiently mystifying without venturing upon the unfamiliar waters of New Zealand law.

II The Interpretive Provision

The Supreme Court in *R v Hansen*[1] (*Hansen*) declined to adopt the wide-ranging remedial interpretation given to s 3 of the HRA by the House of Lords in *Ghaidan v Godin-Mendoza* (*Ghaidan*).[2] Instead, the Supreme Court preferred the narrower, more orthodox interpretation favoured by the House of Lords in the later case, *R (Wilkinson) v IRC* (*Wilkinson*).[3] Since *Hansen*, the Victorian Court of Appeal, in *R v Momcilovic* (*Momcilovic*) has followed *Hansen*, applying the *Hansen* interpretation to s 32(1) of the Charter, Victoria's counterpart to s 6.[4]

The High Court of Australia has recently granted special leave to appeal in *Momcilovic*.[5] This was to be expected, as one of the High Court Justices noted in argument on the special leave application that the case "bristled" with constitutional points.[6] I doubt that these constitutional points will endanger the Court of Appeal's interpretation of s 32(1). If anything, they present a problem for the competing broader interpretation.

The point of interest in the interpretations given in the United Kingdom, New Zealand and Victoria is that they concern interpretive provisions expressed in very similar language in statutes characterised as examples of the "dialogue model" of a human rights statute. Although the three interpretive provisions are very similarly expressed, there is at least one significant difference. It is that the Charter provision (s 32(1)) requires courts and decision-makers to interpret all statutory provisions in a way that is compatible with human rights, but adds the qualification "so far as it is possible to do so consistently with the purpose" of the statutory provisions. This qualification

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1 *R v Hansen* [2007] SCNZ 7, [2007] 3 NZLR 1.

2 *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

3 *R (Wilkinson) v IRC* [2005] 1 WLR 1718 (HL).

4 *R v Momcilovic* [2010] VSCA 50.

5 Editor's note: at the time this volume went to press, the *Momcilovic* appeal had been heard by the High Court and the decision was reserved.

6 *Momcilovic v R* [2010] HCATrans 227 per Crennan J.

relating to the purpose of the statutory provisions forms no part of the corresponding provisions in New Zealand and the United Kingdom.

It appears from the Explanatory Memorandum which accompanied the Bill before it was enacted as the Charter, and other aspects of the legislative history, that the origin of the limiting reference to "purpose" was the decision in *Ghaidan* on s 3 of the HRA where, although the wide-ranging remedial interpretation was adopted, it was pointed out that s 3 does not authorise an interpretation which is inconsistent with a fundamental feature of the primary enactment.[7] Why the Victorian qualification was expressed in terms of "purpose" is not altogether clear. I do not think the term was mentioned in *Ghaidan*. The word "purpose" may have been selected in preference to "intention" because "intention" would have had a more constraining effect than was desired. Leading Australian lawyers, including the Solicitor-General, have suggested that the Victorian qualification avoids the constitutional problem that might otherwise arise in authorising a court to engage in a *Ghaidan*-type interpretation which might exceed judicial power and trespass into the territory of legislation.[8]

Discussion of the authorities on s 3 of the HRA is problematic if only because, to the unlettered observer, they do not seem to be entirely consistent and because *Wilkinson* pursues a very different line from that taken by the House of Lords in *Ghaidan* and other cases which followed the *Ghaidan* path. To add to the problem, no attempt was made in *Wilkinson* to reconcile it with *Ghaidan* and yet their Lordships refrained from discarding *Ghaidan*. There is a tendency these days, more noticeable in Australia and perhaps in England, than New Zealand, to undermine the authority of an earlier decision yet leave it "hanging in the wind", so to speak, without expressly overruling it. This tendency detracts from the certainty of the law and the authority of precedent.

You will recall that in *R v Lambert* (*Lambert*), a reverse onus was transformed by s 3 interpretation into an evidential onus.[9] A similar approach was taken by the House of Lords, with the same result, in other cases,[10] despite the acknowledgment in *Sheldrake v Director of Public Prosecutions* (*Sheldrake*) that it was not the intention of Parliament as expressed in the primary enactment that only an evidential onus be imposed.[11]

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7 *Ghaidan v Godin-Mendoza*, above n 2, at [33] and [68].

8 Solicitor-General's opinion (with Mr Burmester SC) dated 15 June 2009.

9 *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545.

10 *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [2005] 1 AC 264.

11 Ibid, at [15] and [53].

On the other hand, in *Hansen*, where the majority concluded that s 6 of the Act authorised a rights-compliant interpretation of the primary enactment *which was reasonably or properly open*,[12] and no more than that, the Court held that s 6(6) of the Misuse of Drugs Act 1975 (NZ) should be interpreted in accordance with its language. It provided that a person found in possession of more than a specified amount of prescribed drugs was deemed to possess them for the purpose of "supply or sale unless the contrary is proved". The meaning of this expression, the majority held, was so well established as creating a legal or persuasive burden of proof that it could not be interpreted as creating merely an evidential burden.[13]

Similarly in *Momcilovic*, the Victorian Court of Appeal, after concluding that s 32(1) did no more than pick up the common law principle of legality, held that s 5 of the Drugs Poisons and Controlled Substances Act 1981 (Vic), which provided that a person upon whose land or premises drugs were found was deemed to be in possession of the drugs unless "the person satisf[ied] the court to the contrary", could not be interpreted as imposing only an evidential onus. The Victorian Court of Appeal endorsed the approach taken in *Hansen*. The Court, like the New Zealand Supreme Court, was unwilling to follow the House of Lords decisions on reverse onus provisions.

III Discussion

The clash between the expansive interpretation adopted in *Ghaidan* and other authorities and the narrower interpretation favoured in *Wilkinson* (followed in *Hansen* and *Momcilovic*) reflects a tension between the underlying political and constitutional objectives of the HRA and the orthodox principles of statutory interpretation.

Seemingly, the political object of the United Kingdom interpretive model was to secure an interpretation of primary legislation which would result in compatibility with the recognised human rights, even if, as a matter of conventional statutory interpretation, the primary legislation would not be so construed. In other words, the apparent object was to authorise an interpretation which would be compliant with human rights recognised by the European Convention on Human Rights and Fundamental Freedoms (the Convention), although it put a "strained interpretation" on the language of the primary enactment. The apparent object was to outflank the doctrine of parliamentary sovereignty.

The expected operation of s 3 was captured in the speech of Lord Bingham of Cornhill in *Sheldrake* when he stated the effect of the decision in *Ghaidan*. In concluding that it was possible to interpret a provision in the primary enactment imposing a legal burden of proof on a defendant as

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12 These words are similar to those expressed by Cooke P in *MOT v Noort* [1992] 1 NZLR 260 (CA) at 272: " … can reasonably be given such a meaning. A strained interpretation would not be enough".

13 In adopting this view of the expression, the Supreme Court followed *R v Phillips* [1991] 3 NZLR 175 (CA) where Cooke P said, at 177, that to adopt the evidential burden interpretation would be "a strained and unnatural interpretation" which even under the Act the Court would not be justified in adopting.

imposing only an evidential onus, his Lordship said: "Such was not the intention of Parliament when enacting [the provision in the primary enactment], but it was the intention of Parliament when enacting s 3".[14]

He had earlier made the point that *Ghaidan* established that the s 3(1) interpretive obligation was "a very strong and far reaching one and may require the court to depart from the legislative intention of Parliament".[15]

Ghaidan therefore appeared to authorise both a departure from the text of the primary enactment and the legislative intention which it exhibited.

In *Sheldrake*, Lord Bingham made a further point, namely that a Convention-compliant interpretation under s 3(1) was "the primary remedial measure", while a declaration of incompatibility was "an exceptional course".[16] During the passage of the HRA through Parliament, the promoters of the legislation informed both Houses that the need for a declaration of incompatibility would rarely arise.

The constitutional imperative which gave force to the United Kingdom's object of achieving domestic compliance with the Convention and the willingness of the English judiciary to modify the doctrine of parliamentary sovereignty in order to accommodate the United Kingdom's membership of the European Union,[17] marked out the United Kingdom's position. These two considerations support a contextual background which is very different from the background in Australia and New Zealand.

These considerations served as a foundation upon which it could be said that the HRA (including s 3) was a "constitutional statute" and that it did more than simply introduce an interpretive regime. The consequence, it might be argued, is that the HRA modifies the doctrine of parliamentary sovereignty to the extent to which it sustains the doctrine of implied repeal. This argument is based on the well-known judgment of Laws LJ (with whom Crane J agreed) in *Thoburn v Sunderland City Council,*[18] where his Lordship considered that although "ordinary statutes may be impliedly repealed constitutional statutes may not".[19] Laws LJ described a constitutional statute as one:[20]

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14 *Sheldrake v Director of Public Prosecutions*, above n 9, at [53].

15 Ibid, at [28].

16 Ibid.

17 See *R v Secretary of State for Transport, ex parte Factortame Ltd* (1991) 1 AC 603 (HL).

18 *Thoburn v Sunderland City Council* [2002] EWHC 195, [2003] QB 151.

19 Ibid at 186H.

20 Ibid at 186F.

> … which (a) conditions the legal relationship between citizen and the State in some general overarching manner, or (b) enlarges or diminishes the scope of what would now be regard[ed] as constitutional rights.

He instanced the HRA as a constitutional statute.

While this line of argument underpins the *Ghaidan* approach, it invites the question: why the shift to *Wilkinson?* As an outsider I cannot answer this question. The answer may lie in a range of factors: judicial and political dissatisfaction with disregard of the legislative intention clearly expressed in primary enactments, dissatisfaction with some aspects of the human rights regime and judicial concern over the approach of the Strasbourg Court, strongly exhibited in Lord Hoffmann's extra-curricular criticism of that Court.[21] These developments might well have induced a return to a more traditional approach to interpretation and, at the same time, a departure from the rigours of the "mirror principle" in applying the jurisprudence of the Strasbourg Court.

There was no suggestion in either *Hansen* or *Momcilovic* that the Act or the Charter had a constitutional status which could affect the reach of the respective interpretive provisions. Those provisions were treated as extending no further than the boundary which is said to separate what is interpretation from what is legislating, a boundary also referred to in the House of Lords cases, but it was not a boundary seen in *Ghaidan* and *Sheldrake* as locating a "strained interpretation" in that territory known as "legislation". Whether or not the difference between interpretation and legislation is a bright-line boundary, the Supreme Court and the Victorian Court of Appeal regarded the interpretive provisions as not authorising any approach which went beyond interpretation on the basis of the legislative intention discernible from the primary enactment.

As to the location of a bright-line boundary, the true distinction is between what is "judicial" and what is "legislative". The difference between the two is discussed in the Australian and American cases on the severance of statutory provisions held to be invalid on *ultra vires* grounds,[22] pursuant to a statutory provision requiring that a statute be read and construed so as not to exceed constitutional power and providing that, if construed as in excess of power, it shall be valid to the extent that it is not in excess of power.[23] The discussion suggests the possibility that a court, if acting on a clear legislative criterion involving the application of a "legal standard", does no more than execute the legislative intention contingent on a finding that a statute is not "Charter-compliant" then the outcome will be "judicial" and not "legislative", whether it is called "interpretation" or given some other label.

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21 Leonard Hoffman "The Universality of Human Rights" (2009) 125 LQR 416.

22 See *Pidoto v Victoria* (1996) 68 CLR 87 at 109–111; *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 370–372 (where Dixon J refers to the discussion in the American cases of the operation and effect of severability clauses).

23 Acts Interpretation Act 1901 (Cth), s 15A.

In Australia, perhaps even more so than New Zealand, the traditional common law principles of interpretation are seen as an expression of the constitutional relationship between the judicial and legislative branches of government. As the High Court said in *Zheng v Cai*:[24]

> [J]udical findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of law … the preferred construction by the court of the statute in question is reached by the application of the rules of interpretation accepted by all arms of government in the system of representative democracy.[25]

This statement is to be understood in a setting in which, in Australia, other authoritative judicial statements have drawn attention to the importance and grammatical sense of the words that Parliament has chosen in maintaining the accessibility of the law to the public and the accountability of Parliament to the electorate.[26] It is, of course, recognised that context and purpose, even as disclosed by extrinsic materials, may be influential.

And the ordinary process of interpretation does extend in some situations to placing a strained interpretation on the text, for example, in order to give effect to the statutory purpose and also, when two apparently inconsistent provisions occur in the one statute, and "to reconcile them by interpretation is the only course open", as Dixon J noted in *South-Eastern Drainage Board (SA) v Savings Bank of South Australia*.[27] He went on to say:[28]

> They cannot both receive their full meaning as it is expressed. In other words, no-one can say that two provisions cannot live together when the legislature which gave them life found room for them in the one enactment.

In *Ghaidan*, however, the House of Lords applied the same approach to two different statutes, straining the interpretation of the primary enactment in order to give effect to the purpose of the earlier statute.

In the case of apparently inconsistent provisions in two different statutes, as it is or may be with the interpretive model and the primary enactment, there are two different legislative intentions, each separately ascertainable. Reconciliation may not be possible. Ordinarily in such a case, unless the general statute (the interpretive model) has constitutional status, the legislative intention exhibited in the specific statute (the primary enactment), if it is inconsistent with that of the general statute, will

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24 *Zheng v Cai* (2009) 261 ALR 481 (HCA).

25 Ibid, at 486. See also *Wilson v Anderson* (2002) 213 CLR 401 at 418.

26 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 261 ALR 220 (FCA) at 223; *NAAV v Minister for Immigration* (2002) 123 FCR 298 (FCA) at 410.

27 *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 626.

28 Ibid, at 626–627.

prevail, and even more so if it is also the later of the two statutes. Even if it is the first of the two statutes, it may still prevail because there is a preference for the specific over the general. But the application of these rules depends upon the particular provisions and circumstances.[29]

The doctrine of implied repeal, which is an aspect of legislative supremacy, is associated with necessary implication. The doctrine may have greater strength in Australia than New Zealand.[30] Be this as it may, the approach taken in *Wilkinson*, *Hansen* and *Momcilovic*, because it treats the ascertainment of the legislative intention of the primary enactment (admittedly in the light of a presumption created by another statute) as something to be ascertained according to its context, seems implicitly to acknowledge that implied repeal has a role to play.

IV Relationship of the Interpretive Provision to the Principle of Legality

The effect attributed to the interpretive provisions in *Hansen* and *Momcilovic* raises the question whether the "presumption" created by the provisions is more effective in generating a rights-compliant interpretation than the common law principle of legality. The Victorian Court of Appeal seemingly was of the view that the interpretive provision was to be equated to the principle of legality, while the majority in *Hansen* did not express a definitive opinion on the question. The Victorian Court was proceeding on the footing, accepted in Australia, that ambiguity is not required in order to bring the principle of legality into play.

The interpretive model has greater strength than the common law principle in two important respects. First, it identifies the range of rights and freedoms which are recognised and protected. The rights and interests protected by the common law remain to be fully identified. Secondly, the interpretive model has an important legitimising effect. It gives statutory force to an interpretive principle which, without that backing, may be seen by some as an unauthorised usurpation of power by the judiciary designed to qualify the expression of the legislative will. Because the interpretive principle has statutory backing, judges may have greater confidence in applying it than they have in the case of the principle of legality viewed in isolation.

It has been said, in the context of the principle of legality, that general words are not enough and that specific words will be required to displace a common law rights-compliant construction of legislation. But this statement does not mean that there is no scope for necessary implication to yield a contrary intention. So there is no convincing basis for thinking that a rights-compliant interpretation will prevail unless such an interpretation is expressly negated. No interpretive provision has provided that an express statement negating a rights-compliant interpretation of the

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29 As it did in *R v Pora* [2001] NZLR 37 (CA) at [41–43], [102–115] and [139–169].

30 Compare *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 and *R v Pora*, above n 30, at [44], [113–114] and [139–144].

primary enactment is necessary to achieve such an outcome. Whether such an approach would be constitutionally possible or effective is another question.

It has been suggested that the interpretive provisions might authorise a stronger or broader interpretation than that justified by the principle of legality, yet narrower than *Ghaidan.* It is by no means clear what this suggestion amounts to. Naturally judges will apply an interpretive provision with more confidence than they would apply the principle of legality and, in so doing, they may give effect to the interpretive provision in some cases where they would be less confident in applying the principle of legality. If this be so, the outcome does not involve a new principle of interpretation; it simply means that there is a stronger presumption, the greater strength of which is not readily measurable in the form of a proposition capable of general application.

Although it seems that necessary implication remains an element in ascertaining the legislative intention of the primary enactment, it is possible that, in some cases, what otherwise could qualify as necessary implication might not be enough to displace a rights-compliant interpretation. It is, however, difficult, if not impossible, to fit all conceivable questions relating to rights-compliant interpretation within orthodox categories of interpretation. All that can be said is that questions of rights-compliant interpretation have the potential to be so infinitely various that the interpretive provision may perhaps tip the balance in some cases in which a court would have been reluctant to apply the principle of legality. But they are not easy to identify.

In this respect, a central element of the principle of legality, noted by Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms*, was that:[31]

> … the principle … means that Parliament must squarely confront what it is doing and accept the political cost. 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.

The point here is that the principle of legality has a dual aspect. And, if it emerges that Parliament has confronted the question, then the presumption may be strengthened.

The co-existence of the common law principle of legality and the statutory interpretive provision generates a degree of complexity. The procedure which requires the application of the justification (proportionality) analysis to the common law interpretation of the primary enactment before the application of the interpretive provision was the subject of debate in *Hansen*. The majority took the

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31 *R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33, [2002] 2 AC 115 (HL) at 131; see also *Coco v The Queen* (1994) 179 CLR 427 at 437–438 and *Electrolux Home Products Pty Ltd v Australian Workers Union* [2004] HCA 40, (2004) 221 CLR 309 at 329.

view that s 6 (the interpretive provision) was only engaged if the ordinary interpretation of the primary enactment resulted in a limitation that could not be demonstrably justified under s 5.[32] The majority considered that the ordinary meaning was Parliament's intended meaning and that, if the court proceeded to the s 5 meaning before applying the justification test to the ordinary meaning, as Tipping J said:[33]

> … there would be the potential for the subversion of a deliberate policy choice by Parliament and its (at least implicit) view that the ensuing limitation of a right or freedom was justified.

Elias CJ dissented on this point. The Chief Justice considered that, as a matter of interpretation of the provisions of the Act, s 6 was to be applied before the court engaged in the s 5 justification (proportionality) analysis.[34] In *Momcilovic*, the Victorian Court of Appeal agreed with Elias CJ on this point, though the justification provision in the Charter is located in the consideration of rights in Part 2 of the Charter, unlike the New Zealand justification provision which is disconnected from the consideration of rights.[35]

One would expect that, at some time in the future, the principle of legality and the interpretive provision will merge into one, at least as far as recognised rights and freedoms are concerned. And, to the extent to which the principle of legality and the interpretive provision are co-extensive, there is little point in turning to the interpretive provision once the justification case fails.

V The Power to Make a Declaration of Incompatibility

In Australia, in the debate which ended with the Rudd Government refusing to implement the recommendation of the Brennan Committee to enact a federal statutory bill of rights similar to the Charter, the constitutionality of the making of a declaration of inconsistency was the subject of heated disagreement. I shall not assail you with the complexities of Australian constitutional law. Instead, I shall make the simple point that when the nature and character of a declaration of inconsistency is properly understood, much of the Australian argument against constitutional validity is no more than tilting at windmills. The Solicitor-General's opinions in favour of validity are annexed to the Report of the Brennan Committee. They seem to me to be convincing.

In New Zealand, the case against the existence of any power to make a declaration of incompatibility rests principally on the absence of an express power to do so and on the circumstance that the Act does not provide, as do the HRA and the Charter, for the formal

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32 *R v Hansen*, above n 1, at [37].

33 Ibid.

34 Ibid, at [12]–[16].

35 See S Evans and C Evans *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, Chatswood, 2008) at 3.39, 3.45 and 3.63.

mechanisms of a dialogue between the courts, the executive and the Parliament. Another argument against the existence of the power is that such a declaration does not fall within the category of judicial declarations ordinarily made by courts in granting relief because it is neither determinative of the rights of the parties nor imposes legal consequences.

Although the Act contains no provision requiring the Attorney-General to report to Parliament that a court has decided that a statute is inconsistent with the Bill of Rights, s 7 imposes an obligation on the Attorney-General to report to Parliament where a Bill that is being introduced into Parliament appears to be inconsistent with the Bill of Rights. It is perhaps surprising that the Act contains no provision for a report when a court makes a finding of inconsistency. But it would seem to follow that, just as Parliament is concerned with a possible infringement by a Bill, so also it would be concerned when an inconsistency is found to exist. Take a case where the inconsistency found to exist was not one contemplated by Parliament when it considered the Bill. Such a case might arise as an unexpected outcome of court proceedings on a statute enacted in reliance on a report from the Attorney-General that the Bill did not appear to be inconsistent with the Bill of Rights or from the absence of a report at all. On the other hand, there may well be cases in which Parliament enacts a Bill knowing that it will or may contravene the Bill of Rights.

The possibility that a judicial finding of inconsistency might be at variance with the basis on which Parliament considered the Bill is one factor telling in favour of the power to make a declaration of inconsistency. Another factor is the high importance of compliance with the recognised human rights and fundamental freedoms, in conformity with the international obligations arising from New Zealand's ratification of the International Covenant on Civil and Political Rights, evidenced by the enactment of the statute itself. The existence of a power to make a declaration of inconsistency is simply a recognition of that high importance and a signal which will alert both the executive and Parliament to the possibility that consideration might be given to a legislative response to the declaration.

An unfortunate consequence of the use of the expressions "declaration of incompatibility" and "declaration of inconsistency" is that they tend to suggest that such declarations are species of declaratory relief and are therefore subject to the same limitations as attach to the grant of that relief. Declaratory relief is, of course, a formal order determinative of the rights of the parties and may be granted in appropriate cases without the grant of consequential relief where the making of the declaration may have a foreseeable practical consequence.[36]

A declaration of inconsistency is not a formal order which determines the rights of the parties; nor does it impose legal consequences under the Act, unlike the HRA and the Charter where the Attorney-General is required to report to Parliament. The declaration is a record of a step taken by the court in the course of its reasoning to a conclusion which leads to an order determining the rights

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36 *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406 (FCA).

of the parties. In Australia, it is difficult to conceive that courts exercising federal jurisdiction could entertain a case for an abstract declaration of inconsistency in the absence of any issue involving the rights of parties.

To illustrate the point take the facts of *Hansen*. In *Hansen*, the defendant relied on the interpretive provision to read down s 6(6) of the Misuse of Drugs Act 1975 with a view to securing an acquittal. The attempt was unsuccessful and the conviction was upheld. Had the Supreme Court made a declaration of inconsistency in *Hansen*, the declaration would have had no impact on the rights of the parties. In the setting of *Hansen*, such a declaration would have been seen for what it is, namely a record of a step taken by the Court in the course of reasoning to its conclusion resulting in the dismissal of the appeal and the upholding of the conviction.

In the course of the Australian debate about the constitutionality of a provision authorising or requiring the making of a declaration of inconsistency, the Australian Human Rights Commission convened on 22 April 2009 a meeting of so-called "constitutional experts" (including myself and Michael McHugh QC, a former Justice of the High Court of Australia) to consider the question of the constitutionally of a federal human rights act. The meeting was unanimously of the view that such a statute with a Charter-type interpretive provision would be valid, if appropriately drafted so as to require consistency with the purpose of the particular statute, but that a declaration of inconsistency would be more accurately expressed as a "finding of inconsistency". The word "finding" was designed to eliminate any suggestion that a declaration is a form of relief or remedy.

There is an argument that a declaration of inconsistency should not be made because it might be seen as putting pressure on, or criticising, Parliament so as to bring about legislative change, a step that courts are extremely reluctant to take, except in cases where the law gives rise to manifest (and perhaps unforeseen) injustice. This is an argument which has some force and was recognised by Cooke P in *Temese v Police* but he thought "possibly that price ought to be paid".[37] It strikes me, however, as an argument which has more force in relation to the question whether a declaration should be made and what form it should take.

From my understanding of the New Zealand authorities on the question, the proposition that there is no power to make a declaration of inconsistency has no support, except in criminal proceedings. In *Moonen v Film and Literature Board of Review*, Tipping J, writing for the Court of Appeal with reference to the purpose of s 5 of the Act, said:[38]

> That purpose necessarily involves the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom

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37 *Temese v Police* [1992] 9 CRNZ 425 (CA) at 427.

38 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [20].

> which cannot be demonstrably justified in a free and democratic society. Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum. In the light of the presence of s 5 in the Bill of Rights, New Zealand society as a whole can rightly expect that on appropriate occasions the Courts will indicate whether a particular legislative provision is or is not justified thereunder.

This statement, correctly in my view, recognizes that the Court has the power, if not the duty, to make a statement of inconsistency, whether it be termed a declaration, an indication or a finding, as it did in *R v Poumako*.[39] The only question then is whether such a statement should be made in the terms suggested which involve the words "unreasonable limitation". My own preference would be for a more neutral expression of the Court's finding, such as that suggested by McGrath J in *Hansen*.[40] A statement in those terms is more consistent with the simple notion of "a declaration of inconsistent interpretation", the expression used in s 36 of the Charter. My preference for a statement recording the end result of inconsistency rather than the precise reason for inconsistency reflects a personal view that a court should not be seen to putting too much pressure on the other arms of government, particularly in the context of a statute which makes no express provision for a dialogue mechanism. That said, the view expressed in *Moonen* is plainly a tenable view.

The next question is whether such a statement should be made in every case where inconsistency is found or only in "appropriate" cases. There is much to be said for a uniform practice of making a statement whenever inconsistency is found. Otherwise, there is the difficulty of indentifying a touchstone which would enable the Court to determine an "appropriate" case from one which is "inappropriate".

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39 *R v Poumako* [2000] 2 NZLR 695 (CA).

40 *R v Hansen*, above n 1, at [253]–[254]. McGrath J stated:

> While the courts' power to read down another provision so that it accords with the Bill of Rights, or to fill identified gaps in a statute, is accordingly limited by its function of interpretation, a New Zealand court must never shirk its responsibility to indicate, in any case where it concludes that the measure being considered is inconsistent with protected rights, that it has inquired into the possibility of there being an available rights consistent interpretation, that none could be found, and that it has been necessary for the court to revert to s 4 of the Bill of Rights Act and uphold the ordinary meaning of the other statute … .
>
> Articulating that reasoning serves the important function of bringing to the attention of the executive branch of government that the court is of the view that there is a measure on the statute book which infringes protected rights and freedoms, which the court has decided is not a justified limitation. It is then for the other branches of government to consider how to respond to the court's finding. While they are under no obligation to change the law and remedy the inconsistency, it is a reasonable constitutional expectation that there will be a reappraisal of the objectives of the particular measure, and of the means by which they were implemented in the legislation, in light of the finding of inconsistency with these fundamental rights and freedoms concerning which there is general consensus in New Zealand society and there are international obligations to affirm.

The Court has taken the view that a statement of inconsistency should not be made in criminal cases. In this context, the Court of Appeal held in *Belcher v Chief Executive of the Department of Corrections*,[41] that a declaration of inconsistency is a "civil remedy" that cannot be granted in a criminal proceeding. As will be apparent from what I have already said, my view of a declaration of inconsistency falls short of according it the character of "relief" or treating it as "remedial". My view would also inhibit me from drawing the distinction between a formal declaration of inconsistency and an informal indication of inconsistency.

On the other hand, there is force in an argument that a declaration should not be made in criminal cases because it might tend to suggest that there is something unreasonable or wrong about the law which led to the conviction, if not about the conviction itself.

The making of a formal declaration of inconsistency would have more significance if: (a) the court were authorised or required to make such a declaration; and (b) the Attorney-General were required (i) to be joined as a party; and (ii) to bring the making of a declaration to the notice of Parliament within a prescribed time. In the Australian Solicitor-General's opinion to which I referred earlier, he suggested the inclusion of (b)(i) above in a model Bill which already incorporated power to make a declaration and imposed an obligation on the Attorney-General to bring the making of the declaration to the attention of Parliament.[42] This obligation would be enforceable against the Attorney-General at the suit of a party if the declaration was expressed to be binding on the parties. The HRA and the Charter provide that a declaration is not binding on the parties. Of course, there may be an understandable reluctance to facilitate the joinder of the Attorney-General in every case in which a question of human rights-compliant interpretation may arise.

VI Is the Act a Constitutional Statute?

In Australia, where we have invested so much of our thinking in marking out the difference between constitutional law (the written Australian Constitution and State Constitutions and what they incorporate) and other public law which is not constitutional in that sense, the notion that a statutory bill of rights is a constitutional statute is not one that immediately grips the Australian legal mind. Our reluctance to embrace the notion is strengthened if it be the case that the interpretive provision is to be read, as it has been read in *Momcilovic*, as a statutory equivalent to the principle of legality, a principle which we have not endowed with constitutional status.

In New Zealand, however, it has been said that the Act "possesses undoubted constitutional significance"[43] and it has been interpreted in conformity with the approach enunciated by

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41 *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174, 1 NZLR 507.

42 Solicitor-General's opinion, above n 8.

43 *R v Poumako*, above n 40, at [95] per Thomas J.

Lord Wilberforce in *Minister for Home Affairs v Fisher* in relation to the interpretation of a constitution.[44] But, as judges have pointed out from time to time, the Act is not entrenched. Although it has significance in supporting a "rights centred" approach, it does not seem to me that the Act can be characterised as a "constitutional" statute without investing it with more significance than it actually has. What does that expression tell us and how does it help us to answer questions of interpretation and to decide whether or not to make declarations of inconsistency? If "constitutional" means what it says, it might push us in the direction of *Ghaidan* and away from *Hansen*, following the *Thoburn* trail.

VII Conclusion

I have said more than enough. I conclude by saying that New Zealand has had greater experience of the interpretive model of a bill of rights than Australia has had, and we can learn from your experience and apply it as the Victorian Court of Appeal did when, in *Momcilovic*, it applied *Hansen*.

44 *Minister for Home Affairs v Fisher* [1980] AC 319 (PC).