

**THE CONSTITUTION AND A HUMAN RIGHTS ACT -
ARE DECLARATIONS OF INCOMPATIBILITY INCOMPATIBLE WITH
CHAPTER III?**

Mark Moshinsky SC¹

The Commonwealth Government has announced a consultation process to consider the enactment of a national human rights Act in Australia.² It is clear from the terms of reference of the National Human Rights Consultation Committee that a constitutional bills of rights, that is, one entrenched by amendment to the *Constitution*, is not ‘on the table’ and the consultation process is to consider the enactment of a statutory human rights Act.³ In this context, a debate has commenced – or, more accurately, been revived – about the constitutionality of certain expected components of a statutory human rights Act.

In a recent paper,⁴ the Honourable Michael McHugh AC, QC⁵ has discussed the constitutionality of two potential components of a statutory human rights Act, namely ‘declarations of incompatibility’ and an interpretative obligation, requiring courts to interpret legislation, so far as is possible, in a way that is compatible with human rights. In respect of the first of these matters, Mr McHugh expresses doubts about the constitutionality of declaration of incompatibility. On the second of these matters – that is, an interpretative

¹ Barrister at the Victorian Bar. Paper to be presented at a Joint Seminar organised by the Centre for Comparative Constitutional Studies and the Australian Human Rights Commission at the Melbourne Law School on 28 April 2009.

² The announcement of the National Human Rights Consultation was made by the Commonwealth Attorney-General on 10 December 2008 – the sixtieth anniversary of the Universal Declaration of Human Rights.

³ www.humanrightsconsultation.gov.au (accessed 26 April 2009): “The options identified should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights”.

⁴ “A Human Rights Act, the courts and the Constitution”, Presentation given at the Australian Human Rights Commission, 5 March 2009 (“McHugh Paper”).

obligation – Mr McHugh expresses the view that there is “little, if any, chance” that the High Court of Australia would hold that an interpretative obligation as contained in the United Kingdom’s *Human Rights Act*⁶ and as interpreted by the House of Lords was a valid Act of the federal Parliament.⁷ However, it should be noted that Mr McHugh considers that an interpretative obligation framed along the lines of Victoria’s *Charter of Human Rights and Responsibilities*⁸ would be valid.⁹

For the purposes of this paper, I wish to focus on the first of the two matters discussed by Mr McHugh, namely declarations of incompatibility, and the question whether a provision (contained in a national human rights Act) permitting a court to make a declaration that primary legislation is incompatible with the human rights contained in the Act, along the lines of the provision contained in the United Kingdom’s *Human Rights Act*,¹⁰ the Australian Capital Territory’s *Human Rights Act*¹¹ and Victoria’s *Charter*,¹² would be compatible with Chapter III of the *Constitution*.

The nature of such a provision is well-known, but for completeness I briefly refer to the provision as contained in the *Human Rights Act* of the United Kingdom. The provision needs to read in the context of the interpretative obligation. Section 3 of the UK’s *Human Rights Act* contains an interpretative obligation that “[s]o 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”. Section 4(2) – which relates to primary legislation¹³ -

⁵ Former Justice of the High Court of Australia.

⁶ *Human Rights Act* 1998 (UK).

⁷ McHugh Paper, page 27.

⁸ *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

⁹ McHugh Paper, page 29.

¹⁰ Section 4.

¹¹ *Human Rights Act* 2004 (ACT), s 32.

¹² Section 36 (referred to as declarations of inconsistent interpretation).

¹³ See s 4(1). Section 4(4) contains a provision relating to subordinate legislation.

provides that “[i]f the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility”. Section 4(5) limits the word “courts” in this section to the higher courts in the United Kingdom – thus, only those courts may make a declaration of incompatibility. Section 4(6) provides that a declaration of incompatibility:-

- “(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
- (b) is not binding on the parties to the proceedings in which it is made”.

Section 6 of the UK Act provides that the Crown must be given notice of a proceeding in which a court is considering making a declaration of incompatibility and the Crown has a right to intervene.

Section 10 of the UK Act deals with remedial action and contains a ‘fast track’ procedure for the amendment of legislation following a declaration of incompatibility.¹⁴

The two principal concerns that seem to arise in incorporating declarations of incompatibility in a human rights Act in the Australian constitutional context appear to be, first, whether the making of such a declaration would be an exercise of “judicial power” and, secondly, whether a proceeding in which a claimant sought such a declaration would be a “matter”. Each of these is an essential requirement for the exercise of federal judicial power and hence is necessary for the validity of legislation conferring such a power on the courts.

¹⁴ The section applies, inter alia, where a provision of legislation has been declared incompatible under s 4 and all avenues of appeal have been exhausted. Section 10(2) provides that, if a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility. Schedule 2

In my opinion, there are strong arguments in favour of upholding the validity of legislation conferring upon the courts the power to make a declaration of incompatibility along the lines of the United Kingdom model. Before going into these arguments, I would like to take as a ‘case study’ the most high-profile case in the United Kingdom in which a declaration of incompatibility was made.

The case is *A v Secretary of State for the Home Department*, a decision of the House of Lords decided on 16 December 2004 and reported at [2005] 2 AC 68; [2004] UKHL 56. The facts of the case may be summarised as follows. Following the terrorist attacks on the United States of America on 11 September 2001, the United Kingdom Government concluded that there was a public emergency threatening the life of the nation within the meaning of article 15 of the European Convention on Human Rights. Accordingly, it made the Human Rights Act 1998 (Designated Derogation) Order 2001 (“the Derogation Order”), designating the UK’s proposed derogation from the right to personal liberty guaranteed under article 5 of the Convention and Parliament passed Part 4 of the *Anti-terrorism, Crime and Security Act 2001* (“the 2001 Act”) which, by s 23, provided for the detention of non-nationals if the Home Secretary believed that their presence in the United Kingdom was a risk to national security and he suspected that they were terrorists who, for the time being, could not be deported because of fears for their safety or other practical considerations.

The appellants were each detained under the 2001 Act. They appealed against their detention to the Special Immigration Appeals Commission (“SIAC”). SIAC quashed the Derogation Order and granted a declaration that s 23 was incompatible with certain articles¹⁵ of the

of the Act makes further provision in relation to remedial orders. See further, Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (2008), pages 709-716.

¹⁵ Article 5 (the right to personal liberty) and article 14 (the prohibition of discrimination).

Convention. The Court of Appeal allowed an appeal by the Secretary of State for the Home Department. The appellants appealed, with leave, to the House of Lords.

There were nine appellants in the appeals, each of whom was a foreign national. Eight of them had been detained in December 2001 and one in February 2002. By time the appeals came before the House of Lords, in October 2004, four were still in detention in the United Kingdom. None had been the subject of any criminal charge. In none of their cases was a criminal trial in prospect.

There were essentially three issues before the House of Lords, which sat as a panel of nine for this appeal.¹⁶ First, was there a public emergency threatening the life of the nation within the meaning of article 15, entitling the Government to derogate from the Convention? Secondly, if so, was s 23 of the 2001 Act a proportionate response, so as to satisfy the requirement of article 15 that the measure be “strictly required by the exigencies of the situation”? Thirdly, was s 23 incompatible with the prohibition of discrimination contained in article 14 of the Convention?

The House of Lords decided these issues as follows. In relation to the first issue, namely whether there was a public emergency threatening the life of the nation, their Lordships generally said that considerable weight was to be accorded to the judgment of the Government on this issue and the absence of a specific threat of an immediate attack did not invalidate that assessment. Ultimately, all their Lordships except for Lord Hoffman, who dissenting on this issue, accepted that there was a public emergency threatening the life of the

¹⁶ Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Carswell.

nation within the meaning of article 15. Thus the threshold test for reliance on article 15 was satisfied.

In relation to the second issue, that is, was s 23 of the 2001 Act a proportionate response, so as to satisfy the requirement of article 15 that the measure be “strictly required by the exigencies of the situation”, seven of their Lordships¹⁷ held that s 23 was *not* a proportionate response. In general terms, their Lordships said that the right to personal liberty was among the most fundamental rights protected by the Convention and the restrictions imposed by s 23 called for close scrutiny. They said that because s 23 applied to non-nationals suspected of international terrorism but not to United Kingdom nationals who were considered to present qualitatively the same threat, because it permitted non-national suspects to leave the United Kingdom, and because it did not address the threat from United Kingdom nationals, it did not rationally address the threat to security and was a disproportionate response and was not “strictly required” by the exigencies of the situation within the meaning of article 15. It followed that s 23 was incompatible with the right to personal liberty guaranteed by article 5 of the Convention.

In relation to the third issue, namely the prohibition of discrimination, seven of their Lordships¹⁸ held that the measure unjustifiably discriminated against the appellants on grounds of their nationality. Their Lordships’ reasons were that the relevant context was security rather than immigration control; the appellants were treated differently on nationality grounds from United Kingdom nationals suspected of terrorism with whom they shared the characteristics of being both irremovable from the United Kingdom and suspected of

¹⁷ Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Carswell; Lord Walker of Gestingthorpe dissenting.

terrorism; and the purpose of s 23 was to protect the United Kingdom from the risk of terrorist attack presented by both groups, but only non-nationals were detained.

Accordingly, the House of Lords allowed the appeals. It ordered that the Derogation Order be quashed and declared that s 23 of the 2001 Act was incompatible with articles 5 and 14 of the Convention.

In the course of their judgments, many of their Lordships made observations about the nature of declarations of incompatibility and the judicial task that their Lordships were undertaking. Only one of their Lordships, Lord Scott of Foscote, expressed discomfort with the role that the court was required to perform in considering and making a declaration of incompatibility, although he agreed with the making of the declaration. Lord Scott said:

“The normal and proper function of the courts in this country is to adjudicate on the rights and liabilities under domestic law of citizens (or of institutions with legal personality) or to adjudicate on the validity of executive actions or omissions that may affect those rights and liabilities. It is not, normally, the function of the courts to entertain proceedings the purpose of which is to obtain a ruling as to whether an Act of Parliament is compatible with an international treaty obligation entered into by the executive. ... In being asked, therefore, to perform the function to which I have referred, the courts are, it seems to me, being asked to perform a function the consequences of which will be essentially political in character rather than legal. A ruling that an Act of Parliament is incompatible with the ECHR does not detract from the validity of the Act. It does not relieve citizens from the burdens imposed by the Act. It provides, of course, ammunition to those who disapprove of the Act and desire to agitate for its amendment or repeal. This is not a function that the courts have sought

¹⁸ Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Carswell; Lord Walker of Gestingthorpe dissenting.

*for themselves. It is a function that has been thrust on the courts by the [Human Rights Act].*¹⁹

On the other hand, the other members of the House of Lords appear to have considered the nature of declarations of incompatibility and the task they were undertaking to be consistent with the historic duty of the court to scrutinise legislation which may infringe personal liberty. The leading judgment of the majority was given by Lord Bingham of Cornhill. Early in his judgment, after setting out what the appellants' claimed, Lord Bingham said:

*"The duty of the House, and the only duty of the House in its judicial capacity, is to decide whether the appellants' legal challenge is soundly based".*²⁰

In the course of considering the second issue, and after emphasising the important role of the court in scrutinising provisions which affect personal liberty, his Lordship said:

"It follows from this analysis that the appellants are in my opinion entitled to invite the courts to review, on proportionality grounds, the Derogation Order and the compatibility with the Convention of section 23 and the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised. ... It is ... of course true ... that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. ... The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected ... and the remedy lies with the appropriate minister ..., who is answerable to Parliament. The [Human Rights Act 1998] gives the courts a very specific, wholly democratic mandate.

¹⁹ At [145].

²⁰ At [3].

*As Professor Jowell has put it, ‘The courts are charged by Parliament with delineating the boundaries of a rights-based democracy’ ...*²¹

These comments, and comments to similar effect by other Law Lords,²² indicate that the making of declarations of incompatibility was seen to form part of the traditional role of the court to scrutinise governmental action which potentially infringes personal liberty. Although the declaration did not have the effect of invalidating the legislation, it was seen as an important mechanism for drawing to the attention of the Government and the Parliament the fact that the legislation was incompatible with right to personal liberty and the prohibition of discrimination.

²¹ At [42], referring to Jowell, “Judicial Deference: servility, civility or institutional capacity?” [2003] PL 592 at 597. His Lordship also referred to Clayton, “Judicial deference and ‘democratic dialogue’: the legitimacy of judicial intervention under the Human Rights Act 1998” [2004] PL 33.

²² See at [80] per Lord Nicholls: “But Parliament has charged the courts with a particular responsibility. It is a responsibility as much applicable to the 2001 Act and the [Derogation Order] as it is to all other legislation and ministers’ decisions. The duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected. ...”. At [90] per Lord Hoffmann: “Until the Human Rights Act 1998, the question of whether the threat to the nation was sufficient to justify suspension of habeus corpus or the introduction of powers of detention could not have been the subject of judicial decision. There could be no basis for questioning an Act of Parliament by court proceedings. Under the 1998 Act, the courts still cannot say that an Act of Parliament is invalid. But they can declare that it is incompatible with the human rights of persons in this country. Parliament may then choose whether to maintain the law or not. The declaration of the court enables Parliament to choose with full knowledge that the law does not accord with our constitutional traditions.” At [99] per Lord Hope: “Although these appeals are concerned with general issues and not with the cases of each of the appellants individually, their importance to them is nevertheless very great. Two cardinal principles lie at the heart of the argument. It is the first responsibility of government in a democratic society to protect and safeguard the lives of its citizens. That is where the public interest lies. It is essential to the preservation of democracy, and it is the duty of the court to do all it can to respect and uphold that principle. But the court has another duty too. It is to protect and safeguard the rights of the individual. Among these rights is the individual’s right to liberty.” At [192] per Lord Walker: “The detention without trial of terrorist suspects is therefore a crucial instance – probably the most crucial instance of all – of the problems of reconciling individual human rights with the interests of the community, and of determining the proper functions, in this process, of different arms of government. ... Safeguarding national security is (with the possible exception of some areas of macro-economic policy and allocation of resources) the area of policy in which the courts are most reluctant to question or interfere with the judgment of the executive or (a fortiori) the enacted will of the legislature. Nevertheless the courts have a special duty to look very closely at any questionable deprivation of individual liberty. Measures which result in the indefinite detention in a high-security prison of individuals who have not been tried for (or even charged with) any offence, and who may be innocent of any crime, plainly invite judicial scrutiny of considerable intensity.”

In the event, shortly after the judgment of the House of Lords was delivered, the provisions were repealed by the *Prevention of Terrorism Act 2005*, which put in place a new regime of control orders; the remedial legislation came into force in March 2005.²³

I would like to turn now to some of the issues that arise in the Australian constitutional context with respect to declarations of incompatibility. As noted earlier, there appear to be two main issues: first, whether the making of such a declaration would be an exercise of judicial power and, secondly, whether a proceeding in which such a declaration is sought would be a “matter”.

Mr McHugh in his paper²⁴ referred to the draft human rights Bill prepared by New Matilda, a private organisation, which contains a provision, modelled on the UK Act, that a declaration of incompatibility “is not binding on the parties to the proceeding in which it is made”.²⁵ However it is not at all clear to me why an Australian human rights Act would need to include a provision to this effect. Whatever the reasons for inclusion of this provision in the United Kingdom Act, which are not readily apparent,²⁶ so far as I can see it need not be replicated here. I note that the Victorian *Charter* does *not* contain a provision to the effect that a declaration of inconsistent interpretation (as declarations of incompatibility are referred to) is not binding on the parties.²⁷

²³ Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (2008), page 526.

²⁴ McHugh Paper, page 15.

²⁵ New Matilda Bill, clause 51(4)(b).

²⁶ It may be that the provision (s 4(6)(b)) included to preserve the rights of the parties (including the Government) to argue a contrary position before the Strasbourg Court. It may also have been included to underscore what it contained in s 4(6)(a), namely the fact that a declaration of incompatibility does not affect the validity of the relevant Act. Section 4(6)(b) may be in effect saying that the parties remain bound by the Act and not by the declaration of incompatibility.

²⁷ Compare s 36(5)(b) of the *Charter*: “A declaration of inconsistent interpretation does not ... create in any person any legal right or give rise to any civil cause of action”.

Assuming that a human rights Act enacted by the Commonwealth Parliament did *not* contain a provision to the effect that a declaration of incompatibility is not binding on the parties to the proceeding, but otherwise the provisions were along the lines of the UK model, in my view the decision of a court on whether to make a declaration of incompatibility *would* be binding on the parties to the proceeding, in that it would constitute an issue estoppel or res judicata, with the effect it would not be possible for either party to reargue the issue of whether the legislation in question was compatible with human rights in future proceedings.

Would the making, or the refusal to make, a declaration of incompatibility be an exercise of judicial power? The classic statement of judicial power, cited by Mr McHugh,²⁸ is that of Griffiths CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*²⁹ and reads as follows:

“I am of opinion that the words ‘judicial power’ as used in sec 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.”

Obviously this statement, and the many others like it, were made in a context far removed from declarations of incompatibility. However, there does not seem to me to be too much difficulty in describing the making, or refusal to make, a declaration of incompatibility as falling within this description of judicial power. There is a real controversy between two parties – usually an individual on the one side and the Government on the other – as to whether a particular piece of legislation, or a particular provision, is incompatible with human rights. Absent a real controversy between two parties, the court in its discretion would not

²⁸ McHugh Paper, page 16.

make a declaration. That is consistent with the general law in Australia on the making of declarations, and is the position that applies in the United Kingdom under the *Human Rights Act*.³⁰

Griffith CJ's statement also refers to the "power to give a binding and authoritative decision". Assuming that a human rights Act enacted in Australia would *not* contain a provision to the effect that a declaration of incompatibility "is not binding on the parties to the proceeding",³¹ the decision of the court on whether to make a declaration of incompatibility *would* be binding on the parties to the proceeding. It would be a binding and authoritative decision on whether the legislation or provision in question is incompatible with the human rights protected by the human rights Act.

For these reasons, it seems to me that there is an exercise of judicial power.

Turning to the issue of whether there is a "matter" within the meaning of Chapter III of the Constitution, it needs to be acknowledged that there is no definitive statement of what is required to constitute a "matter". The courts are content to entertain cases concerning judicial advice to trustees, liquidators and others, and presumably these constitute "matters". It is difficult to see the distinction between those cases and this, and why a claim for a declaration of incompatibility should not constitute a "matter" for the purposes of Chapter III. Further, there is nothing academic or hypothetical about a claim for a declaration of incompatibility; it involves a real controversy between parties affected by the decision as to whether the

²⁹ (1909) 8 CLR 330 at 357.

³⁰ See Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (2008), page 514: "It has been stated that, even where it is clear that a provision is incompatible with a Convention right, the making of a declaration of incompatibility will not be justified if it is also clear that the provision will not be deployed against the claimant. This is because 'it is not the function of the Court to decide hypothetical questions which do not impact on the parties' or 'to keep the statute book up to date'." (footnotes omitted).

impugned legislation is compatible with the human rights protected by the human rights Act.³²

In addition to these arguments, if one takes a functional analysis, the nature of the task that court would be required to undertake is not very different from considering whether legislation is constitutional under the *Constitution*, or whether State or Territory legislation is inconsistent with Commonwealth legislation for the purposes of s 109 of the *Constitution*.³³

I would like to conclude by making some observations about why I think it would be desirable, as a matter of policy, for a declaration of incompatibility provision to be included in an Australian human rights Act, and for such a provision to be upheld as constitutional. There are three brief points.

First, the experience in the United Kingdom has been a consistent preparedness on the part of the Government and the Parliament to amend legislation following a declaration of incompatibility. As at June 2008, 15 declarations of incompatibility had been made which were final in their entirety and not subject to further appeal.³⁴ According to material prepared as at June 2008, of these 15 declarations:

- 8 had been remedied by later primary legislation;

³¹ See above discussion.

³² See Pamela Tate SC, Solicitor-General for Victoria, “Victoria’s *Charter of Human Rights and Responsibilities: A Contribution to the debate on a national Charter*” (address delivered to the 2009 Commonwealth Law Conference, Hong Kong, 6 April 2009), page 17, para [50].

³³ See Pamela Tate SC, Solicitor-General for Victoria, “Victoria’s *Charter of Human Rights and Responsibilities: A Contribution to the debate on a national Charter*” (address delivered to the 2009 Commonwealth Law Conference, Hong Kong, 6 April 2009), page 16, para [46]: “Declarations of incompatibility require a construction of the relevant legislative provision and that legislative provision with one or other of the human rights protected under the *Charter*. The task of construction is no different in character from that currently engaged in.”

³⁴ Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (2008), page 522.

- 1 had been remedied by a remedial order under s 10 of the *Human Rights Act*;
- 3 related to provisions that had already been remedied by primary legislation at the time of the declaration;
- 1 was the subject of public consultation;
- 2 (which related to the same subject) were the subject of remedial measures before Parliament.

As these statistics show, declarations of incompatibility have been effective in the United Kingdom in leading to changes to legislation to overcome incompatibility.

The second point is this. Over the last 30 years, many countries have adopted constitutional or statutory bills of rights, including Canada in 1982, New Zealand in 1990, South Africa in 1996, and the United Kingdom in 1998. There is now developing a substantial body of case law on human rights among the constitutional courts and highest appellate courts of these countries. Without a mechanism by which the High Court of Australia can and is required to consider the compatibility or otherwise of Australian legislation with human rights, Australia will be left 'out in the cold' in relation to this fundamental area of jurisprudence.³⁵ It will be denied the opportunity to participate in the 'conversation' that is now taking place among the constitutional courts and highest appellate courts of these and many other countries.

Thirdly, a mechanism which required Australian courts to consider the compatibility or otherwise of legislation with human rights would enrich our jurisprudence, both in

constitutional law and generally. Currently, our constitutional law is concerned, in the main, with the limits of Commonwealth law-making powers, the division of power between the Commonwealth and the States, specific prohibitions on legislative activity either at the State or Commonwealth level, and certain guarantees regarding voting and the conduct of elections. A human rights Act with a declaration of incompatibility mechanism would require our courts, in particular the High Court, to engage with human rights and develop a jurisprudence in this area. This would not only enrich our constitutional law, but would likely ‘spill over’ to other areas of law which raise human rights issues.

³⁵ A similar point is made by Geoffrey Robertson in *The Statute of Liberty: How Australians can take back their rights* (2009), p 175.