

**THE DILEMMAS IN DIALOGUE:
A CONSTITUTIONAL ANALYSIS OF THE NHRC'S PROPOSED
HUMAN RIGHTS ACT**

HELEN IRVING*

I INTRODUCTION

The statute books of modern Australia contain many Commonwealth Acts, the majority of which give effect to Australia's obligations at international law, protecting specific human rights and outlawing discriminatory conduct against rights holders.¹ At the same time, Australian history is punctuated with proposals – official and popular – for the adoption of a paramount human rights instrument, either constitutional or 'superstatutory'.² So far, all of these proposals have come to nothing. Australia's legislative and constitutional record is marked by a preference for narrowly tailored rights, expressed in concrete, pragmatic language. For the most part, Australian voters and their representatives have eschewed both the entrenchment of rights and their expression in general or abstract terms.

Notwithstanding this record, many Australians believe that something more is needed. In recent years, debate about the adequacy of Australia's current rights protection regime has been intense, generating a large body of literature in which the merits of adopting an Australian Bill or Charter of Rights have been debated. Since the passage of the Australian Capital Territory's *Human Rights Act 2004* (ACT) and Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic), demands for a national equivalent have multiplied. Much ink has been spilled on unofficial ideas for a federal equivalent, and in speculation about its possible shape and content. The potential application of the Australian Capital Territory ('ACT') and Victorian models to a federal Act has attracted extensive analysis, in particular concerning whether the *Commonwealth Constitution* would permit Australia's federal courts to perform the functions that are conferred on

* Professor, Faculty of Law, University of Sydney. The author would like to thank the anonymous *University of New South Wales Law Journal* referee for useful comments.

1 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) 114.

2 Ibid 229–40.

state courts under these Acts.³ Both the debate and the speculation intensified after the election of the Rudd Labor Government in November 2007 and exploded with the establishment of the National Human Rights Consultation ('NHRC') in December 2008. The Consultation's Committee ('NHRCC') handed down its Report in September 2009. Finally, a concrete proposal was on the table. Constitutional analysis could profitably begin.

As instructed in its terms of reference, the NHRCC had consulted widely, identified key issues, and received submissions from the public. Its Report then listed 'options' for enhancing Australia's protection and promotion of rights in the form of 31 recommendations. Included, among others, were recommendations concerning human rights education (singled out for priority attention),⁴ amendments to parliamentary procedure, rights strategies for Indigenous Australians, and enhancement of the powers of the Australian Human Rights Commission. These particular recommendations attracted relatively little attention at the time of the Report's release and generated little constitutional controversy.

It was otherwise with Recommendation 18. Despite its relegation to the second half of the list, it leapt from the Report, exciting proponents and alarming critics with equal intensity. It recommended, without qualification, that 'Australia adopt a federal Human Rights Act'.⁵

Thirteen recommendations followed, setting out the detailed scheme for such an Act. Among its salient features, the Human Rights Act ('HRA'), as proposed, would bind only the Commonwealth government/Parliament and apply only with respect to federal laws. Courts would be required to interpret federal legislation in a manner compatible with rights protected under the Act and consistent with the legislative purpose.

3 See, eg, Dominique Dalla-Pozza and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights' (2007) 12(1) *Deakin Law Review* 1; Geoffrey Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?' (2006) 17 *Public Law Review* 188; Stefanie Wilkins, 'Constitutional Limits on Bills of Rights Introduced by a State or Territory' (2007) 35 *Federal Law Review* 431; James Stellios, 'State/Territory Human Rights Legislation in a Federal Judicial System' (2008) 19 *Public Law Review* 52; Jim South, 'Campaign for a National Bill of Rights: Would "Declarations of Incompatibility" Be Compatible with the Constitution' (2007) 10(1) *Constitutional Law and Policy Review* 2.

4 National Human Rights Consultation Committee, above n 1, 151.

5 Ibid xxxiv.

The Report identified three categories of rights for recognition under the HRA.⁶ First, a broad range of derogable civil, political, and equality rights, subject only to a limitations clause based on the ACT and Victorian Acts ('such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom').⁷ Second, 'non-derogable' rights, including, among others, the right to life, to a fair trial, to freedom from torture and from slavery, and a prohibition on retrospective criminal laws. Third, socio-economic rights, which, although listed with priorities indicated, should not to be justiciable.

Several other recommendations – separate from, but related to, the proposed HRA – completed the package. The government would be required to attach a statement of rights compatibility to all Bills. Regardless of whether the HRA was adopted, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be amended 'in such a way as to make the definitive list of Australia's international human rights obligations a relevant consideration in government decision making'.⁸ In the absence of a HRA, the *Acts Interpretation Act 1901* (Cth) should be amended to require courts to interpret federal legislation 'as far as it is possible to do so consistently with the legislation's purpose' to be consistent also with an interim list of rights and, later, a definitive list of Australia's human rights obligations to be drawn up by the government.⁹

The NHRC's terms of reference had instructed the NHRCC, in identifying options for change, to 'preserve the sovereignty of the Parliament'.¹⁰ The

6 Following Recommendation 5 at *ibid* xxx–xxxi, the government would immediately draw up an interim list of rights, sourced, regardless of whether the HRA is adopted, from the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) and the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). This list would, after two years, be made 'definitive'. It is unclear whether the rights to be identified on the list are confined to those already incorporated into Australian legislation, but other proposed measures, including Recommendation 4 (there should be an 'audit' of Australia's international rights obligations): at xxx, and Recommendation 17 ('any right' listed in the seven major international human rights treaties should be protected and promoted): at xxxiv, suggest that the list is not so confined. The rights protected under the HRA, it appears, are to be a subset of those identified on the list. (The relationship between the 'readily comprehensible list of Australian rights and responsibilities', referred to in Recommendations 2 and 3, and the list proposed under Recommendation 5 is not clear): at xxix–xxxi.

7 *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'), from where this elegant formula was originally borrowed.

8 National Human Rights Consultation Committee, above n 1, 187 (Recommendation 11). This paper is concerned specifically with the proposed HRA, and the likely impact of this provision is not discussed. I note here, however, the dramatic effect that the proposed amendment to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) would likely have in the event that the 'definitive' list of human rights obligations embraces all of Australia's international law obligations, other than those for which Australia has entered a reservation. Such a provision would effectively shift Australia from a dualist to a monist system with respect to international law; it might also have the paradoxical effect of discouraging Australia from ratifying international treaties or encouraging it to lodge reservations to treaty provisions. It would certainly have a major impact on the process of administrative decision-making and the outcome in individual cases.

9 National Human Rights Consultation Committee, above n 1, 187 (Recommendation 12). See above n 6.

10 *Ibid* 383.

inclusion of this term of reference was neither accidental nor casual. The impact on the sovereignty of Parliament was, and remains, a key issue in debates surrounding the desirability of Australia's adopting a human rights instrument and its likely impact on the separation of powers. The NHRCC paid close and consistent attention to this instruction during the NHRC, and its commitment to it is evident throughout the Report.

Central to its response is the so-called 'dialogue' model of 'weak' judicial review.¹¹ Accordingly, under the HRA, the courts would lack jurisdiction to strike down laws for rights incompatibility. The High Court alone would be empowered to issue 'declarations of incompatibility' between laws and the justiciable rights protected under the HRA. A claim of incompatibility could only be made in a pre-existing proceeding and would not provide an independent ground for appeal to the High Court. The Commonwealth Attorney-General would be compulsorily joined as a party to any proceeding where such a claim was made. If a declaration of incompatibility were issued by the Court, the Attorney-General would be obliged to report the declaration to Parliament, and a response would be required, indicating whether the government intended either to amend the impugned legislation, or let it stand, incompatibility notwithstanding. The Report also recommended that 'an individual be able to institute an independent cause of action against a federal public authority for breach of human rights and that a court be able to provide the usual suite of remedies'.¹²

On 21 April 2010, the Commonwealth Attorney-General, Robert McClelland, announced the government's response to the Report.¹³ The Commonwealth, he stated, will create a 'Human Rights Framework', subject to a performance review in 2014. The Framework will involve wide-ranging

11 See Mark Tushnet, 'Weak-Form Judicial Review: Its Implications for Legislatures' (2004) 23 *Supreme Court Law Review* 213.

12 National Human Rights Consultation Committee, above n 1, 377. The compatibility of this recommendation with the declaration of incompatibility (which excludes an independent cause of action or legal remedy) is not entirely clear. In its (brief) reasons for recommending such a provision, the Report makes reference to the Victorian Bar Association's submission that 'a free-standing remedy against public authorities based solely on a breach of the protected rights should be provided': at 376 n 48. It is possible for an independent 'remedy' to be sought in a pre-existing cause of action. However, having regard to the words 'freestanding' and 'solely', and the rest of the Victorian Bar Association's submission, in which the 'obscure' or unclear nature of the remedy provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is listed as a 'weakness', it would appear that the remedy is not to be confined to pre-existing causes of action. Another possible interpretation is that the 'independent' cause of action is to lie for breach of human rights not arising from the exercise of power conferred on the public authority by statute (and therefore not entailing interpretation of the statute's rights compatibility). This, presumably, would only apply to decisions made in the exercise of federal prerogative power or supported by s 61 of the *Constitution*. I do not consider this recommendation further, since it is not addressed in the Attorney-General's response. I note, however, that were a similar recommendation adopted in future, its impact is likely to be significant, potentially much more so than the more restrained declaration of incompatibility mechanism.

13 Australian Government, *Australia's Human Rights Framework* (2010); Robert McClelland, 'Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club of Australia, Canberra, 21 April 2010).

education programs, enhanced parliamentary scrutiny of legislation, the consolidation of existing anti-discrimination laws, and a strengthened role for the Australian Human Rights Commission. All Bills presented to Parliament will require statements of rights compatibility.

There will be no Human Rights Act. The HRA proposal, the Attorney-General acknowledged, had been divisive: 'the enhancement of human rights should be done in a way that as far as possible unites, rather than divides, our community'.¹⁴

In rejecting the proposed HRA, the Attorney-General focused on normative disagreement and conflicting perspectives on rights and the means of their protection. His decision was presented as that of an umpire at the end of a particularly trying match. Significantly, it avoided questions surrounding the HRA's constitutional validity and its compatibility with Australia's constitutional system. These questions, however, had featured importantly in the debate on the HRA's merits. The Attorney-General's response, thus, leaves them unsettled. They are unlikely to go away. If, as promised, a review of Australia's provisions for rights protection takes place in 2014, they are certain to be reactivated. Nor will arguments about validity die with the shelving of this particular HRA proposal. It is what the HRA attempted to do – preserving the constitutional separation of powers by conferring a 'dialogue' function on the High Court – that raised the principal constitutional doubts. So long as 'dialogue' is seen as the primary means of reconciling a HRA with Australia's separation of powers, the constitutional dilemmas remain. These are not merely technical or doctrinal but go to the core of Australia's constitutional system, understood broadly, in which a balance of powers between the arms of government and the sovereignty of the Australian people are embedded both in law and in legal/political culture.

This paper seeks to identify these dilemmas and to suggest that any future HRA, based on a similar model, is likely to confront major constitutional obstacles. It does so through an examination of the key provisions of the HRA, as proposed in the NHRC Report.

Its primary focus is the separation of powers. It considers whether the proposed HRA would empower or compel the courts to perform functions or exercise powers that fall outside the 'judicial power of the Commonwealth'; whether it would empower or compel the courts to perform non-judicial functions; and finally whether the HRA would be likely to shift public perceptions of the respective roles of the arms of government, and/or alter traditions or conventions surrounding the exercise of their respective powers.

Within these larger questions lie several sub-questions: (i) would the proposal to empower the High Court to issue declarations of incompatibility purport to confer a non-judicial power on the Court, thereby breaching Chapter III of the *Constitution*; (ii) would the power to issue declarations of incompatibility be otherwise unconstitutional, for incompatibility with the exercise of judicial power; (iii) would the proposed interpretation provision permit or, indeed,

¹⁴ Australian Government, above n 13, 1.

compel the courts to exercise legislative power, notwithstanding the companion requirement that interpretation must give effect to legislative purpose; and (iv) would the proposed HRA, notwithstanding the exclusion of socio-economic rights from the class of justiciable rights, effectively empower the courts to exercise executive (policy making) power?¹⁵

Many potential constitutional pitfalls were recognised and circumvented by the NHRCC in preparing its Report. The proposed HRA is significantly sounder than it might have been, than many critics feared it might be, and than many supporters might (unintentionally) have wanted it to be. The challenge was unenviable and the achievement enormous. To identify concerns about the constitutional soundness of the proposed HRA is not to underrate or disparage the NHRCC's work.

II JUDICIAL POWER

The proposed HRA, as noted, was to rest upon the 'dialogue' principle.¹⁶ Following the model employed in the United Kingdom, the ACT, and Victoria,¹⁷ the High Court would be empowered to make 'declarations of incompatibility' between a law and a protected right, but would not have the power to strike down a law on such grounds. Instead, it would be in 'dialogue' with Parliament, leaving Parliament free to respond as it chooses. A declaration of incompatibility is not intended to be in the nature of an order or remedy – its purpose is to draw the government's attention to rights deficits in legislation and to invite a government response. It is expressly designed to avoid 'judicial interference' in the legislative process.

In debate on the proposed HRA, the role of the courts, as participants in the dialogue, thus became a central issue. Federal courts, it was recognised, are not free to play any role assigned to them. The *Constitution* constrains their role. Section 71 of the *Constitution* vests the judicial power of the Commonwealth in 'the High Court of Australia, and in such other federal courts as the Parliament creates' or invests with federal jurisdiction. This power is exercised subject to the provisions of Chapter III of the *Constitution*, which confine federal jurisdiction to 'matters'. Sections 75 and 76 list the 'matters' constituting the jurisdiction specifically of the High Court. Section 77 empowers the Parliament to make laws

15 The paper does not consider whether the Commonwealth has a constitutional head of power to pass such an Act. The Solicitor-General has advised that the external affairs power, s 51(xxix) of the *Constitution*, will serve as a source of power, permitting the Commonwealth to incorporate Australia's international law obligations into domestic legislation in the form of the HRA. There is no indication that the HRA, as proposed, would fail on this footing: Stephen Gageler and Henry Burmester, *In the Matter of Constitutional Issues Concerning a Charter of Rights: Supplementary Opinion*, Solicitor-General Opinion Nos 40, 68 (2009).

16 Dalla-Pozza and Williams, above n 3, 2 n 5 refers to the Canadian source of the metaphor, and the 'intense debate' it has provoked in Canada, as well as Australian literature on the issue.

17 See, eg, *Human Rights Act 1998* (UK) c 42; *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

defining the jurisdiction of other federal courts with respect to the ‘matters mentioned in’ the two foregoing sections. These provisions and this limitation are relevant to the question of whether the High Court (which the Report identifies as the exclusive repository of this function) can issue declarations of incompatibility in the exercise of its original jurisdiction; that is, whether a declaration of incompatibility is a judicial function and, specifically, whether it is a ‘matter’.

Section 73 of the *Constitution* gives the High Court jurisdiction ‘to hear and determine appeals from all judgments, decrees, orders, and sentences’ of (among others) ‘any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State’. This provision is relevant to whether the High Court can issue a declaration of incompatibility arising in an appeal from a lower court. It is uncontroversial that section 73 also confines the High Court to the exercise of the judicial power of the Commonwealth, and that appeals can therefore only be heard with respect to the exercise of the judicial power of the lower courts. Whether section 73 confines the High Court to appeals from ‘matters’ is less well settled. In *Mellifont v Attorney-General (Qld)*,¹⁸ for example (a case we consider below), Toohey J stated that section 73 did not demand that appeals from a judgment should involve a ‘matter’ – ‘[t]he existence of a “matter” is the touchstone of the original jurisdiction of the High Court, rather than of its appellate jurisdiction’.¹⁹ Justice Brennan (in dissent) rejected this proposition: ‘no distinction in terms of judicial power was intended between the orders of a federal court from which an appeal might lie to [the High] Court and the orders of a State Court from which an appeal might lie to this Court ... Section 73 gives no protection – for none is possible – in respect of appeals in proceedings which are not “matters”’.²⁰ The majority in *Mellifont* did not conclude specifically on the scope of section 73, but affirmed that ‘an advisory opinion or abstract declaration ... will not ground an appeal to [the High] Court in the exercise of its appellate jurisdiction’.²¹ Advisory opinions and other abstract declarations are not ‘matters’.²² This opinion may assist in settling the issue.

Since the High Court alone would be empowered to make declarations of incompatibility, and only with respect to federal laws, an appeal from a federal court or a state court exercising federal jurisdiction could not arise with respect to a pre-existing declaration of incompatibility. Appeals to the High Court in which a claim for a declaration of incompatibility might arise would involve, presumably, questions about the interpretation and application of particular federal laws (interpreted, as far as possible, compatibly with the rights protected under the HRA and consistent with legislative purpose). However, where state

18 (1991) 173 CLR 289 (*‘Mellifont’*).

19 Ibid 324. In *Abebe v Commonwealth* (1999) 197 CLR 510, 590 n 214 (*‘Abebe’*), Kirby J stated unequivocally, with respect to s 73, that ‘[i]t should be noted that appeals lie from “judgments, decrees, orders, and sentences” and not in respect of “matters”’.

20 *Mellifont* (1991) 173 CLR 289, 313–14.

21 Ibid 303.

22 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265.

courts are empowered under state laws (as in Victoria) to make declarations of incompatibility, appeals to the High Court from declarations concerning state laws may arise. Uncertainty surrounds this process. Is the HRA's provision confining declarations to federal legislation intended to prevent the High Court from considering (either to affirm or 'reverse') a declaration of incompatibility made by a state court (exercising state jurisdiction)? Or would the High Court – as the final 'state' court – be free to rule on such declarations? If so, the resolution of whether a declaration of incompatibility is or is not a 'matter' and whether section 73 permits appeals to the High Court in non-matters will be significant. The relationship between the High Court and the state courts as Chapter III courts is not the subject of this paper. However, as even this brief note on the issue suggests, much remains to be resolved.

The indicia of a 'matter' were first identified by the High Court in 1921. At issue was whether the Parliament (pursuant to section 76 of the *Constitution*) could confer on the High Court the power 'to hear and determine' 'any question of law as to the validity of any Act or enactment of the Parliament'²³ – in other words, advisory opinion jurisdiction. It could not. There can be no 'matter', the Court said, 'unless there is some immediate right, duty or liability to be established by the determination of the Court'.²⁴ Advisory opinions lack the necessary attributes; they are abstract questions, unrelated to the determination of rights in concrete cases, and detached from the attempt to administer the law. While they have the character of a judicial function, they fall outside the judicial power of the Commonwealth.

Well before the NHRC Report was handed down, Geoffrey Lindell identified the absence of a 'matter' as a potential problem for bringing declarations of incompatibility within the judicial power of the Commonwealth.²⁵ He noted the difficulty created by the requirement that federal jurisdiction over 'matters' must involve 'some immediate right, duty or liability to be established by the determination' of a court. Lindell acknowledged that, from one perspective at least, the objection that a declaration of incompatibility is not a 'matter' 'may be well founded'; indeed, the plaintiff 'can be seen as seeking to establish the *absence* of the very thing required to sustain the existence of a "matter" since the "right" asserted ... is actually extinguished or not otherwise recognised by the legislation which overrides the same right'.²⁶ However, Lindell suggested that the existence of a right, duty, or liability may be established in other ways. The non-existence of the plaintiff's asserted right may engage a 'reverse' right on the part of a public authority; it may involve a duty on the part of the Crown to clarify the law to remove uncertainty about the existence of such a 'right'.²⁷

In the absence of a draft federal HRA, Lindell's analysis was necessarily abstract; however, we may note here that his 'solution' – which rests upon the

23 *Judiciary Act 1903* (Cth) s 88, last amended 1910.

24 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265.

25 Lindell, above n 3, 204.

26 *Ibid* 204–5 (emphasis in original).

27 *Ibid* 205.

identification of a right and its official establishment – would not apply to the proposed HRA. A plaintiff or appellant could not, conformably with the HRA, succeed in establishing that he or she enjoyed a right currently withheld or denied. All that could be established was that a current law was not compatible with one or more rights listed under the Act. This declaration would direct the government's attention to an absence, but could not establish a (legal) existence. Indeed, a court could not find otherwise without breaching the 'dialogue' principle. Thus, the very attributes that make something a 'matter' would be missing. The only alternative might be, as Lindell proposes, for a 'matter' to be defined less narrowly than in *Re Judiciary and Navigation Acts*,²⁸ and for the judicial power to be understood as validly exercised by the courts in 'deciding questions of law about the existence of rights arising out of actual facts'.²⁹ We return to these issues below.

An unofficial HRA, drafted by the 'New Matilda' group prior to the establishment of the NHRCC, also endorsed the 'dialogue' model, and created an opportunity for focused analysis.³⁰ Dominique Dalla-Pozza and George Williams were among the first to examine its constitutional validity; they also acknowledged the obstacle created by the constitutional requirement of a 'matter', but concluded that a declaration of incompatibility might be made compatible with it.³¹ Their approach was to reconsider when and how a rights compatibility question might arise, and to rethink, at the same time, what a 'remedy' might look like. Their solutions ruled out the making of rights incompatibility claims as a separate cause of action and permitted claims to be made only in legal proceedings already in train. Thus, it was thought, the requirement for a concrete legal controversy would be met. The Attorney-General would be obliged to respond in the event of a declaration. This, they suggested, provided the remedy.

As Stephanie Wilkins recognises,³² the perspective proposed by Lindell comports with the 'test' for the exercise of the judicial power adopted by the High Court in *Mellifont*. It is a perspective that, joined with the approach suggested by Dalla-Pozza and Williams, underpins the advice given to the NHRCC by the Commonwealth Solicitor-General, Stephen Gageler. Indeed, much of the Solicitor-General's analysis rested upon the decision in *Mellifont*, a case that he identified as having 'particular significance'.³³

The case arose from a referral by the Queensland Attorney-General to the Queensland Court of Criminal Appeal for a ruling on a point of law (pursuant to a provision of the *Criminal Code 1899* (Qld) ('*Criminal Code*')) following the

28 (1921) 29 CLR 257, 265 ('*Re Judiciary Act*').

29 Lindell, above n 3, 206. Stelios, above n 3, also argues for a broader interpretation of 'matter', on both interpretive and policy grounds.

30 Australian Human Rights Group, *Model Human Rights Bill* (2009) Human Rights Act for Australia Campaign <<http://www.humanrightsact.com.au>>.

31 Dalla-Pozza and Williams, above n 3.

32 Wilkins, above n 3.

33 Gageler and Burmester, above n 15, [27].

termination of a criminal trial in a *nolle prosequi*. The Court ruled that the trial judge had erred on a point of law. Special leave was then sought to appeal to the High Court against that ruling. The question before the High Court was (among others), whether the ruling was an exercise of judicial power, sufficient to bring it under section 73 of the *Constitution*. Since the trial had terminated and the *Criminal Code* provided that the result of the reference would not affect the dismissal of the indictment, there appeared to be no immediate rights, duties, or liabilities at stake. The central difficulty was that the ruling of the Court of Criminal Appeal offered no remedy; nor did it conclusively determine the parties' rights and obligations. In considering whether there was a 'matter' here, the Court identified 'two critical concepts' arising from *Re Judiciary Act* that identified a non-matter: 'One is the notion of an abstract question of law not involving the right or duty of any body or person; the second is the making of a declaration of law divorced or dissociated from any attempt to administer it'.³⁴ As Wilkins has noted, *Mellifont* effectively restated the test from *Re Judiciary Act* but omitted the requirement of *immediacy* with respect to the legal effect of the ruling. The Court retained the test of an attempt to administer the law but identified different ways in which a determination might be binding: first, binding on the court and the parties at first instance, and secondly, binding in the sense of 'influential, that is, binding in a practical sense or virtually so'.³⁵ (The ruling on the point of law, it appears, fell into the secondary category.) Whilst acknowledging that the ruling would 'not play any part in the subsequent determination of the charge on the indictment',³⁶ the Court nonetheless found it sufficient that the ruling arose from pre-existing proceedings. The majority concluded that 'the decision on the reference was made with respect to a "matter" which was the subject-matter of the legal proceedings at first instance and was not divorced from the ordinary administration of the law'.³⁷

The more recent case of *Attorney-General (Cth) v Alinta Ltd*,³⁸ the Solicitor-General suggested, also serves to illustrate the High Court's willingness to find a 'matter', notwithstanding that the decision on appeal in question 'had no effect on any immediate right, duty or liability of any of the parties'.³⁹ This example, combined with *Mellifont*, Gageler concluded, 'strongly supports the view that ... the making of a declaration of incompatibility [will] be characterised as an exercise of judicial power and that the fact that the rights of neither party would be directly altered or affected by the declaration is of no consequence'.⁴⁰ A

34 *Mellifont* (1991) 173 CLR 289, 303.

35 *Ibid* 304. The Court made reference here to the judgment in *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232.

36 *Mellifont* (1991) 173 CLR 289, 304. There was, however, the likelihood of a new indictment and second trial, but the High Court majority did not consider this relevant to determining whether an appeal could be heard from the ruling. In contrast, Toohey J in *Mellifont* found the prospect of a fresh indictment to be a 'consideration': at 326.

37 *Ibid* 305.

38 (2008) 233 CLR 542 ('*Alinta*').

39 Gageler and Burmester, above n 15, [26].

40 *Ibid*.

declaration of incompatibility, he advised, would be ‘closely allied to the “ordinary administration of the law” ... It would flow directly out of the court’s determination of the matter’.⁴¹

The conclusion in both cases offers considerable assistance to the argument that declarations of incompatibility, attached to pre-existing proceedings, fall within the category of ‘matter’. Still, the meaning of ‘matter’ remains ‘elusive’.⁴² The facts in *Alinta* do not assist in achieving certainty. The Solicitor-General’s claim that the rights, duties, and liabilities of no party were affected in that particular case is arguable. In the opinion of Kirby J, allowing the appeal implied an ‘apparent expansion of the notion of a constitutional “matter”’ in light of the fact that ‘the parties to [the] controversy have packed their bags and announced their intention to depart from the courts’.⁴³ But, as Hayne J pointed out, having intervened as of right in *Alinta*’s appeal to the Federal Court (the decision of which gave rise to the Attorney-General’s appeal to the High Court), the Attorney-General was joined as a party to the proceedings. Although the other parties to the controversy no longer had ‘any commercial reason to oppose the Attorney-General’s appeal, the matter [was] neither merely hypothetical nor moot’.⁴⁴ The Attorney-General was a party to the proceedings (in which a declaration of the invalidity of a provision of the *Corporations Act 2001* (Cth) was made): ‘It is that controversy about validity which the Attorney-General of the Commonwealth seeks to pursue further by appeal to [the High] Court’.⁴⁵

A declaration of incompatibility, made in the course of a pre-existing proceeding – as proposed in the HRA – has, indeed, much in common with the facts in these cases. Still, out of an apparent abundance of caution, Gageler drew upon the recommendations offered by Dalla-Pozza and Williams for overcoming potential breaches of the constitutional requirement that the federal courts can only exercise the judicial power of the Commonwealth with respect to ‘matters’. As we have seen, these recommendations included, in addition to confining the making of declarations of incompatibility to pre-existing proceedings to avoid the prospect that the declaration is seen as abstract or hypothetical, compulsorily joining the Commonwealth Attorney-General as a party to a proceeding in the High Court where a declaration of incompatibility is raised, and making the declaration ‘binding’ on the parties to add an element of ‘enforcement’ to the declaration.⁴⁶ The Report adopted the core of these combined perspectives.

For all this, the similarities between the facts in *Mellifont* and *Alinta* and the mechanism of the declaration of incompatibility should not be overstated. The appeal in *Alinta* resulted in a remedy: a declaratory order. While the ruling in

41 Ibid [28].

42 *Abebe v Commonwealth* (1999) 197 CLR 510, 584 (Kirby J); Kirby J repeated this observation in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 638.

43 *Alinta* (2008) 233 CLR 542, 559.

44 Ibid 568.

45 Ibid. In addition, amici curiae had been given leave to appear in the appeal, thus providing ‘a contradictor to the Attorney-General’s arguments where none otherwise would have appeared’.

46 Gageler and Burmester, above n 15, [20]–[21], [26].

Mellifont had no effect on the *immediate* rights, duties, and liabilities of the parties (although, arguably, the High Court's decision on the appeal from the ruling did), the holding in *Alinta* did have a legal effect on a party, namely the Commonwealth. In both cases, the law was stated not hypothetically but in the context of a concrete controversy. Certainly, a declaration of incompatibility, made in the course of pre-existing proceedings, would contemplate the rights and liabilities of the parties at issue. However, the declaration could not settle what was at stake in the controversy. It would have no legal effect. This is, after all, what the 'dialogue' model intends.

By contrast, a ruling on a point of law or constitutional validity has a legal impact. Indeed, in *Mellifont*, the majority stated that the ability of the Court of Criminal Appeal 'to correct an error of law at the trial' was the 'characteristic of the proceedings that stamps them as an exercise of judicial power and the decision as a judgment or order within the meaning of s 73'.⁴⁷ Although such a ruling did not affect the outcome of the proceeding, it would have a legal effect in future cases; enforceability would follow. In contrast, an attempt to administer the law would not follow a declaration of incompatibility. Indeed, as proposed in the HRA, the identification of incompatibility between the law, the subject of the proceedings, and a protected right could *not* have an effect on the outcome of the proceedings or on future application of the law at issue. Its effect – if any – would be political. Only if and when Parliament amended a law that had been the subject of a declaration of incompatibility would a legal effect be identifiable. The obligation arising from a declaration falls politically on the Attorney-General. It is an obligation to prepare a response for Parliament; the nature of the response is open, and no legal consequences flow from failure to comply with the obligation.

In a speech to the Australian Human Rights Commission, soon after the launch of the NHRC, former Justice of the High Court Michael McHugh suggested that a statutory obligation on the part of the Attorney-General to report the declaration of incompatibility to Parliament could be enforced by a party to the proceedings from which the declaration was issued. The party would seek a writ of mandamus (as, for example, might follow from failure to comply with a declaratory judgment) and thus provide enforceability and remedy.⁴⁸ Failure to comply on the part of the Attorney-General, he stated, would occur 'prior to the engagement of the Parliamentary procedure',⁴⁹ and the issue of a writ would not, therefore, amount to an invalid interference with the workings of Parliament. Wilkins also conjectures that 'if the High Court is able to review mandamus compelling a response to a declaration, it is logical that the High Court would also consider the declaration which precipitated the mandamus'.⁵⁰

47 *Mellifont* (1991) 173 CLR 289, 305.

48 Michael McHugh, 'A Human Rights Act, the Courts and the *Constitution*' (Paper presented at the Australian Human Rights Commission, Sydney, 5 March 2009).

49 *Ibid* 17.

50 Wilkins, above n 3, 460.

The conclusion that the enforcement of the Attorney-General's obligations by order of mandamus may provide the element of enforceability necessary to bring the declaration within the judicial power is questionable. What would be reviewed, surely, would be the Attorney-General's failure to comply with the relevant provision of the HRA; the review would concern whether a legal duty arose and, if so, whether it had been discharged. This is not the same as asking whether the declaration of incompatibility had been enforced; indeed, it would appear quite unrelated to the question of whether the declaration affected the rights, duties, and liabilities of the parties in relation to the dispute. To claim that it did would be analogous to claiming that an action against failure to comply with a court order with respect to costs was assimilable to the enforcement of a declaratory judgment or an award of damages arising from the same proceeding.

Seeking to resolve the problem created by the apparent lack of remedy in a declaration of incompatibility, several commentators have drawn attention to the similarity between a declaration and declaratory relief.⁵¹ The comparison is not without merit. Each is made with reference to legal standards; each arises from a concrete and not a hypothetical case, and rights and liabilities of the parties are implicated (although the rights and liabilities implicated in a declaration of incompatibility will necessarily be different from those with respect to which the Court will make its orders; the declaration will take the form of a statement that the applicant is *not* protected by the right asserted). In each case, the applicants are, in a sense, vindicated. But, the two part company at the point of enforcement or administration of the law. This difference holds even if we accept the broad *Mellifont* test for 'bindingness', which appears to include 'influence'. A declaratory judgment frees the parties from the immediate or prospective effect of the impugned law.⁵² The declaration of incompatibility, however, cannot do this; it can have no legal effect. Otherwise, the NHRCC may just as well have adopted the declaratory judgment as the remedy for breach of a right protected under the HRA. It did not do so, presumably because a non-judicial, non-coercive effect was desired in order to satisfy the conditions of the 'dialogue' model.

If, however, the declaration of incompatibility does satisfy the test of a 'matter', including the providing of a legal remedy (perhaps of a novel type), the process ceases to be 'dialogic'. The 'dialogue', as we have seen, is meant to leave the government/Parliament free to make what it wants of the declaration, including nothing. Either the declaration fails the test for the exercise of judicial power, or it succeeds and the 'dialogue' fails. It is difficult to see how it might do both.

Were the HRA adopted with the declaration mechanism as proposed and in the (likely) event that it were challenged, the Court may well decide not to be bound by 'legal theory'⁵³ or 'the mechanical application of bright-line rules'⁵⁴ or

51 See, eg, McHugh, above n 48; Dalla-Pozza and Williams, above n 3.

52 See *Croome v Tasmania* (1997) 191 CLR 119.

53 *Mellifont* (1991) 173 CLR 289, 303.

54 *Alinta* (2008) 233 CLR 542, 560.

‘constitutional doctrine ... ossified by history’.⁵⁵ It may endorse Lindell’s view that the meaning of a ‘matter’ should be loosened. On the other hand, it might be persuaded that the relaxation of the test for a ‘matter’ cannot be unlimited. It might recognise, too, that the relevant judgments, however much they appear to depart from the strict tests set down in *Re Judiciary Act*, ultimately remain respectful of the separation of powers. In these cases, as we have seen, we find examples where the absence of immediate legal effect and/or attempt to administer the law was not decisive; we find decisions of the Court detached from or only tenuously connected to the controversy that gave rise to the proceedings; we find disagreement about whether the matter has been concluded *ex parte*. But nowhere do we find a ruling with no legal effect. In no case is the effect purely political. For this reason, the declaration of incompatibility, in my view, is most closely analogous to a recommendation arising from a law reform report. It is advisory and thus not compatible with the judicial power of the Commonwealth.

To the extent that uncertainty remains, there are several ways of proceeding. Strengthened by the affirmative advice of the Solicitor-General to the NHRCC, proponents may simply persevere with the HRA (or a similar model), seeking its adoption by a future Parliament and anticipating a positive outcome in the event of a High Court challenge. An alternative is to pick apart what the declaration of incompatibility is intended to achieve and see whether it may be achieved in other, less constitutionally uncertain, ways. The central purpose of the declaration of incompatibility, as the Report states, is to alert the government to cases where laws conflict with rights and to invite, but not compel, the government to do something about it.

Could this be done without the formal mechanism outlined in the HRA? A statement about the law’s status regarding rights protected under Australian or international law may be made *obiter dicta* in the normal course of a proceeding. Such statements are not uncommon. Justice Kirby adverted to the incompatibility between Australian and international law on many occasions;⁵⁶ McHugh J considered the difference a hypothetical Australian Bill of Rights would have made to the outcome in *Al-Kateb v Godwin*.⁵⁷ Like the declaration of incompatibility, such *obiter dicta* would have no immediate effect on the rights and liabilities of the parties but would be merely incidental or ancillary to the exercise of judicial power in the resolution of the legal controversy at issue.

This, however, is unlikely to be a satisfactory alternative for proponents of the HRA, because the element of *obligation* on the government would be missing. It is this very element, however, that makes the declaration of incompatibility, as conceived, problematic. The declaration is intended to serve

55 Ibid 563 (Kirby J).

56 See Fleur E Johns, ‘Human Rights in the High Court of Australia, 1976–2003: The Righting of Australian Law?’ (2005) 33 *Federal Law Review* 287.

57 (2004) 219 CLR 562 (*Al-Kateb*). See also Alice Rolls, ‘Avoiding Tragedy: Would the Decision of the High Court in *Al-Kateb* Have Been Any Different if Australia Had a Bill of Rights Like Victoria?’ (2007) 18 *Public Law Review* 119.

as a piece of obligation-creating *advice* to the government (it remains unclear what ‘binding’ on the parties – as proposed by the Solicitor-General and adopted in the Report – means otherwise). Its primary purpose, I have suggested, is to drive law reform.

An alternative would be for the purpose of the declaration of incompatibility to be achieved through a rule of statutory interpretation.⁵⁸ The proposed HRA incorporates such a rule, and, as we have seen, the Report also recommends its insertion in the *Acts Interpretation Act 1901* (Cth) in the absence of a HRA. The latter, it appears, would have a similar effect to the interpretation provision proposed for the HRA;⁵⁹ it would, presumably, permit the courts to state in their reasoning in a particular case that the legislative purpose of the relevant statute did not permit an interpretation consistent with one or more of the listed rights. Such a statement would appear similar to a ‘declaration of incompatibility’, absent the obligations imposed by the latter on the Attorney-General and government.

The proposed interpretation rule is not without constitutional problems, however: specifically, it may invite the courts to ‘read in’ a rights-consistent purpose, thus, engaging (albeit indirectly) in legislative drafting, and thereby breaching the separation of powers. This is discussed further below.

Before considering this alternative, I turn briefly to other concerns about the constitutional compatibility of the HRA with the judicial power of the Commonwealth.

III INCOMPATIBILITY AND THE JUDICIAL POWER

A declaration of incompatibility may conceivably satisfy the *Mellifont* test of ‘influencing’ the rights, duties, and liabilities of the parties but may fall outside the judicial power for other reasons. Chapter III courts cannot exercise non-judicial power, but there are exceptions. Non-judicial functions may be performed by Chapter III judges but only *persona designata*.⁶⁰ While this particular exception is not relevant to declarations of incompatibility, which the HRA proposes to be made by the High Court *qua* court, the ‘incompatibility test’ that developed from the *persona designata* cases may be relevant, both with

58 Pamela Tate, ‘Protecting Human Rights in a Federation’ (2007) 33 *Monash University Law Review* 220, suggests that this is, in practice, likely to be a primary approach, with the declaration of incompatibility being an extension of the process of statutory interpretation; as such, a declaration of incompatibility would be characterised as incidental or ancillary to the exercise of judicial power, and the question of its having a non-judicial character (falling outside s 71 of the *Constitution*) would not need to arise.

59 Indeed, it may create a more expansive scope for interpretation since it appears that the ‘definitive’ list may include all of Australia’s international rights and convention obligations (other than those in respect of which Australia has entered a reservation): see National Human Rights Consultation Committee, above n 1, 183. Such a list would potentially go beyond the narrower list identified by the Report for protection under the proposed HRA; it may operate free from the proposed HRA limitation clause, and escape the non-justiciability limitation applied to socio-economic rights.

60 *Grollo v Palmer* (1995) 184 CLR 348.

respect to constitutional questions and to broader questions about constitutional conventions surrounding the separation of powers. The independence of the judiciary from political interference, or even merely from the perception of interference, has been stressed by the Court. In the words of McHugh J in *Kable v Director of Public Prosecutions (NSW)*, '[p]ublic confidence in the impartial exercise of federal judicial power would soon be lost if ... courts exercising federal jurisdiction were not, or were not perceived to be, independent of the legislature or the executive government'.⁶¹

If the Solicitor-General and others are correct, and declarations of incompatibility are *judicial* functions, how might this be relevant? Might a *judicial* function incompatible with the doctrine set down in *R v Kirby; Ex parte Boilermakers' Society of Australia*⁶² – the 'Boilermakers doctrine' – be conferred on the High Court? The constitutional impediment in *Re Judiciary Act*, as we have seen, was that an advisory opinion did not constitute a 'matter'; while the Court in *Mellifont* loosened the test for the exercise of judicial power, the majority did not question the need for a 'matter' in the exercise of federal jurisdiction, including arising under section 73. What is relevant here is the recognition that there are forms of judicial power that fall outside the judicial power of the Commonwealth and which Chapter III courts are constitutionally unable to perform. Thus, a declaration of incompatibility may be a judicial function, but if its performance gives rise to a loss of public confidence in the impartiality or independence of the judiciary, the function itself may be incompatible with the judicial power of the Commonwealth and thus the constitutional separation of power.

Kable concerned the legislative conferral of non-judicial powers on a state court, and its incompatibility doctrine has not been applied to conferral on a federal court. The federal cases are concerned with *persona designata* exceptions to *Boilermakers*. Nevertheless, the reasoning in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*⁶³ suggests a wider application of the latter exceptions. Following a long disquisition on the centrality of the separation of powers to Australia's constitutional system, the majority in *Wilson* affirmed that '[t]he *Constitution* is concerned not with the conduct of a judge who exercises his or her discretion to maintain independence from the Legislature or the Executive government but with the limits on legislative and executive power that might be exercised to confer a function bridging the separation of the Judiciary from the Legislature and the Executive Government'.⁶⁴ The *political* impact of a conferral of power may thus be important.

We enter the realm of speculation here about the possible impact of the proposed HRA. The speculation is not idle, however. Dan Meagher has established that, in other jurisdictions, the conferral on the courts of the power to make declarations of incompatibility, as well as the power to interpret statutes in

61 (1996) 189 CLR 51, 116 ('*Kable*').

62 (1956) 94 CLR 254 ('*Boilermakers*').

63 (1996) 189 CLR 1 ('*Wilson*').

64 Ibid 20.

conformity with protected rights, has had the effect of embroiling the courts in political controversy, even where judges have faithfully adhered to the obligation to give effect to legislative purpose.⁶⁵ A similar effect would be produced in Australia, Meagher concludes, were a superstatutory Human Rights Act adopted.

Commenting on the NHRC Report, Richard McHugh makes the point that ‘the mere fact that the courts might have to address controversial issues’ if the HRA were adopted ‘is not itself inconsistent with the way in which the rule of law has operated in our courts’,⁶⁶ and the view that the power to make declarations of incompatibility ‘might draw the Court into the political fray ... [or] amount to an interference by the judiciary in the affairs of Parliament’⁶⁷ is exaggerated. However, adverting to the controversy created by the judgment in *Mabo v Queensland [No 2]*⁶⁸ and in common with Meagher, McHugh expresses a deeper concern that ‘declarations of incompatibility could inspire, and in a practical sense even require, political attacks on the Court’. He concludes:

I do not think there is any room to doubt that the proposed *Human Rights Act* would increase the occasions on which the courts’ decisions are the subject of political debate ... I doubt that current levels of public confidence in the courts, which is essential to the rule of law, could survive a *Mabo* every year. Taking the long view, I think the real risk which the proposed *Human Rights Act* presents for the rule of law as we know it is that it could ultimately lead to greater conflict between the judicial and the political branches, and perhaps to more widespread judicial adventurism.⁶⁹

McHugh’s concerns about the impact on the rule of law readily apply to the separation of powers. The exercise of the judicial power of the Commonwealth is implicated. It is not cynical to suggest that, for some proponents, such politicisation would be a *desirable* result. Indeed, a number of High Court judgments of recent years have attracted criticism for the perceived restraint of the Court (or individual justices) in protecting rights,⁷⁰ and the view that the courts should be compelled to interpret laws or the *Constitution* in a ‘more reasonable’ manner was one of the contributing factors in the call for an Australian HRA, emerging in submissions to the NHRC.⁷¹

65 Dan Meagher, ‘The Scope of Judicial Rights Interpretation under Bills of Rights (and Its Political Consequences)’ (2009) 20 *Public Law Review* 214.

66 Richard McHugh, ‘Implications of the Proposed Human Rights Act for the Rule of Law as Manifested in Australian Courts’ (Paper presented at Is the Rule of Law Under Challenge in Australia?, Rule of Law Association of Australia and the New South Wales Bar Association, Sydney, 20 November 2009) 11 (emphasis in original).

67 Ibid 17.

68 (1992) 175 CLR 1.

69 McHugh, above n 66, 18.

70 See *Al-Kateb* (2004) 219 CLR 562.

71 National Human Rights Consultation Committee, above n 1, 275.

IV INTERPRETATION AND LEGISLATIVE POWER

Offering an analysis of the ‘New Matilda’ HRA in his speech to the Australian Human Rights Commission, Michael McHugh suggested that its interpretation provision, under which the courts would be required to interpret legislation in conformity with human rights, would have the effect of permitting the courts to insert a rights-compatible meaning into the law. The judicial arm of the government would effectively be empowered, indeed compelled, to amend legislation and exercise legislative power, breaching the constitutional separation of powers and the prohibition on the courts’ exercising non-judicial power.

McHugh’s analysis proved influential. Edward Santow, making a submission to the NHRC on behalf of the Gilbert + Tobin Centre of Public Law, wrote:

An Act that allowed, or indeed required, a court effectively to re-write a statutory provision that is inconsistent with human rights would offend the separation of powers. The problem with the New Matilda Bill, on which Mr McHugh was directing his comments, is that the interpretive principle is qualified only by what is ‘possible’. That is, it would require a court to adopt a human rights compatible construction ‘[s]o far as it is possible to do so’. This would arguably allow, or even compel, a court to disregard the legislative intent behind the provision in question.⁷²

However, Santow continued, ‘there would be no constitutional impediment to a HRA containing an interpretive principle that required a court to interpret legislation consistently with human rights ... [so long as the] human rights-consistent interpretation [is only adopted] where this does not conflict with the purpose of the impugned provision’.⁷³ The analysis – that a human rights-consistent interpretation would be unlikely to breach the constitutional separation of powers so long as it does not empower the courts to depart from legislative purpose – appeared to have attracted consensus during the NHRC. The Report’s recommendations included an interpretive principle ‘that requires federal legislation to be interpreted in a way that is compatible with the human rights expressed in the [Human Rights] Act and consistent with Parliament’s purpose in enacting the legislation’.⁷⁴

Is the matter settled then? Both the Victorian and ACT human rights Acts include a similar provision; their jurisprudence may assist by providing examples of the provision in practice. But their status as non-federal courts may render this assistance of limited value.⁷⁵ The question of whether the *Commonwealth Constitution*’s separation of powers applies equally and in all respects to state courts that are vested with federal jurisdiction remains fully to be resolved.⁷⁶ The

72 Edward Santow, Submission to National Human Rights Consultation Committee, *National Human Rights Consultation*, 63–4.

73 Ibid 64.

74 National Human Rights Consultation Committee, above n 1, 373 (emphasis added).

75 See Jim South, ‘Political Constitutional and Statutory Limitations on the Scope of the Interpretative Obligation Imposed by S 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)’ (2009) 28(1) *University of Queensland Law Journal* 143, for a detailed discussion of the Victorian rule and Chapter III of the *Commonwealth Constitution*.

76 See Dalla-Pozza and Williams, above n 3.

federal courts, however, as McHugh noted, are incontrovertibly prohibited from exercising legislative power. Will the requirement that the legislation should be interpreted to give effect to legislative purpose protect the courts from constitutional breach?

Several questions need to be addressed here. If the legislative purpose regarding human rights is not expressed (or found by necessary intendment) in the relevant Act, will the courts be empowered to supplement or 'fill in' the Act with a rights compatible purpose? Does the formula for determining whether legislative limitations on derogable rights are legitimate – involving tests of 'reasonable limits', 'demonstrably justified', and 'in a free and democratic society' (and taking into account a list of 'relevant factors') – draw the courts into evaluative processes in questions that 'will often involve controversial political issues'?⁷⁷

Interpretation of federal legislation, at present, is governed both by common law rules of statutory interpretation and the *Acts Interpretation Act 1901* (Cth). The Act already instructs the courts to interpret legislation conformably with legislative purpose.⁷⁸ The common law guides the courts to interpret legislation conformably with the assumption that a breach of rights was not intended by the legislature, unless the contrary intention is made expressly clear.⁷⁹ Where legislative purpose or meaning is not clear, the *Acts Interpretation Act 1901* (Cth) permits reference to a limited range of extrinsic sources, including second reading speeches, law reform reports, parliamentary reports, memoranda, and others.⁸⁰ We do not know what the relationship between the Act, the common law, and the interpretation principle in the HRA is intended to be. We must assume that the HRA is meant to add something.

Will the HRA provide an additional extrinsic source where legislative purpose is not clear in an Act? Will it thus permit the courts to adopt an interpretation that supplements legislation with a purpose or objective drawn from the HRA? If so, in cases where legislative purpose regarding human rights is not clear, and where extrinsic sources do not assist, the risk lies that the courts may supplement the legislation in a positive sense, rather than 'negatively' assuming an absence of intention to breach rights. To supplement, by reference to rights enumerated in the HRA, would run the risk of legislative 'drafting', not dissimilar from the legislative 'amendment' identified by McHugh.

To give a simple example, a law restricting access to, say, internet information about the construction of explosive devices may have a clear legislative purpose with respect to defence. Its purpose concerning *rights*, however, may not be clear, either on the face of the law or by recourse to extrinsic sources. Does the legislature intend the law to override 'the right to freedom of expression', or to operate compatibly with this freedom? Perhaps 'the

⁷⁷ McHugh, above n 66, 12.

⁷⁸ *Acts Interpretation Act 1901* (Cth) s 15AA.

⁷⁹ James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 24–6.

⁸⁰ *Acts Interpretation Act 1901* (Cth) s 15AB.

right of children to be protected by ... the State' (another of the derogable rights in the proposed HRA)⁸¹ is also implicated in the purpose of defence. The High Court may conclude that the law is incompatible with freedom of expression, and may not be satisfied that the particular limitation is demonstrably justified in a free and democratic society.⁸² It may wish to make a declaration of incompatibility. At the same time, however, it may be persuaded that the law's purpose is compatible with the right of children to be protected by the State. For this reason, notwithstanding the law's incompatibility with freedom of expression, it may not want the law to be amended. Does it say so in making its declaration of incompatibility? If it does, an implied purpose will be attributed to a law. The government will, of course, be free to disregard the declaration. But the effect of this interpretation may be relevant in subsequent cases before the courts. Unless the courts are extremely careful to avoid such reasoning (or the HRA provision is drafted in such a way as to confine a declaration of incompatibility to 'negative' assessments alone) legislative purpose may, effectively, be drafted or 'read in' by the courts. If this is correct, the courts will have performed a non-judicial function contrary to Chapter III of the *Constitution*.

How does this differ from the ordinary common law rule of statutory interpretation that requires courts not to assume a legislative intention to infringe common law rights unless the intention is clearly expressed in the legislation in question? In some respects, the interpretive rules are similar, but the differences may be important. The common law rule operates 'negatively'; that is, the courts assume no purpose or intention to infringe rights unless that intention is made clear. The HRA formula invites the courts to read in rights positively with reference to an extrinsic statutory list. Evidence from other jurisdictions suggests that the shift from 'negative' common law protection to 'positive' statutory supplementation occurs when courts are required to interpret laws against a superstatutory list of rights.⁸³

The extra-curial view of the Chief Justice of New South Wales, James Spigelman, may be relevant here:

The express statutory requirement to interpret the words of other legislation so as to comply with an express statutory right is, in my opinion, more likely to be given effect than a judge-made principle derived only from Parliament's presumed intention ... One does not have to go as far as the English judiciary has gone to give force and effect to an expression of Parliamentary will in a statute entitled to be treated as quasi-constitutional. The inhibition that any judge will feel, albeit to varying degrees, before trespassing into what may appear to some to be the province of the Parliament, must be allayed to some degree by such an express Parliamentary mandate.⁸⁴

81 National Human Rights Consultation Committee, above n 1, 369.

82 The compatibility of this formula with the existing constitutional test for laws that restrict the implied freedom of political communication will also need to be determined: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

83 James Allan, 'Turning Clark Kent into Superman: The *New Zealand Bill of Rights Act 1990*' (2000) 9(4) *Otago Law Review* 613.

84 Spigelman, above n 79, 96.

This result, it is conceded, is what many proponents of an Australian HRA seek. As noted, the point of the exercise is to *add* something to the existing law. But, will this be compatible with Australia's constitutional scheme for the separation of powers? If not, what does this tell us about the potential of the HRA – even one as restrained as that proposed in the Report – to shift Australia's constitutional architecture and, with it, Australia's core constitutional values? I consider these issues in the final section of this paper.

Performing a balancing act between protected rights is a familiar exercise in countries with Bills of Rights. Courts are required, not infrequently, to balance, for example, gender equality rights against general equality rights, or freedom of speech against freedom of religion.⁸⁵ The United States Supreme Court recognises the very fine line between applying tests for rights protection and legislative interference, and has adopted techniques of interpretive restraint and deference towards the legislature. Nevertheless, in cases concerning fundamental rights or 'suspect' discriminatory classifications (as in laws that make distinctions on the ground of race), it places a very heavy burden on Congress to 'justify' its law. The mechanism proposed in the HRA attempts to circumvent this type of outcome. It is intended to be dialogic rather than directive, but the process of statutory interpretation – the first step in the 'dialogue' – will involve the courts in evaluations of legislation and speculations about legislative purpose that may go beyond the judicial power. Even if constitutionally valid, such processes have the potential to unsettle Australia's constitutional and political conventions.

V CONFERRAL OF EXECUTIVE POWER

It is harder to assess the likely impact of the proposed HRA with respect to the executive power of the Commonwealth, in part because section 61 of the *Constitution*, which identifies the repositories of Commonwealth executive power, is imprecise. However, it is not controversial that the formulation of policy (prior to its incorporation in legislation) is a matter for the executive. We know that the courts cannot be engaged in policy making without breaching section 71 of the *Constitution* that confines their role in the separation of powers to the judicial power of the Commonwealth. A Human Rights Act that purported to confer executive power on the judicial arm would be invalid.

The NHRCC recognised this issue, and addressed it, in recommending against the inclusion of socio-economic rights among the justiciable rights to be protected under the HRA (despite the fact that many submissions favoured otherwise, and that much of the 'mischief' identified by proponents of a HRA related to socio-economic disadvantage).⁸⁶ It acknowledged the problems

⁸⁵ Note, however, the anxieties produced when judicial review requires a choice between competing rights; Richard H Fallon Jr argues that judicial review should not apply in such cases: Richard H Fallon Jr, 'The Core of an Uneasy Case For Judicial Review' (2008) 121 *Harvard Law Review* 1693.

⁸⁶ National Human Rights Consultation Committee, above n 1, 365.

justiciability would create in drawing the courts into policy considerations, including evaluations of the impact of government programs, priorities, and the allocation of resources. Such considerations, the NHRCC recognised, do not rely on clear *legal* standards.

However, the classification of civil and political rights alone as justiciable does not necessarily free the courts from the exercise of judgments of this nature. The provision in the HRA that confines claims for declarations of incompatibility to pre-existing proceedings will pre-empt many fanciful claims, including those with socio-economic implications (for example, the claim that ‘the right to marry and found a family’⁸⁷ compels governments to provide financial allowances to indigent couples wishing to have children). But some rights claims arising in pre-existing proceedings may be implicated.

Section 5 of the *Marriage Act 1961* (Cth) notoriously defines marriage as a union between ‘a man and a woman’.⁸⁸ It also defines marriage as a union between two persons, ‘to the exclusion of all others’. While it is unlikely that any pre-existing proceeding would permit a challenge to the prohibition of same-sex marriage to arise and, with it, a claim that the *Marriage Act 1961* (Cth) is incompatible with the ‘right to marry’, a prosecution for bigamy might do so. Does the ‘right to marry’ protect polygamous marriage? Or, alternatively, does the non-derogable right to ‘freedom from ... restraint in relation to religion and belief’ protect the religious practice of polygamy? In the course of hearing an appeal from a conviction in a lower court, the High Court may well be invited to make a declaration of incompatibility between the Act and the right (such an issue has recently been considered in Canada and, at the time of writing, is still live).⁸⁹

While resource neutral (unlike the example of family allowances), such a declaration of incompatibility would involve the Court in an assessment of policy with respect to which there is no legal standard other than the law itself (or, arguably, the meaning of ‘marriage’ under section 51(xxi) of the *Commonwealth Constitution*, which does not define ‘marriage’ and therefore does not readily assist). Even the refusal to make such a declaration would involve the Court in an assessment of government policy, affirming – by interpreting the Act not to breach the right – that marriage is a union of two people only. In a prosecution for bigamy, in which the right to marry was invoked, the Court would be required, effectively, to rule on the *virtue* of the law, rather than whether the law applied in the particular instance.

In a sense, all exercises of judicial review in which impugned laws are examined in the light of broad and general standards (which incorporate values themselves) involve an examination of policy by the judicial branch. Even a relatively precise and legally referable ‘right’, such as the right to vote, invokes

87 Ibid 368.

88 In the event that the HRA is adopted, this definition is likely to be challenged.

89 *Blackmore v British Columbia (A-G)* [2009] BCSC 1299; *Reference re: Criminal Code, s 293* [2009] BCSC 1668.

the ‘reasonableness’ of policy in cases where the right to vote is denied.⁹⁰ The NHRCC recognised this problem; hence the introduction of a test for legitimate limitations. But the test itself invites deeper evaluations of policy. How can it be determined whether the provision in the *Marriage Act 1961* (Cth), confining marriage to two people (at a time), is incompatible with the ‘right to marry’ polygamously without reference to the concept of ‘marriage’ – traditional, religious, or normative – and thereby a choice of values? What legal criteria are available to determine whether the law that prohibits polygamy is ‘demonstrably justified in a free and democratic society based on human dignity, equality and freedom’?

Again, I recognise that the proposed HRA only permits the High Court to make a declaration; it cannot strike down rights-incompatible laws. The government is free to take whatever action it chooses. Policy, in this sense, is squarely in the hands of the executive. But, *advice* on policy is a non-judicial function. For reasons canvassed above, this may be unconstitutional, either as a direct breach of section 71 of the *Constitution* or indirectly in eroding public confidence in the independence and/or integrity of the judicial arm. At the very least, it will embroil the courts in non-legal controversies.

The Report acknowledges, and perhaps endorses, the view that the resolution of deep normative controversies about matters such as marriage and the right to life are best left to the Parliament,⁹¹ and it assumes that the ‘dialogue’ model will have this effect. With respect, this position is not reconcilable with the inclusion of rights such as ‘the right to marry’ in the list for protection under the HRA. It is hard to imagine how legal controversies surrounding the *Marriage Act 1961* (Cth) could fail to arise if the HRA were adopted.

VI CONSTITUTIONAL CONVENTIONS

We cannot know for certain whether the HRA is constitutionally ‘watertight’.⁹² We can be confident, however, that it would have a significant impact on Australia’s political and legal culture. Indeed, this is the intention of its proponents, for whom mischief lies in the existing culture. Although the NHRCC, directed by its terms of reference, sought to minimise the disturbance to Australia’s existing constitutional arrangements, disturbance would result.

A superstatutory HRA, empowering the courts to assess the validity of other Acts against a list of rights and freedoms expressed at a high level of generality or abstractness, will engage the judicial arm in evaluations about many things that are not referable or confined to clear legal standards (regardless of the limits on judicial review under the HRA). These will include: the scope and nature of the right itself (what, for example, does the ‘right to take part in public life’

90 See *Roach v Electoral Commissioner* (2007) 233 CLR 162 (‘*Roach*’).

91 National Human Rights Consultation Committee, above n 1, 363.

92 As the NHRCC strove for it to be: *ibid* 373.

mean?); reasonableness; the nature of a 'free and democratic' society; rights priorities; and much more. Certainly, the courts already rule on 'reasonableness' in administrative law; they have engaged in assessments of what 'responsible and representative government' includes;⁹³ they have considered what democratic 'choice' requires and developed tests for its breach.⁹⁴ But these exercises are grounded in principles drawn from or based on Australia's existing constitutional arrangements, and the Court's evaluations make reference to the text and structure of the *Constitution*. The HRA, as proposed, would politicise the courts – if not in terms of public controversy (although this, as explained above, is likely), then in requiring judges to consider arguments going beyond the law. The grey area between law and politics will be further widened.

As has happened in other countries, the courts will need to develop a complex recipe book of tests and standards that will rest on, or at least permit, evaluations of programs and priorities – a function traditionally performed by the political branches of government. It is notable that (other than distinguishing derogable from non-derogable rights and recommending that socio-economic rights should be non-justiciable) the HRA does not identify or create a rights hierarchy. We do not know which of the derogable rights will trump and which will succumb in the collisions that will inevitably occur. The courts will be required to decide in individual cases. Over time, their judgments, as in the United States, will establish a hierarchy. This hierarchy will elevate the 'trumping rights' not merely legally but also normatively. Preferences or priorities that do not necessarily correspond to those held at the time of the HRA's enactment will become entrenched.

I do not overlook the fact that the proposed HRA would take the form of 'ordinary' legislation, amenable to parliamentary amendment or repeal. This features importantly in the NHRCC's provision for the preservation of parliamentary sovereignty and in the response given by proponents to expressions of concern about the HRA's potential for negative or unintended consequences. It remains to be seen, however, whether amendment, while technically available, will be politically viable. The genie (whether good or evil) may not easily be put back in the bottle.

Australia's political history is marked by a strong preference for parliamentary means of achieving reform. This preference goes hand in hand with a robust attachment to the idea of electoral democracy. Australia's parliamentary institutions were developed early; progressive franchise laws were adopted ahead of almost all other countries.⁹⁵ The introduction of electoral innovations, and indeed the commitment to perfecting electoral systems with the goal of achieving better and more accurate representation in the legislatures, is a

93 See, eg, *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 140.

94 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('ACTV').

95 This is not to overlook the racially-discriminatory restrictions in, for example, the *Franchise Act 1902* (Cth), but to draw attention to international comparisons, and in particular the significance of voting in Australia's institutional history.

distinctive feature of Australia's history.⁹⁶ The *Constitution* is a minimalist instrument, setting down the institutions and structures of representative democracy in a federal system. Its weightiest section is Chapter I, 'The Parliament'. Under the system of responsible government that it entrenches, the executive is incorporated in the legislative branch; it is thus accountable to the people through periodic elections. The *Constitution* does not entrench broad or abstract rights or envisage a powerful role for the judicial arm. The key cases where implied rights or freedoms have been identified in the *Constitution* concern restrictions on the institutions of democracy, specifically the right to take part in electoral processes.⁹⁷

The separation of powers is one of the key pillars of Australia's constitutional system.⁹⁸ Constitutional rules, as well as conventions, sustain it. Conventions surrounding judicial independence and judicial integrity are particularly significant. These include the convention that the judiciary does not speak on political matters, and that judicial appointments are made on the ground of legal qualifications alone. As Meagher has argued, a HRA, if adopted in Australia, would inevitably lead to the politicisation of the judicial appointments process, as has happened in other countries.⁹⁹ Speaking on the relationship between the *Constitution*, 'good government', and proposals for an Australian Bill of Rights, Sir Gerard Brennan has drawn attention to the politicisation of the judiciary in the United States, where the Bill of Rights 'raises a popular expectation that many controversial political issues are to be solved by judges, not by the democratically elected branches of government'.¹⁰⁰ The tenor of many submissions to the NHRC suggests, indeed, a high level of expectation that a HRA would place politically controversial matters in the hands of the judiciary. Even if the judges avoid ruling on what are essentially political questions,¹⁰¹ the HRA's invitation to the courts to determine the parameters of a 'free and democratic' society, or to make declarations about whether a law breaches, for

96 Marian Sawer (ed), *Elections Full, Free and Fair* (Federation Press, 2001).

97 See *ACTV* (1992) 177 CLR 106; *Roach* (2007) 233 CLR 162.

98 It is often remarked that separation of powers in a system of responsible government, as in Australia, is incomplete, since the executive branch is formed from within the legislative branch. It should not be forgotten, however, that the purpose of the separation of powers is to keep the individual branches of government from accumulating or monopolising power, and that the institutional mechanism involves 'checks and balances' of accountability, including those which make the executive responsible to the legislature. With respect to judicial independence, see the lengthy discussion of the separation of powers in *Wilson* (1996) 189 CLR 1.

99 Meagher, above n 65, 231.

100 Sir Gerard Brennan, 'The *Constitution*, Good Government and Human Rights' (Paper presented at the Human Rights Law Resource Centre Seminar, Melbourne, 12 March 2008) 19.

101 For example, through developing a 'political questions' doctrine, as in the United States. In his dissent in *Mellifont* (1991) 173 CLR 289, 318, Brennan J makes reference to *Baker v Carr* 396 US 186 (1962), the leading American 'political questions' case, in support of his Honour's view that the exercise of judicial power is undermined where it is 'available in situations where its exercise does not affect the legal situation of persons subject to the jurisdiction of the court'.

example, ‘the right to take part in public life’ or ‘the right to freedom from forced work’,¹⁰² would invite political evaluations.

Loss of faith in government, it seems, drove many of the public submissions to the NHRC. Their authors, however, may not be representative of the Australian community. Although an overwhelming percentage of the 35 000 unsolicited submissions was favourable to a HRA, an opinion survey commissioned by the NHRC revealed a relatively high level of confidence in the current political arrangements, relatively little experience of rights deprivation, and a relatively low commitment (both quantitative and qualitative) to the adoption of a HRA.¹⁰³ A superstatutory HRA (as opposed to the focused, limited purpose instruments Australia currently has in place for protecting rights) may encourage cynicism about the tendencies of government and about the prospect of achieving reform through the political process. It may also encourage an expectation that judges – contrary to judicial conventions – will speak out against ‘bad’ laws. The constitutional lines between the branches of government may blur, and the purpose of the separation of powers – to prevent accumulation of power in the hands of any one branch – may be compromised.

VII CONCLUSION

My goal in this paper has been to identify the constitutional problems inherent in the proposed HRA. While I am on record as a critic of proposals for a superstatutory Human Rights Act,¹⁰⁴ I have sought to do this impartially. Separating a constitutional evaluation from a normative assessment is difficult, however, since the constitutional problems provide many of the grounds for the normative opposition. I note again that the HRA as proposed is much more constitutionally sound than it might have been, and my conclusion that it is constitutionally doubtful is provisional. My view that the HRA would alter Australia’s constitutional and political landscape is expressed more confidently, however, since (unlike with respect to the legal effect of the HRA, which would

102 National Human Rights Consultation Committee, above n 1, xxxvi–xxxvii (Recommendation 25). Would ‘work for the dole’ obligations, for example, breach the latter?

103 Colmar Brunton Community Research, ‘Final Report’ in National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) 384. For example, ‘Support Levels for Various Protection Options’ reveals the strongest statistical support for ‘Parliament to pay attention to human rights when making laws’ and the weakest for ‘A specific Human Rights law that defined the human rights to which all people in Australia were entitled’. Ninety per cent favoured parliamentary attention to human rights in law making, ranking this top of five alternatives for rights protection, with a HRA at the bottom, attracting 57 per cent support. At the same time, only 7 per cent disagreed with the statement that human rights in Australia are adequately protected.

104 Helen Irving, ‘A Legal Perspective on Bills of Rights’ in Julian Leeser and Ryan Haddrick (eds), *Don’t Leave Us with the Bill: The Case against an Australian Bill of Rights* (Menzies Research Centre, 2009) 169.

be *sui generis* to Australia's particular constitutional arrangements) we have other countries' examples to guide us.¹⁰⁵

There is a paradox in identifying constitutional concerns about any proposed HRA. One of the primary objections to advisory opinion jurisdiction, going to the question of its conformity with the constitutional requirement that the judicial power of the Commonwealth is exercisable only with respect to 'matters', is the abstract and legally sterile nature of such advice. An advisory opinion, as the Court affirmed in 1921, is a judicial function, but it does not resolve real legal controversies. Concrete cases throw up facts and circumstances that cannot be anticipated. No legal question is fully resolvable in the abstract. The constitutional character of the HRA, in short, cannot itself be finally resolved without reference to the actual disputes in which its constitutional validity may arise.

The Catch 22 is obvious. An advisory opinion cannot conclusively settle a legal issue since legal issues arise in real circumstances, but the very advice one might offer about whether declarations of incompatibility resemble unconstitutional advisory opinions is itself offered in the abstract. For the reasons that make an advisory opinion invalid, advice about whether the HRA purports to confer non-judicial powers on the High Court cannot be conclusive. In another article, I have endorsed a number of normative objections to advisory opinion jurisdiction, including the concern that pre-enactment advice will lead to legislative timidity with the risk of killing adventurous legislation 'at birth' in anticipation of future invalidation by the High Court.¹⁰⁶ Counterfactually, the 'infanticide' may be needless. Invalidation may never occur, since constitutional objections may never be raised. There are familiar examples of important laws in Australia's history (establishing the Snowy Mountains Scheme, for example), which may have been invalidated had they been challenged, but lived on, their *vires* never tested. Similarly, adventurous laws (*Workplace Relations Amendment (Work Choices) Act 2005* (Cth), for example)¹⁰⁷ have survived challenge, to the surprise of at least some constitutional lawyers who, if asked in advance, may well have advised that the infant was certain to die. To put it crudely, sometimes the government should simply 'suck it and see'.

The paradox is that proponents of a HRA seek legislative 'timidity' with respect to all laws but the HRA itself. They want to prevent the Parliament from contemplating, in the first place, legislation that they believe to be rights-incompatible, and they do not want debate about the identity of the rights against which laws are to be tested. They want to 'warn-off' governments, or to put it

105 Commentary on the effect of the *Human Rights Act 1998* (UK) c 42 in Britain is divided as to the merits of the Act, but not on the fact that it has had a major impact. For a highly positive assessment, see Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Vintage Books, 2009). For an equally highly negative assessment, see Dominic Raab, *The Assault on Liberty: What Went Wrong with Rights* (Fourth Estate, 2009).

106 Helen Irving, 'Advisory Opinions, the Rule of Law, and the Separation of Powers' (2004) 4 *Macquarie Law Journal* 105.

107 *New South Wales v Commonwealth* (2006) 229 CLR 1.

more delicately, they want government to conduct greater scrutiny into the impact of legislation on protected (ostensibly unassailable) rights. It makes little difference, in this respect, that the Parliament may be empowered to ignore the Court's declaration. There would be little point in passing the HRA if it were thought easy to ignore. The very point is to mandate official restraint. In this respect, whether the proposed HRA purports to confer judicial or non-judicial power on federal courts, its impact will be similar.

My conclusion is that declarations of incompatibility fall over the line that divides judicial from non-judicial functions. If I am wrong and a HRA, similar to that proposed by the NHRCC, is successfully adopted at some point in the future, it will have a significant (and in my view, negative) impact on Australia's constitutional culture. For this reason, and having regard to the highly divided public opinion that emerges from the Report's various sources (solicited and unsolicited submissions, community meetings, and the opinion survey), it may be more appropriate for a Bill of Rights to be proposed in the form of a constitutional amendment.¹⁰⁸ The NHRC was precluded by its terms of reference from recommending this course, but a referendum would have the virtue of inviting consideration of the magnitude of constitutional change entailed. Few, however, are likely to want the divisive and uncertain drama of a referendum. Australians' historical attachment to pragmatic, incremental, and focused protections of rights has been reaffirmed by the government's commitment to a 'Framework' instead of a single instrument. Taking into account the character of the *Constitution*, the conventions that surround it, and Australia's long history of democratic and progressive incrementalism, this seems – at least in 2010 – both inevitable and desirable.

108 A similar point is made by Sir Gerard Brennan, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response' in Philip Alston (ed), *Towards an Australian Bill of Rights* (National Capital Printing, 1994).