THE HUMAN RIGHTS (PARLIAMENTARY SCRUTINY) ACT 2011 (Cth) AND THE COURTS

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ABSTRACT

The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) (the Act) has established a new model of pre-legislative rights scrutiny of proposed Commonwealth laws. This is undertaken by the political arm of the legislature and interpreted (1) the requirement that a statement of human rights compatibility must accompany proposed laws and (2) the legislative framework when introduced into Parliament and (3) the establishment of the Parliamentary Joint Committee on Human Rights (PJCCHR) which regularly reports to the Parliament on the compatibility of its proposed laws with human rights.

This article looks at the relationship between the Act — and these two new mechanisms — and the interpretative role of the courts. It does so by first considering the potential direct role of Australian courts in the interpretation of Commonwealth laws that engage human rights. It then assesses whether the Act may exert an indirect influence on the content and scope of the common law interpretative presumptions that protect human rights.

1 INTRODUCTION

This article will consider what impact the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) (the Act) may have upon the judicial interpretation of Commonwealth legislation that engages human rights. It is an important question the answer to which, as Remnant Thross notes, falls "strictly outside the terms of the Act itself." The Act, as will be detailed in Part II, establishes a model of pre-legislative rights scrutiny of proposed laws that is unrelated to the political arm of government or the courts. It is a model that former Attorney-General Robert McClelland said was intended at enhancing understanding of and respect for human rights in Australia and ensuring

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appropriate recognition of human rights issues in legislative and policy development. The two key mechanisms to this end are (1) that proposed Commonwealth legislation and certain types of secondary instruments must now be accompanied by a statement of compatibility when introduced into the Parliament and (2) the establishment of the Parliamentary Joint Committee on Human Rights.

In order to explain the relationship between the Act and the interpretive role of the courts, Part II provides a brief outline of how the Act came into being and those new pre-legislative scrutiny mechanisms. Consideration is then given to when and how the courts may directly use the instruments of compatibility (Part III) and reports of the Parliamentary Joint Committee on Human Rights (PJCCHR) (Part IV) to assist in their interpretative role under Commonwealth legislation. This is done by first identifying their status as restricted legislative instruments to the Act (Part IV (A)) and then assessing their effect on the courts based on the quality of the statements of compatibility and PJCCHR reports produced so far. On the available evidence, statements of compatibility are invalidating the judicial construction of statutes. In most cases, the reports of the PJCCHR, on the other hand, any probe useful if they continue to provide the sort of human rights scrutiny at both the legislative instruments generally unification. And when the interpretive duty of the courts is to give the words of a statute the meaning which the legislature (effectively) intended them to have, a parliamentary assessment of legislative human rights compliance is likely to carry some interpretative weight. Finally, Part V looks at the extent to which the Act may exert an indirect influence on the judicial interpretation of Commonwealth legislation that engages human rights. Specifically, it considers the capacity and likelihood of the new pre-legislative scrutiny mechanisms to induce further development in the content and scope of the common law interpretative presumptions that protect human rights: the principle of legality and the presumption of international law conformity.

II THE HUMAN RIGHTS PARLIAMENTARY SCRUTINY ACT 2001 (CTH) — A BRIEF OUTLINE

In April 2001 the Commonwealth government released Australia’s Human Rights Framework (BR 2001) 3 The HRF was the government’s formal response to the report of the High Human Rights Consultation Committee (headed by deputy reptant George A. Garnaut, AO ("HRC Report"). It has been well documented that the HRF rejected the key recommendations of the HRC Report: that the Australian Parliament ought to enact a statutory Bill of Rights of the kind operating in the Australian Capital Territory. Now

In recent years, the High Court has consistently held that by declaring a law to be inconsistent with a human right, the Court is not invalidating that law, but simply declaring that the law, as interpreted and applied, does not comply with the human right. This approach is consistent with the Court's previous decisions and allows for the possibility of the law being amended to comply with the human right in question. The Court's approach is also in line with the principles of proportionality and necessity, which are central to the interpretation of human rights. Therefore, it is crucial that the legislative process be conducted in such a way that it does not undermine the Court's ability to perform its role effectively.

The Court has also held that the human rights of individuals must be protected against the actions of the State. This includes the right to a fair trial, the right to freedom of expression, and the right to respect for private and family life.

In conclusion, the Court's role in the protection of human rights is critical. It is incumbent upon the government and parliament to ensure that any legislation or policy measure is consistent with the human rights protections contained in the Constitution and other international instruments. Failure to do so may result in the Court invalidating the legislation or policy measure, which could have significant implications for the administration of justice and the protection of individual rights.
Section 15A of the Act imposes a prohibitory penalty by allowing the court to order, by a majority vote, that a publication cease and desist. The Act provides that the court may order a publication to cease and desist if it is found that the publication is likely to create imminent or serious threats to the public interest.
of proportionality with those of the evidence-based justification meaning that such an inquiry involves it done meaningfully.

This brief and summaryatory perfunctory form of statement of compatibility has for as for been the norm. For the many Bills and legislative instruments that pulse every minute or straightened human rights issues, this is unsatisfactory, indeed such an approach is, arguably, consistent with the expectations of the FCCH in this regard. For example, in a speech delivered on October 29, 2012 the Chair of the FCCH, Henry Jersdom MP made the following observations:

Statements of compatibility have been central place in the committee’s deliberations. They are the starting point for the committee’s consideration of Bills and legislative instruments. They can be quite brief but they do not reach out in any every sense stand-alone documents capable of informing debate within the parliament. The committee looks to see if the statement of compatibility contains an assessment of the extent to which legislation engages human rights. While statements at compatibility provide a starting point for the committee’s work, the committee does not accept statements at face value.

Even though statements of compatibility are jointed the visiting point of the formal pre-legislative scrutiny process and their succinctness is to be encouraged, the FCCH clearly expects that a more detailed and sophisticated analysis will be undertaken when a Bill refers to issues or complex human rights issues. This was lacking, for example, in the statement of compatibility that accompanied the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012, as the Fourth Report of 2013 of the FCCH states:

Regrettably, the statement of compatibility that accompanied the Bill did not include a sufficiently detailed analysis of the Bill’s compatibility with human rights. While the committee acknowledges that the government has since provided further information to the committee which has gone some way to address the lack of detail in the statement of compatibility, that information is the provision of a more comprehensive statement of the Bill’s compatibility with human rights that would have been greatly assisted the committee in its consideration of the Bill. The committee would have been assisted in its understanding of the precise impact of these changes is more clearly way.

The Bill was nevertheless enacted into law and the Social Security Legislation Amendment (Fair Incentives to Work) Act 2012 (Cth) took effect on January 1, 2013. In its Fifth Report of 2013 the FCCH gave a further (and final) assessment of the new legislation’s compatibility with human rights.

The committee concedes that the government has not provided the necessary evidence to demonstrate that the total cost of the Bill is sufficient to enable minimum essential levels of receipt namely as generated in award of the JPCBA and the minimum requirements of the Bill on lower than the threshold of living in Australia are guaranteed in article 21 of the CEDAW. The

[Unstructured compatibility have not yet held a significant impact on parliament outcome. Some of the Bills have not yet been enacted at length, there have

25 Mr Henry Jersdom, Human Rights at your Fingertips, Online and in Practice (Speech delivered to the launch of Human Rights at your Fingertips, Canberra, 29 October 2012). 

26 Parliamentary Joint Committee on Human Rights, Fourth Report of 2013 (November 2013).]
have stipulated the human rights bill into pre-legislative play. For some Bills this may well spell the death knell for the former Attorney-General and the
PJCIR. On the other hand, the Reports of the PJCIR make clear that statements of compatibility - even for supposedly 'clear and obvious' - have certainly resulted in disputes between the executive and the parliament whereby ministers and senators will be able to consider the impact of proposed legislation on the "welfare they represent", just as the former Attorney-General had hoped.43

Moreover if the new model works as intended the obligation to provide statements of compatibility has the potential to shut down a culture of human rights in the federal public sector by isolating the constructive of human rights into the development of policy.44 This is an important point. The privilege of a statement of compatibility is, then, the essential conclusion of the rights scrutiny process that is undertaken within the executive arm of government in the course of shaping policy into legislative proposals. There is some evidence of this propositional effect in New Zealand according to Andrew Butler where 7 of the New Zealand Bill of Rights Act 1990 (NZ) requires the Attorney-General to report to Parliament if a Bill inserted appears to be incompatible with any of the protected rights and freedoms.45

Even after a short period on the market, it has become clear to me from my work at the Currie Law Office that the section 7 proceeds would need in the absence of a number of procedural that, if enacted, would have resulted in substantial crossfire upon the judges, also informed of the human rights litigation, are more likely to alter the proposals in such a way as to accommodate these concerns.46

Relevantly in this regard, the PJCIR Chair made the following observation in a speech delivered to the Human Rights Committee of the New South Wales Bar Association on 29 February 2000:

The requirement to produce a statement of compatibility is having tangible results. It is clear that government agencies and Ministers are gradually getting better at thinking about human rights impacts as part of the legislative process and this is being reflected in the statements that come before the committee. The committee generally provides a prompt and detailed response to its requests for further information and we are hopeful that this see a right comprehensive level of analysis will be provided in the future.47

This suggests that the willingness of the PJCIR to pursue the government when government's incompatibility to properly assess if proposed legislation is compatible with human rights may, in time, improve their quality. But in the meantime it underlines the necessity of the PJCIR to the process of ensuring pre-legislative rights scrutiny which the Act contemplates. The importance of the PJCIR - and the ability of its reports to produce will be considered below in Part IV.

It is not the underlying aim or expectation of a statement of compatibility to inform the judicial interpretation of the legislation to which it relates. But that is, of course, a focus of this article. The current suggestion is that statements of compatibility operate as an intrinsic part of the legislative process and the legal meaning of Commonwealth legislation that engages human rights. That is equally to say that statements of compatibility do not properly assess legislation that when seen or complex human rights concerns - as is generally the case - for it is typically these sorts of laws that trigger legal controversies about rights requiring judicial interpretation and resolution. This is consistent with the position in both Victorian and the United Kingdom: When statements of compatibility must be presented pursuant to the Charter of Human Rights and Responsibilities Act 2002 (Vic) and the Human Rights Act 1998 (UK) respectively.48 In Victoria, for example, the Supreme Court in Judicial Review proceedings has not once used a statement of compatibility to assist in constraining the proper construction of the relevant statutory provisions.49 Indeed, and on the contrary, the Court explicitly rejected an argument to this effect in the recent case of Alagold.50 Whilst in the UK, a leading human rights theorist has said that "which statement are not regarded as no less significant as the reports of the Joint Committee on Human Rights and academic commentators.51 Lord Hope has observed that statements of compatibility are "more than expressions of opinion by the Minister. They are not binding on the courts, nor do they have any pre-enforcement effect."

authority.\textsuperscript{68} According to Allan Kentough, whilst understanding of the role of perceptions of compatibility is based on the judiciary by (2), namely, to read and give effect to statutes in a way which is compatible with Convention rights,\textsuperscript{69} and subsequently in the Australian context, that interpretative obligation -- to give priority to an interpretation which favour human rights\textsuperscript{70} exists also of common law through the principle of legality. It must, for example, that a court will still strive to give a right-compatible construction to a Commonwealth law that was accompanied by a statement of rights incompatibility with a declaration into the Parliament. A statement of rights incompatibility cannot preclude the application of the common law principle of legality but interpretatively reasonable: an important point considered in more detail below in Part IV.

Interestingly, however, it has been suggested in the UK context that "the fact that a statement of compatibility has been made may, properly be of some relevance in deciding whether to place reliance on the words of a statute.\textsuperscript{71} That is, it should be more difficult to contest that altering the meaning of the provision to make it compatible with Convention rights constitutes an important legislative step than prudential interpretation\textsuperscript{72} in this regard it is generally acknowledged that the UK courts have applied the interpretative mandate in s. 3 of the HRA in a more robust and sometimes radical fashion.\textsuperscript{73} Lord Nicholls, for example, in the seminal case of R (Abuse of Children) v Gwynedd Council\textsuperscript{74} et al (C&C Medical Ltd) made the following observations:

The interpretative obligations deemed by s. 3 of an Act and its accompanying characteristic Section 3 may require a court to draw from the meaningful meaning the legislature would otherwise be free. The tension of Parliament is having to face this, in an Act (nullified) to resolve, and it is not so clear an immediate view, and hence the effect, it may have on secondary legislation.\textsuperscript{75} But, this may need to be taken here for there is no equivalent of s. 3 of the HRA in the federal Australian context. And though a statement of compatibility cannot preclude the application of the principle of legality as noted, the UK approach to s. 3 is obviously more constructive than legislative interpretation.\textsuperscript{76} Therefore in the Australian context a statement of compatibility is not enough even to the statute or Statutory Interpretation and Human Rights (University of Queensland Press, 2009) 3-68.

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70 ibid 881.
71 ibid 883, 884.
72 ibid 888, 889, 890.
73 ibid 890, 891.
74 ibid 892, 893, 894.
75 ibid 895, 896, 897.
76 ibid 898, 899.
In the United Kingdom, the equivalent reports produced by the Joint Committee on Human Rights (JCHR) have, generally, been described as of an irreproachable quality.62 In terms of their content, the reports express the Committee’s own conclusions on compatibility, rather than second-guessing the views which courts might form in future cases.63 Even so, the JCHR undertakes this analysis within the same kind of proportionality framework employed by the courts.64 However, the JCHR’s analysis is, on this account, different, and less rigorous, view about the compatibility of a provision than the Minister’s65 in a statement of compatibility. The JCHR reports have at a consequence provided an acceptable pre-legislative rights scrutiny and are taken into account by courts in the discharge of their interpretive duty pursuant to Art 8 of the ECHR.66 It is clear, however, that the UK courts can — indeed must — form their own view as to the rights-compatibility of legislation and may take into account Parliament’s statement in this regard as detailed in a JCHR report.67

It remains to be seen whether the PCHR consistently produces reports of a similar quality to their UK counterparts. On the evidence available things look promising in this regard. The reports produced so far for the PCHR have provided a meaningful rights scrutiny of bills and relevant legislative instruments. And when the view that a bill infringes human rights, the PCHR also undertake a proportionality analysis that is generally instructive and accessible.68 It is necessary to undertake this justification analysis in order to test legislation for its potential to be incompatible with human rights,69 which the PCHR’s stated approach to human rights scrutiny,70 and in its 8th Report of 2013 the PCHR continued that in order to do so, the analytical framework used and applied in the classic tripartite test of proportionality.71

The PCHR has, however, not been insulated, as said, to extent the insufficient detail provided in a statement of compatibility and requested (and sometimes received) from the relevant Minister a more comprehensive explanation of and justification for the

68 See, eg, A Secretary of State for the Home Department [2003] 2 AC 69, 94-95 [11] (HL). [The Government’s] would [not] be proportionate to the end of the offence, Order and Security Act 2011 (UK) — which was consistent with other aspects of proportionality and with the rights to the liberty under Art 5 the European Convention on Human Rights which the provision was not justified.
69 See, eg, the JCHR’s approach to the assessment of the Social Security Legislation, Accountancy and Ethics Bill 2009-2010, Joint Committee on Human Rights, Twenty-Fourth Report of 2010-2011, 42.
70 See, eg, the JCHR’s approach to the assessment of the Social Security Legislation, Accountancy and Ethics Bill 2009-2010, Joint Committee on Human Rights, Twenty-Fourth Report of 2010-2011, 42.
71 See, eg, the JCHR’s approach to the assessment of the Social Security Legislation, Accountancy and Ethics Bill 2009-2010, Joint Committee on Human Rights, Twenty-Fourth Report of 2010-2011, 42.
72 See, eg, the JCHR’s approach to the assessment of the Social Security Legislation, Accountancy and Ethics Bill 2009-2010, Joint Committee on Human Rights, Twenty-Fourth Report of 2010-2011, 42.
73 See, eg, the JCHR’s approach to the assessment of the Social Security Legislation, Accountancy and Ethics Bill 2009-2010, Joint Committee on Human Rights, Twenty-Fourth Report of 2010-2011, 42.
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78 See, eg, the JCHR’s approach to the assessment of the Social Security Legislation, Accountancy and Ethics Bill 2009-2010, Joint Committee on Human Rights, Twenty-Fourth Report of 2010-2011, 42.
79 See, eg, the JCHR’s approach to the assessment of the Social Security Legislation, Accountancy and Ethics Bill 2009-2010, Joint Committee on Human Rights, Twenty-Fourth Report of 2010-2011, 42.
80 See, eg, the JCHR’s approach to the assessment of the Social Security Legislation, Accountancy and Ethics Bill 2009-2010, Joint Committee on Human Rights, Twenty-Fourth Report of 2010-2011, 42.
81 See, eg, the JCHR’s approach to the assessment of the Social Security Legislation, Accountancy and Ethics Bill 2009-2010, Joint Committee on Human Rights, Twenty-Fourth Report of 2010-2011, 42.
82 See, eg, the JCHR’s approach to the assessment of the Social Security Legislation, Accountancy and Ethics Bill 2009-2010, Joint Committee on Human Rights, Twenty-Fourth Report of 2010-2011, 42.
judgments in this area suggests that if the common law or fundamental right enjoyed is close to the judicial branch — such as pre-trial liberty[19] access to the courts[20] or search Judith[21] — then the balance of the argument has shifted legislative meaning in the event when the statutory test and parliamentary exercise materialistic resistance to the court's[22] free speech reasonably. That is the process of and principles for articulating (or reviewing) the decision of Parliament — and so legislative meaning — leaves the courts with plenty of interpretive room to move, and especially so when rights that vigorously protect their play.

This also raises an interesting possibility. It is conceivable, for example, that the relevant [CCH] may want to extend or even [CCH] to a proposed amending of the 1984 Act to allow the Parliament to extend to a law that limits a human right to a way that is in their view proportionate to the achievement of other legitimate policy goals. If so, the test of the extent to which the law fails to make that limitation, the case being the same at the core, is only for the principles of liberty to be applied to protect the fundamental human rights from legislative encroachment. This is interestingly, the application of the Caso-vision of the principles of liberty appears to be in the form of a legal role with little or no following of other rival roles and in that sense is the essence of a proportionality analysis[23]. So in this sense the courts would, arguably, be required to (and producing) a fundamental right that the Parliament ought to be able to limit in a proportionate manner. Does this involve the courts departing from the interpretative process to extend — indeed one would — a legislative decision on constitutional limits — that decision requires a proportionate between competing rights and interests and is justified as a proportionate limitation of the right in play, but it is not, arguably, an inappropriate judicial intervention into the legislative domain of the democratic acts of government in most cases for the following these reasons.

First, the Parliament has, and prior to litigation that legislative ambiguity is not replaced before the principles of liberty can be applied. It is an independent principle of constitutional significance that permits the Parliament or even the legislative branch of government in the act of lawmaking to have (indeed it is a fundamental human right) the existence of which is

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express that intention with absolute clarity. It is important to remember that
the principle of legality is not only an aspect of the rule of law; it is an expression of
parliamentary sovereignty.94

The analysis undertaken in Part III and IV has considered the possible direct use
of statements of compatibility and JCHR reports by Australian courts in the
interpretation of Commonwealth statutes that engage human rights. Part V will look
at whether the Act may exert an indirect influence on the content and scope of
the common law interpretative presumptions that protect human rights.

V The Human Rights (Parliamentary Scrutiny) Act 2011
(CHR) and Common Law Rights Presumptions

In Australia, the judicial protection of human rights through interpretation is facilitated
primarily through the common law principle of legality and, to a lesser extent, the
presumption of international law consistency. The principle of legality and the
presumptions of consistency were endorsed by the High Court as early as 1973.95 As
noted, the former involves the strong presumption that courts do not depart to the
legislature an intention to abrogate or curtail fundamental common law rights or
freedoms unless such an intention is clearly manifested by unambiguous and
unambiguous language.96 The latter presumes that where possible legislation should
be read consistently with the settled rules of international law.97 The key
methodological distinction between the two presumptions in Australia is that the
application of the principle of legality does not negate legislative autonomy whereas
the presumption of consistency does.98 But as former Chief Justice Dyson Heydon observed
in his 2000 Macquarie Lectures, "[p]erhaps not without irony, the word 'autonomy' is itself
contingent.99

In any event, the principle of legality has proven a considerably more potent
interpretive weapon in the protection of human rights in Australia than the
presumption of consistency. In many cases at both the High Court and senior appellate
level judges have highlighted the constitutional significance of the principle of legality,
its capacity to provide strong protection of fundamental rights and freedoms and even
in some cases in the rule of law.100 On the other hand, they have displayed a degree of
(Lord Hoffmann); see generally Sir Philip Sales, A Compendium of the Principle of Legality
Peter B. Sands (2000) 29 C.L.R. 272, 301 ("principle of legality, parliamentary power "
95 Florida’s 1971-1972 (1971) C.L.R. 442, 455 (Kiefel C.J.)
98 Expropriation v Commonwealth (1994) 118 C.L.R. 385 (Gummow and Heydon J.)
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104 Expropriation v Commonwealth (1994) 118 C.L.R. 385 (Kiefel C.J.)
It does not take a great stretch of the imagination to visualize interactions between these inextricable rights and freedoms, long recognized by the common law, and the fundamental rights and freedoms which are the subject of the historical definition of human rights and subsequent International Conventions to which Australia is a party. 156 The Act is an unambiguous and deliberate commitment to International human rights. The common law context in which the Commonwealth Parliament legislates now includes the new post-legislative flood of rights rhetoric that stems from the constitutional incompatibility of laws and certain legislative instruments with their rights. In this way, the common law rights are interpreted in a manner that is consistent with Human rights as defined in the Act. This may require the courts to apply the presumption of consistency (wherever necessary) to ensure Australia’s domestic laws comply with international human rights obligations. To do so would, arguably, further both the aims of the Act as intended by the Commonwealth Parliament and, most relevantly, the will of other legislators that exist legislation in accordance with these pre-legislative scrutiny obligations.

If the primary aim of the Act is to ensure that Australia’s domestic law comply with our international human rights obligations, then — consistently with Pokority v Ky 157 — it may be sometimes legitimate for the moral or grammatical meaning of a statute to yield to an alternative meaning if that meaning is open on the text (considered in its wider legislative context) and is consistent with Human rights. This approach may, however, require a rethinking of the legislative antitypical threshold that must generally be met before the presumption of consistency may be applied in Australia. This is possible if the courts were, for example, to consider the provisions taken by former Chief Justice Gummiges that the common law concept of ambiguity should be understood in a broad sense to include not just lexical or verbal ambiguity but also where the scope and particularistic of a particular statute is, for whatever reason, doubtful. 158 This would lead towards the convergence or unification of the principle of human rights and the presumption of consistency when legislative engages Human rights as defined by the Act. That would of course be a significant — if dramatic — development in the context and scope of the common law rights presumptions in Australia.

This unification of common law principles has, arguably, occurred already in New Zealand. In two important decisions 159 the New Zealand Supreme Court did not consider that ambiguity on the face of the statute was a necessary pre-condition for the application of the presumption of consistency. 160 In Zaccardi 161 for example, the

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156 Chief Justice Robert French, 157 and Walter International Law and Domestic Law in Australia (Speech delivered at the Bremara Lecture, Royal University, 30 June 2009), 21 Australian Centre for International Law (Australian Law Journal), vol. 47 (2007), 1, in which he notes that the problem of inconsistency could be solved by providing that the courts are required to construe the statute consistently with the Human rights in the Act.
159 See for example, the decisions of the New Zealand Supreme Court in Zaccardi 160 (1981) 1 NZLR 259 (Gentis) 161 (2002) 1 NZLR 389.
161 See for example, the decisions of the New Zealand Supreme Court in Zaccardi 160 (1981) 1 NZLR 259 (Gentis).
the Act is a strong commitment to international human rights, it does not contain an explicit parliamentary direction to judges to assume legislative compliance with those rights and those sourced to the common law in whatever interpretative means possible.177

Second and finally, there is a need for an audacity — if not provoking courage — to suggest that the Australian judiciary as to the status of the presumption of international law interpretability. A unified common law interpretative approach to human rights necessarily deviates from the presumption to the same status as principles of equity. The willingness of the judiciary to further develop the principle of legality (not the presumption of interpretative means) from a deep concern as to the legitimacy of adjectival human rights norms imposed into the domestic legal system human rights norms derived from a source that is actually governing. This legitimacy concern which is arguably, prompted by the strong support for the common law interpretative power established by the Australian Constitutions, is unlikely to be overcome by the Act.

And Sir, the Act is not an influence upon common law rights interpretability in Australia. It is likely to be through a deepening of the principle of legality, not the diminution of the presumptions. In this regard, for example, Chief Justice French is happy enough to construe the domestic incorporation of international human rights norms into the norm through the mechanism of the principle of legality and only after they have crystallised (or been transformed) into common law rights and freedoms.178

One area which avoids further exploration in the context of international human rights norms is Commonwealth in which Australia is a party or in customary international law and the presumption against statutory displacement of fundamental rights and freedoms of the kind espoused in 1965, then the context of the principled principle of legality may be decreased.179

This makes clear that there is no assumption per se to the application of international human rights norms to domestic Australian law through statutory incorporation. On the contrary, Chief Justice French positively invites the possibility, though the possibility that the common law will be developed further in this regard an interpretative vehicle to be used to incorporate these norms into Australian law is the principle of legality.

Importantly however, the Act — and its unapologetically parliamentary commitment to international human rights — might heighten the recognition of new common law rights whose there is less common ground between these rights and values and concerns of the common law. This is especially the case, for example, for developing the institutional capacity and expertise to provide meaningful and legitimate protection of such rights. This definition of human rights in 5 of the Act provides one

178 Chief Justice French, Australian Law and Domestic Law in Australia, Above at 356, 377.
179 See supra fn 1 and 105. The right to early-dilution on the grounds of race, sex, age and disability has been enacted in Australian statute law for some time; Act of Television Act 1984 (Cth); Sex Discrimination Act 1984 (Cth). Equality Discrimination Act 1992 (Cth) Age Discrimination Act 1984 (Cth) Disability Discrimination Act 1992 (Cth) Age Discrimination Act 1984 (Cth). See, eg, Mabo v Queensland (No 2) [1992] 1 Qd L R. 348 (Browne J) where Browne J held in the case of this case that interpreted, the common law doctrine of human rights established that 124-26
180 See supra fn 1 and 105.
181 See supra fn 1 and 105.
182 Supra fn 1 and 105.
183 These consider 402 U.S. 298 (1977).
184 See supra fn 1 and 105.
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