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The New Commonwealth Model in Australia

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1. In my talk today, I hope to provide a comparative dimension to your debate over a national human rights act by discussing the experiences of Canada, New Zealand and the UK under their versions of what, eight years ago, I termed 'the new Commonwealth model of constitutionalism.' In my comments, I'll be drawing on both this earlier work describing and evaluating the potential of this new model and my current project of reassessing its success in practice after much additional experience and sustained academic attention to it in each country. The model has, of course, since spread to this country at the state and territorial levels, and I will say a few words about these two versions towards the end of my comments.

2. Let me start by explaining what I think is new about the new Commonwealth model. It has three essential features: (1) a legalized bill or charter of rights; (2) some form of judicial power to enforce these rights against legislation that goes beyond ordinary modes of statutory interpretation; and (3) most distinctively, a formal legislative power to have the final word on what the law of the land is. In combination, the first two features distinguish the new model from traditional conceptions of parliamentary sovereignty; the third one from judicial supremacy, as for example in the US and Germany. As a result, the new model constitutes a third, intermediate alternative. By authorizing some form of judicial review of legislation in the name of rights but by giving the final word to the legislature, its great novelty is to decouple the power of judicial review from judicial supremacy or finality.

3. The model has been institutionalized in four different ways so far. The first is the Canadian Charter, (1) a constitutional bill of rights (2) granting the judiciary power to invalidate conflicting statutes but (3) with a formal legislative power under section 33 to override rights by ordinary majority vote. The second is the still operative 1960 Canadian Bill of Rights: a statutory bill of rights with the same two judicial and legislative powers. The third way is the UK HRA, the ACT HRA and the VC: a statutory bill of rights without the power of judicial invalidation of legislation but a new power to declare statutes incompatible with protected rights that does not affect their continuing validity, and a requirement that statutes be given a rights-consistent interpretation wherever possible. The fourth was the original version of the New Zealand Bill of Rights Act, 1990: a statutory bill of rights with the interpretive duty but without the declaratory power.

4. What is the essential case for the new model as a whole? I think it's that it provides a better balance between two foundational values of liberal democratic polities than the other models. These are (1) the recognition and effective protection of certain fundamental or human rights and (2) the proper distribution of power between courts and the elected branches of government. Judicial supremacy prioritizes the protection of rights by constitutionalizing them and granting too much power to the judiciary at the expense of democratic decision-making. Traditional parliamentary sovereignty prioritizes the democratic decision-making claims of the political

branches at the expense of at least potentially inadequate protection of rights via the common law as supplemented by certain specific statutory safeguards. The new model promises to recalibrate these two more lopsided options by effectively protecting rights through a redistribution of power between the judiciary and the political branches that denies too much to either.

5. The case against the new model, at least as compared to the traditional conception of parliamentary sovereignty, is both normative and empirical. The normative is that there are basic democratic objections to any judicial power over legislation beyond ordinary statutory interpretation, and perhaps rule of law concerns about a legislative final word. The empirical are (1) that nothing's broken, there's no need to protect rights more, (2) that rights are not in fact better protected under the new model, and/or (3) that the new model is unstable -- the alleged balance of the intermediate position cannot be maintained in practice but inevitably reverts to one of the two traditional positions.

6. To evaluate the success of the new model in practice, we first need to clarify what the relevant criteria are. These follow, I think, from the basic arguments. First, are rights better and adequately protected under the new bills of rights? Second, is there greater balance between courts and the political branches with respect to rights? Does the new balance appear to be stable? Part of *both* the better protection and balance is that there should be rights-consciousness and review by all three branches of government (including, importantly, legislative oversight of the executive) to ensure a 'ground up' rights culture rather than the more typical 'top down' one of judicial supremacy.

7. To help make these criteria a little more concrete, let me outline here what I see as the ideal working of the third and last stage: the possible exercise of the legislative final word following pre-enactment political review and judicial review. Here, I suggest, we should want to see the sort of legislative debate following a judicial finding of incompatibility (or invalidity in Canada) in which Parliament takes seriously the judicial view but does not automatically defer to it. The process here is the most important thing and not the outcome -- so that principled and serious legislative consideration resulting in decisions to comply with the courts manifest what the new model seeks to achieve as much as decisions not to comply, as long as the latter is generally taken to be a realistic political possibility. In other words, compliance per se is not a problem although a 'culture of compliance' is.

8. So let's apply these criteria to the experiences of Canada, NZ and the UK, each of which has made the move from the traditional conception of parliamentary sovereignty that you are contemplating. Overall, academic judgments have been mixed. The predominant line of criticism is that, whatever the advantages in theory, in practice the new model as a whole -- especially in Canada and the UK -- has not proven itself to be as different from US-style judicial review as was claimed or hoped.

9. I won't say much about Canada because for your purposes its experience is less relevant since the Charter version of the new model is not within the parameters of discussion in this country. Suffice it to say that although to my mind the section 33 override power continues to be the distinctive structural feature of Canadian constitutionalism, its infrequent use seriously

undermines any claim that the Charter version of the new model – which requires affirmative action by legislatures to have the final word – has been the most successful in practice.

10. Under NZ's 1990 statutory bill of rights, political rights review is afforded by requiring the Attorney-General to bring to its attention of Parliament any bills that appear incompatible with the rights. Judicial protection is afforded by requiring courts to interpret legislation so that, according to section 6, 'wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.' Section 4 expressly denies the courts power to invalidate or deny operative effect to any statute – previous or subsequent -- that is inconsistent with any protected right. The legislative final word lies in the legal power to enact a statute that cannot be interpreted consistently with the rights or to amend an existing one to this effect. In 2000, absent any express provision, the Court of Appeal strongly suggested in dicta that it had formal authority to 'indicate' that a statute is inconsistent with BORA, although it has not yet clearly been exercised.

11. There have been approximately 40 reports by the Attorney-General of apparent inconsistencies, compared to zero in Canada and the UK under equivalent duties. In terms of the judicial power, despite the analytical clarity between sections 4 and 6 – where possible, rights-consistent interpretation of statutes are to be given but where not, courts will apply the inconsistent provision -- in practice there is inevitably a fine line between whether a rights-consistent interpretation is or is not 'possible' depending on what this undefined term is taken to mean and so scope for judicial subjectivity. Indeed, this interplay between the interpretive duty on courts to give statutes rights-consistent readings whenever possible on the one hand and the ban on courts from denying inconsistent statutes operative effect on the other is the most difficult and controversial aspect of both BORA and the UK HRA in practice. Do aggressive or strained exercises of section 6 violate section 4?

12. The general sense among New Zealand commentators is that this interpretive duty has been used with reasonable moderation, without the types of 'judicial vandalism' or 'interpretation on steroids' that have sometimes been alleged in the UK. Exhibit number one is the refusal of the Court of Appeal in the Quilter case (1998) to interpret the gender-neutral language of the 1955 Marriage Act as embracing same-sex marriage, despite not only section 6 but also section 19 BORA, which prohibits discrimination on grounds of sexual orientation. Six years after Quilter, the House of Representatives enacted the Civil Unions Act, which has been posited as evidence that judicial-legislative dialogue is working reasonably well. There is at least one pair of cases in which the NZ and UK courts came to opposite conclusions in interpreting essentially identical statutory language imposing a reverse onus of proof on criminal drug defendants, with the UK court giving it the more rights-consistent but arguably strained meaning and the New Zealand court refusing to do so and relying instead on section 4. More recently, in reaffirming the original New Zealand decision and rejecting the subsequent British one, Justice Tipping of the new New Zealand Supreme Court expressly rejected the 'broader' use of the textually similar interpretive power by UK courts in favour of the narrower requirement of 'reasonably possible' meanings (versus what he referred to as '*unreasonably possible*' in the UK).

13. On the other hand, some NZ judges have espoused more expansive statements of the judicial duty to give merely possible rather than plausibly intended meanings to statutes, and there are

dicta to this effect in majority opinions in a few cases. As one assessment concludes: ‘There is little consistency of approach or application [to section 6]...One can find support in the case law for almost any view relevant to s6...In this respect, [NZ]BORA case law is no different from the case law that has developed in respect of s3(1) of the HRA (UK).’

14. Overall, there appears to be general consensus among leading NZ commentators that BORA is working fairly well, that criminal procedure and freedom of expression rights have been adequately if not boldly protected, whilst protection of other rights has been more minimal, that NZ is better off with BORA than without but that there is no need or justification for moving to a fully constitutionalized bill of rights. This consensus includes the perception that the legislature still decides basic issues rather than the courts. There is some disagreement, however, about the exact balance between judicial and legislative power, and how it might be improved. So, one ‘section 4 proponent’ has expressed concern that the implication of the declaratory power heralds the further erosion of constraints on judicial power that have marked the new model elsewhere. By contrast, two other prominent commentators have argued that the balance needs to be recalibrated in favour of rights protection by repealing section 4 and replacing it with a judicial invalidation power subject to a section 33-type override mechanism. This would ensure that legislative inertia works for rather than against rights claimants who otherwise may have too little incentive to bring proceedings. This general consensus and assessment of NZBORA by its major commentators suggests something of a corrective to the ‘too little difference from US-style judicial review’ verdict on the new model.

15. Because the central features of the UK HRA are well-known here, let me just provide a very brief summary. HRA incorporates most of the rights in the ECHR, creates new modes of pre-enactment political rights review, and the following new powers of courts: (1) to invalidate executive action based on violation of Convention rights rather than the previous power-based, ultra vires approach; (2) to interpret legislation in a rights-consistent way wherever possible under section 3; and (3) where not possible, to issue a formal DI under section 4, which does not affect the continuing validity of the statute or have any other legal consequence but is expected to focus parliamentary and governmental attention on possible amendment or repeal.

16. The assessments of the HRA in practice by UK commentators do not exhibit the general consensus seen in NZ, but literally span the spectrum of possible evaluations:

(1) The ‘futility thesis.’ HRA hasn’t had significant impact on the UK’s legal and political system and, in particular, has resulted in no better protection of rights. It has failed to prevent the enactment of rights-violating legislation and judges have failed to oppose it. Only one piece of post-HRA Labour government legislation has been the subject of a DI [the 2001 Anti-Terrorism, Crime and Security Act]. Otherwise, the judiciary has exhibited traditional deference to the government and the pull of parliamentary sovereignty remains strong. More generally, there have been complaints of disappointing ‘judicial minimalism’ in the interpretation and application of rights by the courts, especially in the criminal context.

(2) HRA is too weak. Not because *judges* are not respecting rights but because the *government* isn’t – and the courts lack the power to force them to. So, despite the DI in *A and Others* on indefinite detention of foreign terror suspects, the government did not choose to release the

prisoners but waited several months until the new control order legislation was enacted to ‘free’ and immediately re-arrest them. Moreover, the absence of a remedy for the injured individual under section 4 provides too little incentive to bring proceedings. This record proves that the UK needs to follow the Canadian example of giving courts the power to invalidate legislation.

(3) HRA is too strong. It has in practice reverted to de facto judicial supremacy so that the difference between it and US-style judicial review is far less than anticipated or hoped for. The evidence cited is as follows:

(a) there has been little separate political rights review, as any pre-enactment review that has occurred has been dominated by legal discourse and predictions of what the courts will do;

(b) all 15 surviving declarations of incompatibility have been dutifully complied with by the Government, so that challenging court decisions in the UK seems to be as politically impossible as under section 33 in Canada;

(c) the courts have treated the section 3 interpretive obligation as the primary remedy under HRA and in so doing have engaged in aggressive and radical use of it going way beyond any defensible conception of ‘interpretation.’ As a result, courts have not relied on section 4 – the main structural vehicle for institutional balance and ‘dialogue’—anywhere near as much as expected or hoped, and are violating the core surviving principle of parliamentary sovereignty given expression by HRA generally and section 4 in particular.

(4) HRA is about right. Almost the only non-judicial voice arguing that HRA is working more or less successfully and as anticipated is the official one of the government, in a report published by the Department of Constitutional Affairs in 2006. Less officially, however, several government ministers and ex-ministers have disagreed with this claim, arguing that HRA was a major mistake, unexpectedly handcuffing the government in the-then unforeseen post 9/11 world.

17. I think these assessments of the HRA should be taken with a small grain of salt because many people appear to be locked into initial positions -- in which HRA’s enactment came as a surprise after lengthy campaigns for and against a constitutionalized bill of rights: so that proponents viewed HRA as too little and opponents as too much. My own preliminary assessment falls somewhere in between the view that HRA has resulted in de facto judicial supremacy and that it is just right in practice, but closer to the latter. Here are some specific reactions to the above assessments:

(1) On the futility thesis, I think this seriously underestimates the extent to which courts are protecting rights. Although only one DI has been made with respect to post-HRA Labour legislation, (1) that one, *A and Others*, was of the highest importance and compares favourably with the fact that the United States Supreme Court has not yet held that any constitutional rights have been violated by post 9/11 government action – executive or legislative, and (2) 14 other declarations of incompatibility have been made and survived appeal. Moreover, many more cases have involved judicial invalidation of executive action for violation of the HRA, including the ‘control order’ cases. Finally, the section 3 interpretative power has been an important part of the judicial protection of rights, particularly in such areas as sexual orientation discrimination and reverse onus of criminal proof provisions, and it is hard to make the case that this protective power has been meekly used.

(2) On the too weak thesis, to my mind, the major example cited of *A and Others* illustrates the distinctive feature of the new model and how it is meant to work rather than being a departure from expectation and a failure in practice. Under HRA, it was of course never intended that the judiciary would have the power to invalidate legislation and provide redress under a DI. But the government and Parliament *did* affirmatively respond to the DI by subsequently amending the statute to create the control order regime in place of executive detention after prolonged and very extensive parliamentary debate – and subject the prisoners to it. Indeed, in counting this DI among all the others that have triggered such responses, it is part of the evidence of those who argue that the HRA has proven too strong in practice!

(3) On the too strong thesis, I think the critics have some reasonable grounds for disappointment on this score but as an overall assessment it is significantly overstated, especially to the extent it argues there is now little difference from US-style judicial power.

(a) Pre-enactment political rights review. True, there has been far too much focus on legal argument and predicting what courts (both UK and the European Court of Human Rights) will do. On the other hand, the work of the Joint Committee on Human Rights as a high-quality, cross-party committee has been quite successful in alerting Parliament to rights concerns – indeed, this committee has criticized the *courts* for not protecting rights aggressively enough, so as a parliamentary body it seems not to think there is de facto judicial supremacy.

(b) On the alleged over-compliance with declarations of incompatibility, the political branches are between a rock and a hard place. Routine ignoring of declarations would undoubtedly be taken by some as clear evidence that HRA is too weak and is reverting to traditional parliamentary sovereignty. Yet, the record of compliance then prompts the claim that the legislature and executive are just kowtowing to courts, afraid to exercise an independent voice, so that the model is unstable in the other direction and rolling towards judicial supremacy. As suggested earlier, I think the best understanding and operation of legislative final words in general is a presumption that legislatures will abide by court decisions and not routinely ignore them – but where there is reasonable disagreement after serious and principled debate, legislatures should feel able to exercise this independent power of the final word. In *A and Others*, although Parliament did not ignore the DI but responded to it after several months, the content of that response did not just ‘surrender’ to the judicial view but raised certain challenges to it – that were subsequently litigated in the recent ‘second look’ control order cases. Overall, perhaps this is as it should be.

(c) On the alleged judicial over-reliance on section 3 versus section 4, I think it is a threshold mistake to view every use of section 3 rather than section 4 as a failure of institutional balance and to conceive of section 4 as the exclusive basis for legislative voice. Section 3 is always the first step in any case and by the logic of the section 3/section 4 divide, always likely to be used in the majority of cases – as the Government argued during enactment. But, second, use of section 3 does not deprive Parliament of its say or undermine its retained sovereignty, at least to the extent the critics suggest. Parliament has the power of the final word in response to *either* a declaratory or an interpretive judgment by the courts. It can always respond to a section 3 decision by amending the legislation to overrule the judicial interpretation and make clear that

the courts have mistaken its meaning – subject of course to the possibility of a subsequent DI. This is the important difference between statutory and constitutional interpretation.

On the way section 3 has been used, I think it also overstates the case to claim that the practice of the courts has been so aggressive and radical as to amount to rewriting legislation at will, thereby violating retained parliamentary power. It is certainly true that overall, the UK courts have treated the interpretive obligation as a strong one, a little stronger than NZ courts, and have advanced well beyond traditional domestic modes of statutory interpretation. At the same time, however, (1) as in New Zealand, different judges take different views of the appropriate strength of the interpretive obligation so, as one commentator puts it, '[t]o distil or elicit any working principles or rules of guidance from the cases is not easy'; (2) there are certainly still limits beyond which a Convention-compatible interpretation is not possible and (3) the approach of the courts is not clearly and plainly without justification in terms of the text, structure and intent of HRA.

Moreover (4) the general strength of the obligation under section 3 appears to have slightly weakened over time from the 2002 high point in *R v. A*. The leading opinion in that case stated that a rights-consistent meaning is not 'possible' if -- and perhaps only if -- Parliament has clearly and expressly limited a convention right. But in *Ghaidan*, now the leading section 3 case, several judges expressed the slightly weaker test that a rights-consistent interpretation is not possible where it would be incompatible with 'the underlying thrust of the legislation' (Lord Nicholls) or 'the fundamental features of the legislative scheme' (Lord Millett). And *Wilkinson*, decided in 2005, arguably rolled back the standard of impossibility a little further still. Here, Lord Hoffman's leading opinion rejected the notion that section 3 required courts to give the language of statutes 'acontextual meanings,' and stated that 'the question is still one of *interpretation*, i.e., the ascertainment of what, taking into account the presumption [of compliance] created by section 3, Parliament would reasonably be understood to have meant by using the actual language of the statute.'

If one looks at the *applications* of section 3 in these three cases, the impression of a slight weakening over time is further confirmed. So, it seems hard to conclude that the section 3 interpretation of the rape shield law at issue in *R. v. A* (reading in a fair trial limitation) did not fly in the face of Parliament's specific intent or the 'underlying thrust' of the statute as manifested in its unambiguous blanket exclusion of evidence of prior sexual history between the defendant and complainant. By contrast, in *Ghaidan*, it does not seem an unreasonable contextual reading of a statute extending tenure protection, absent other clear language to the contrary, to interpret the words 'as his or her wife or husband' to refer to a general relationship of sexual intimacy exemplified by but not limited to the heterosexual relationship of husband and wife. And in *Wilkinson*, because there *were* such clear contrary indications elsewhere in the statute, the court found that the word 'widow' could not be given a similarly generic, non-discriminatory meaning. Corresponding to this slightly reduced weight on the section 3 scale over time has been relatively greater reliance on section 4.

18. As commentators have suggested, rather than self-aggrandizement, the remedial structure of section 3 and 4 creates strong pressure on courts to use the interpretive power under which they can grant a remedy to the aggrieved individual versus section 4, under which they cannot. But

the political branches have not done all they can to reduce this pressure on the courts. Under the ‘fast-track’ procedure of HRA section 10, there is express provision for an amending order to have retrospective effect and therefore to grant a legislative remedy to the individual whose rights the court has declared have been violated. However, this power has not been used. So where the government intends to comply with a DI, it could and should use either (1) this express section 10 power or (2) otherwise ensure that, wherever possible, along with the amending legislation – whether or not it is given retroactive effect -- provision is made to afford compensation to the individuals affected by the incompatible statute. The duty to repair the damage caused to an individual is already a legal obligation of the UK under the European Convention whenever the European Court of Human Rights finds a violation.

19. Overall, with respect to the first criterion of success, it is I think hard to establish that there is not now greater consciousness and protection of rights than before HRA. Even if the approach of ‘judicial minimalism’ – no less but also no more protection than given by the ECtHR to the same rights -- is disappointing to some, this is still undoubtedly more at the domestic level than pre-HRA. The courts could not even have considered the claims in *A and Others* before. On the second criterion, the balance of power has I think at most gone a little too far in the judicial direction and somewhat greater use of section 4 should certainly be encouraged or mandated – perhaps in the way I have suggested -- as should greater political rights review both before and after the judicial stage. But only a little. All in all, my view is that HRA is working reasonably well and that there is no clear and obvious practical problem with this version of the new model, as there is for example in Canada.

20. Turning to the Australian dimension. Firstly, how might any distinctive features of the general Australian legal context potentially affect the operation of the new model in practice? Paul Rishworth once described the BORA as a ‘hybrid’ bill of rights, and I think this helpfully describes the new Commonwealth model as a whole: a hybrid, that is, between judicial and legislative supremacy. And yet, unlike NZ and the UK, Australia starts out as *already* a hybrid system: combining strong and robust judicial review in the area of federalism (and to a slightly lesser extent, separation of powers) under the Constitution with essentially parliamentary sovereignty in the area of rights. In this sense, at the federal level, Australia is more similar to Canada before the 1960 statutory bill of rights than to New Zealand and the UK before theirs: the latter have no tradition at all of judicial invalidation of legislation.

21. So the question is how, if at all, might this affect the working of the new model differently than in New Zealand and the UK? As Australia is already a hybrid system, adoption of a national parliamentary bill of rights would entail first adopting the different hybrid system of the new model, but would also entail moving to a *double* hybrid, as it were, both strong and weak-form judicial review – as presumably existing strong judicial review of federalism under the Constitution would be maintained. In particular, will courts be able to distinguish their roles between federalism and rights issues in a way that creates a new judicial approach to the latter but does not devolve into duplicating one or other of the two existing modes?

22. Secondly, to what extent if any are the two existing Australian versions of the new model better instantiations of it? As you know, the general structures of both are substantially based on the UK HRA but the texts have been tweaked in certain interesting ways that appear to try and

address -- and reduce -- some of the criticisms of its workings, in particular the risk of too much judicial power. But tweaked rather than introducing fundamentally novel departures. These subtle textual differences have been fully described by Carolyn Evans and Simon Evans in their recent book on Australian Bills of Rights. I should like to mention just three:

(1) Both statutes add the qualifying phrase ‘consistently with the legislative purpose’ to the interpretive duty placed on the courts, which may help to qualify it and constrain more aggressive judicial conceptions and use of this power;

(2) Unlike all three other statutory bills, the VC contains a legislative override power in addition to the default final word that comes from not having to accept a judicial declaration of incompatibility/inconsistency. Unlike Canada’s section 33, section 31 VC specifies that it is the legislature’s understanding that the override is only to be used in ‘exceptional circumstances,’ and the MP introducing a bill containing an override must make a statement explaining why this criterion is satisfied. Arguably, even more than section 33, both the wording and the logic of this provision within a statutory bill without a judicial invalidation power envision pre-emptive rather than reactive use of the override.

(3) Finally, the wording of the judicial declaratory power in section 36 of the VC is that ‘if...the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect.’ The declaration is also termed a ‘declaration of inconsistent interpretation’ versus the ‘declaration of incompatibility’ in the ACT and UK HRAs. To the extent this connotes that exercise of the legislative final word would typically reflect reasonable interpretive disagreement rather than ‘rights misgivings’, it will perhaps increase the perceived legitimacy of ignoring a declaration.

23. In conclusion, one principal practical dilemma has emerged from experience under the new model as a whole. If courts are granted the power to invalidate rights-incompatible statutes (as under the Canadian Charter and CBOR) there is a serious risk that the political costs will generally be too high for the legislature to exercise its override power – leading to more effective rights protection at the cost of a de facto judicial final word. If, on the other hand, courts are not granted the power to invalidate rights-incompatible statutes, then the risk that the individual whose rights they adjudicate to have been violated will not receive a remedy creates strong pressure on the courts to rely too much on their interpretive duty, again at the cost of ousting legislative judgment and creating a de facto judicial final word.

24. Although NZ courts have seemed better able than those of the UK to resist the pressure under the second horn of the dilemma, the general and most straightforward solution, as I suggested before, lies in reducing the pressure by creating a norm or rule that where the legislature responds to a declaration of incompatibility/inconsistency by amending or repealing the relevant statutory provision, it will also provide as much of a legislative remedy as it can, including either or both monetary compensation and retroactive effect. Moreover, such a norm not only promises to solve this practical dilemma but is also fair.

25. A more radical solution at the judicial stage would be to omit the interpretive duty altogether (or seriously reduce it), and so authorize only ‘ordinary’ modes of statutory interpretation to

protect the rights. This should result in greater reliance on judicial declarations of incompatibility/inconsistent interpretations, which may in turn reduce the political costs associated with ignoring them. On the other hand, of course, it may result in perceived or actual underprotection of rights, depending in part on how legislatures respond to declarations.

26. Another possibility would be to revert to the original NZ model of a purely interpretive bill of rights without the power (perhaps expressly prohibited) to declare statutes inconsistent with protected rights. In practice, to the extent this power is not inherent and inevitably exercised at least by necessary implication, this might lead in other contexts to even greater pressure on the courts to distort parliamentary intent than the current situation.

27. Of course, it would also be possible to have a statutory bill without *either* the interpretive duty or the declaratory power. That is, in effect, not to have a judicial stage of review at all. But, as an option that lies outside the parameters of the new model, it would be unlikely to bring most of its potential benefits.