The Legal Protection of Rights in Australia

Edited by
Matthew Groves
Janina Boughey
and
Dan Meagher

• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are
trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2019

Copyright © The editors and contributors severally 2019

The editors and contributors have asserted their right under the Copyright, Designs and Patents
Act 1988 to be identified as Authors of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means,
electronic or mechanical, including photocopying, recording, or any information storage or retrieval system,
without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for loss or damage
occasioned to any person acting or refraining from action as a result of any statement in it can be
accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is Crown Copyright ©.
All House of Lords and House of Commons information used in the work is Parliamentary Copyright ©.
This information is reused under the terms of the Open Government Licence v3.0 (http://www.
nationalarchives.gov.uk/doc/open-government-licence/version/3) except where otherwise stated.

All Eur-lex material used in the work is © European Union,
http://eur-lex.europa.eu/, 1998–2019.

A catalogue record for this book is available from the British Library.

A catalogue record for this book is available from the Library of Congress.

ISBN: HB: 978-1-50991-983-3
ePDF: 978-1-50991-982-6
ePub: 978-1-50991-984-0

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

To find out more about our authors and books visit www.hartpublishing.co.uk.
Here you will find extracts, author information, details of forthcoming events
and the option to sign up for our newsletters.

21

Designing an Australian Bill of Rights: The Normative Trade-offs

SCOTT STEPHENSON

I. Introduction

If Australia were to introduce a bill of rights at the federal level, it is likely that the design and drafting process would devote a great deal of attention to the possible adoption of a 'dialogue' model.[1] Among the different constitutional approaches to rights protection, it has become the most popular in Australia and its closest constitutional relatives in recent decades. It is the model that was endorsed by the last federal inquiry into rights reform – the National Human Rights Consultation Committee – in 2009,[2] that formed the basis for the bills of rights enacted in the Australian Capital Territory in 2004,[3] in Victoria in 2006[4] and in Queensland in 2019,[5] and that is said to describe the bills of rights found in Canada, New Zealand and the UK.[6] The dialogue model has risen to prominence because it is often claimed to provide 'a better working coexistence of democratic self-governance and the constraints of constitutionalism, the twin concepts underlying constitutional democracy'.[7] It seeks to achieve this coexistence by simultaneously empowering courts to review executive and legislative acts for compatibility with rights while also preserving the centrality of legislatures in evaluating and resolving disagreements about the scope and limit of rights through the investiture of new responsibilities and powers before and after acts of judicial review.

[1] In previous scholarship, I have put forward several reasons for abandoning use of the term 'dialogue': Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Annandale, Federation Press, 2016) 50–55. However, as it is the most common means of labelling the model in Australia and nothing in the present chapter turns on the term used, I will continue to refer to it as the 'dialogue' model.

[2] National Human Rights Consultation Committee, *Report* (2009) ('National Consultation Committee').

[3] *Human Rights Act 2004* (ACT). For the consultative committee report that endorsed the dialogue model, see Australian Capital Territory Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003) ('ACT Consultation Committee').

[4] *Charter of Human Rights and Responsibilities Act 2006* (Vic). For the consultative committee report that endorsed the dialogue model, see Victorian Human Rights Consultation Committee, *Report: Rights, Responsibilities and Respect* (2006) ('Victorian Consultation Committee').

[5] *Human Rights Act 2019* (Qld). Section 3 of the Act states that '[t]he main objects of this Act are … (c) to help promote a dialogue about the nature, meaning and scope of human rights.' The Explanatory Notes to the Bill state that '[t]he Bill aims to promote a discussion or "dialogue" about human rights between the three arms of government (the judiciary, the legislature and the executive)': Explanatory Notes, Human Rights Bill 2018 (Qld) 6.

[6] See, eg, Mark Tushnet, 'Dialogic Judicial Review' (2009) 61 *Arkansas Law Review* 205.

[7] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge, Cambridge University Press, 2013) 52.

This chapter highlights a set of considerations that should factor into the design and drafting process if a dialogue model were to be chosen. In particular, it argues that part of that process should focus on the normative trade-offs that arise with the model. A normative trade-off is a point of tension between two principles or features, each of which is capable of reasonable justification. The dialogue model gives rise to a number of points of tension with other aspects of Australia's constitutional system of government. For example, its system of legislative committee review, which facilitates legislative disagreement with the executive's positions on rights issues, is in tension with Australia's existing system of responsible government, which operates to minimise disagreement between the executive and legislature. If these points of tension are not addressed prior to the enactment of a bill of rights, it will fall to institutional actors (ie members of the executive, legislature and judiciary) to resolve them after enactment. If this occurs, the risk is that these actors will prioritise the existing features of the constitutional system because they are well-established and well-known, which would undermine the dialogue model's ability to function in practice and thus achieve the working coexistence mentioned above.

This chapter puts forward three, related suggestions about the way in which the design and drafting process should proceed in order to identify, analyse and, as far as is reasonably possible, resolve the normative trade-offs before the enactment of a bill of rights. First, the process must go beyond the four walls of the bill of rights to include potential reforms to other aspects of Australia's existing constitutional system of government. Reform of the system of responsible government, for example, should be one potential option for resolving the point of tension between it and legislative committee review. Second, the process should include, and indeed prioritise, the possibility of implementing a dialogue bill of rights by means of a constitutional rather than statutory instrument. In the event of a point of tension between a statutory instrument (the dialogue bill of rights) and a feature of the existing constitutional system, the latter will almost invariably prevail due to the priority that is accorded to constitutional law. For any of these normative trade-offs to be resolved in a manner that favours the operation of the dialogue bill of rights, it must have the same status in the hierarchy of laws as the competing principle or feature. Third, the enactment process must be inclusive and popular rather than exclusive and elite. Not only will this give any proposed constitutional reforms a greater likelihood of success at the required referendum, it also counters the perception from scholars evaluating the advent of bills of rights in similarly-situated countries that they are the product of inter-party competition and elite self-interest rather than a broad-based, popularly-supported movement.

Part II of the chapter provides a brief overview of the dialogue model's components and objective. Part III sets out three illustrative normative trade-offs that arise between the dialogue model and Australia's existing constitutional system of government. Part IV details the three suggestions for how the drafting and design process should proceed to identify, analyse and resolve these normative trade-offs.

II. What is a Dialogue Bill of Rights?

Before it is possible to evaluate the points of tension between a dialogue bill of rights and Australia's existing constitutional system of government, it is necessary to understand what a dialogue bill of rights is. There are problems with speaking of a 'dialogue model' because

each bill of rights that has attracted the label does not have the exact same set of features. Furthermore, scholars disagree as to the objective that these features seek to achieve. While these differences are important and would have to factor into the drafting and design process of a dialogue bill of rights, they do not detract from this chapter's principal argument – that the design and drafting process should be designed in a way that takes account of the normative trade-offs that arise with the adoption of a dialogue model – and do not prevent a broad overview of its features and objective from taking place. The differences do, however, affect the precise normative trade-offs that arise, a point that will be discussed below in Part III.

A. Features

While each instantiation of the dialogue model is different, the most comprehensive versions to date contain four stages of rights review. First, the executive is required to review proposed laws for their compatibility with rights prior to their introduction into the legislature. The product of that review is the statement of compatibility. When a proposed law is introduced into the legislature, the executive is required to issue an accompanying statement of compatibility that sets out the reasons why the law, if enacted, will or will not be compatible with rights.

Second, a legislative committee is empowered to review proposed laws for compatibility with rights. After a proposed law is introduced into the legislature, the committee reviews the law, including the executive's statement of compatibility, and issues a report that sets out whether it considers the law to be compatible with rights and, if not, possible amendments to the proposed law that would rectify the incompatibilities with rights it has identified.

Third, courts are empowered to undertake rights-based judicial review of executive and legislative acts.[8] A wide range of judicial powers are compatible with the dialogue model. Courts can be given, for example, the power to invalidate statutes that are found to be incompatible with rights, as in Canada, the power to interpret statutes compatibly with rights, as in New Zealand, or the power to interpret statutes compatibly with rights and, where that it not possible, the power to issue a declaration of incompatibility that alerts the executive and legislature to its finding, but does not affect the validity or operation of the statute, as in the ACT, Queensland, the UK and Victoria.

Fourth, legislatures are empowered to override judicial decisions on rights using the ordinary lawmaking process. The precise power that needs to be given to the legislature will depend on the powers given to the courts and whether or not the bill of rights is constitutionally entrenched. A constitutionally entrenched bill of rights that empowers courts to invalidate statutes will require an explicit legislative override power. An unentrenched, statutory bill of rights that empowers courts to interpret statutes compatibly with rights and issue declarations of incompatibility does not require an explicit legislative override power because judicial interpretations of statutes can be overridden using the power to amend statutes and no positive step is required to override declarations of incompatibility because they have no legal effect.

[8] For a discussion of the impact of a dialogue model on judicial review of executive action, see ch 11 in this volume.

B. Objective

The objective of the dialogue model is, I have argued in a previous scholarship,[9] to facilitate disagreement on rights issues between the three arms of government. The four stages of rights review provide each arm of government with the opportunity to evaluate and, where appropriate, challenge determinations about the scope and limit of rights made by the other arms of government. Legislative committee review allows the legislature to review and, where appropriate, disagree with the executive's determinations on rights by recommending amendments to the executive's proposed law. Rights-based judicial review allows the courts to review and, where appropriate, disagree with the legislature's determinations on rights by finding a law to be incompatible with rights. Legislative override allows the legislature to review and, where appropriate, disagree with the judiciary's determinations on rights by exercising its override power.

The cumulative effect of the four stages further facilitates disagreement. As the judiciary does not bear the moral and political weight of having the 'final word' on contested rights issues, the need, as a matter of practice and principle, for it to defer to the legislature is diminished (as compared to a system of constitutional or judicial supremacy where courts do have the 'final word'). In other words, the presence of stage four (legislative override) facilitates disagreement at stage three (rights-based judicial review). Furthermore, as the legislature has reached an independent and considered view on a proposed law's compatibility with rights prior to enactment, it has stronger grounds for challenging a judicial decision finding a law to be incompatible with rights. It can point to the legislative committee's report to help substantiate the claim that its disagreement with the judiciary is the product of a good faith, reasonable difference of opinion about the scope or limit of a right rather than an adverse reaction to having lost a court case. In other words, the presence of stage two (legislative committee review) facilitates disagreement at stage four (legislative override).

The dialogue model thus aims to structure the constitutional system of government to use the interactions between the three arms of government as a mechanism for expressing and resolving the reasonable, good faith disagreements about the scope and limit of rights that exist in society. Each arm of government is apt to bring a different perspective to bear on rights issues and to allow the public to participate in different ways. The executive brings the high-level, political perspective of the governing political party (or parties) that is informed by the work of the public service and that allows participation by the public writ large through, for example, bureaucratic data collection and opinion surveys. The legislature brings the mid-level, political perspective of legislators, including non-governing political parties (and individual legislators), that allows the public to participate through, for example, interest group lobbying and submissions to the committee. The judiciary brings the case-specific, legal perspective of judges that allows members of the public directly affected by a particular executive or legislative act to participate through the initiation of, or intervention in, court cases.

[9] Stephenson, above n 1, ch 6.

III. The Normative Trade-offs

A constitutional system of government never pursues a single objective. Constitutional drafters (before enactment) and institutional actors (after enactment) often have to strike a balance between different objectives, and their concomitant features, that are in tension with each other.[10] The attainment of an efficient form of government may create points of tension with, for instance, the attainment of a federal form of government because federalism invariably creates points of overlap and duplication. The attainment of a responsive form of government may create points of tension with, for instance, the separation of powers because separation slows down the ability of government to take particular types of action (eg the requirement for imprisonment only to occur after a finding of criminal guilt by a court[11] slows down the ability of the government to remove a dangerous person from the community). Importantly, each competing objective is capable of justification (ie a normative trade-off arises). It is not a case of a valuable constitutional aim being impeded by a practical inconvenience (ie a practical trade-off). The pursuit of efficient and responsive government are valuable constitutional objectives, as are the pursuit of federalism and the separation of powers.

A constitution's system of rights protection is no exception. Every approach to rights protection creates normative trade-offs that must be resolved. Legislative supremacy (ie a constitutional system without a bill of rights) pursues the objective of legislative primacy in relation to rights (ie the legislature is the institution responsible for evaluating and resolving rights issues). However, that may be in tension with the principle of legislative legitimacy (ie the legislature enjoys its position of primacy in the lawmaking process because it is the electorally accountable arm of government). The reason is that the legislature's primacy allows it to alter those rights that form the basis for its legitimacy. For example, in a system of legislative supremacy, the legislature has the power to abrogate the right to vote even though that would undermine its legitimacy because the legislature's legitimacy relies on the people voting for its members.

Australian constitutional lawyers are all too familiar with this normative trade-off. With its system of legislative supremacy at the federal level, the difficult task of resolving the tension between legislative primacy and legislative legitimacy has come before the High Court in recent decades. The Court has held that limits must be placed on the legislature's ability to curtail the right to vote[12] and freedom of political communication.[13] These are implications that preserve the legislature's legitimacy – its place of primacy rests on the maintenance of representative and responsible government. However, these implications sit at odds with the principle of legislative primacy, which is also at the heart of Australia's

[10] For a more comprehensive, comparative-oriented discussion of normative trade-offs, see Stephenson, above n 1, ch 7.

[11] There are, of course, some limited exceptions where detention without a finding of criminal guilt is permitted. In Australia, see, eg, *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1.

[12] *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

[13] *Nationwide News v Wills* (1992) 177 CLR 1; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

constitutional system of government – as the Constitution does not have a bill of rights, it assigns responsibility for resolving rights issues to the legislature, not the judiciary. To minimise this tension, the Court has attempted to tie these implications as closely as possible to the constitutional text and, in general, adopted narrow interpretations of their scope.[14] Thus, it has sought to reconcile the normative trade-off by recognising and preserving the principle of legislative legitimacy without encroaching on the principle of legislative primacy to a significant extent.

Tensions also arise in systems of judicial or constitutional supremacy (ie a constitutionally entrenched bill of rights where the judiciary has the 'final word' on rights issues). This approach to rights protection pursues the objective of judicial primacy in relation to rights (ie the judiciary is the institution ultimately responsible for evaluating and resolving rights issues). However, that may be in tension with the principle of judicial independence (ie the judiciary should be free from interference by the executive and legislature). All public officials, including judges, are expected to be accountable for their exercises of public power. The pressure for judicial accountability is particularly acute in systems of judicial supremacy because judges have the 'final word' on significant moral and political issues over which there is good faith, reasonable disagreement within society. However, many mechanisms for ensuring accountability may give rise to points of tension with the principle of judicial independence. Holding judges to account through, for instance, the appointments process may undermine the perception that judges are independent from the other arms of government. This tension is manifest in systems of judicial supremacy such as India and the US where the non-judicial arms of government have sought to render the judiciary accountable for its decisions on rights through the appointments process, which has threatened the appearance of independence.[15]

The dialogue model of rights protection also requires a set of normative trade-offs to be made, all of which follow a similar pattern. In short, the dialogue model's facilitation of disagreement between the three arms of government is in tension with other aspects of the constitutional system of government that seek to minimise or suppress disagreement between the three arms of governments. Three illustrative examples of the types of normative trade-offs that may arise in the Australian context are discussed below.

A. Responsible Government

The dialogue model is in tension with Australia's system of responsible government because the former seeks to facilitate disagreement between the executive and legislature while the latter operates to minimise disagreement between them. Responsible government minimises disagreement by forging a close link between the two arms of government. In particular, it provides that the executive 'is chosen by, is answerable to, and may be removed by' the

[14] See, eg, the reformulation of the implied freedom of political communication doctrine, purporting to tie it closer to the text of the Constitution, in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[15] For the US, see, eg, Michael J Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis* (Chicago, University of Chicago Press, 2001) 313; Christopher L Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (New Jersey, Princeton University Press, 2007) 145, 158–59, 189–90. For India, see, eg, Anashri Pillay, 'Protecting Judicial Independence through Appointments Processes: A Review of the Indian and South African Experiences' (2017) 1 *Indian Law Review* 283.

legislature.[16] In the contemporary era of relatively well-disciplined political parties, responsible government operates to ensure that the executive enjoys a large degree of control over the legislature.[17] The senior members of the political party (ie the executive) can be confident that the other members of the political party will support them in the legislature in most circumstances.[18]

This point of tension manifests at stage two (legislative committee review) of the dialogue model. The executive can use its power in the legislature to frustrate the operation of legislative committee review, suppressing it as a mechanism for the legislature to express disagreement with the executive on rights issues. This suppression can occur in a number of ways. The executive might be able to pack the legislative committee with members from its own political party, helping to ensure that the committee rarely issues reports critical of the executive's positions on rights.[19] The executive might be able to use its control of the legislature's timetable to prevent the committee from having sufficient time to conduct a thorough investigation of the rights issues raised by a proposed law. The executive might be able to use its majority in the legislature to ensure that the legislative committee's report has no effect on the final form of, or even the deliberation on, the proposed law.

This point of tension gives rise to a normative trade-off because reasonable justifications can be put forward for each principle. Executive-legislative disagreement on rights issues is justifiable on the basis of the reasons set out above in Part II(B). Responsible government is justifiable on the basis that it creates an effective, efficient form of government with clear lines of political accountability. Minimising disagreement between the executive and legislature more readily allows the state to respond to pressing social issues – it reduces the space for executive-legislative disagreement to prevent the state from taking action – and offers greater clarity about who is responsible for those actions – there is less room for the executive and legislature to 'pass the buck' by blaming each other for a problematic act.

Australians are all too familiar with this species of tension and the problems that can arise from its unresolved dimensions. The 1975 constitutional crisis was, at base, a dramatic manifestation of the tension between the Constitution's elements that facilitate disagreement between the executive and legislature and the elements that minimise disagreement between them. On the one hand was the principle of responsible government, which operates to minimise the possibility of disagreement between the executive and legislature by ensuring that the executive retains the confidence of the House of Representatives at all times. On the other hand was the principle of bicameralism, which operates to create opportunities for

[16] David Hamer, *Can Responsible Government Survive in Australia?* (Department of the Senate, 2004) xvii.

[17] See John Uhr, 'Parliament and the Executive' (2004) 25 *Adelaide Law Review* 51.

[18] As Stephen Gardbaum notes, '[t]he party [has] replace[d] parliament as the central non-executive political institution and locus of power, so that a prime minister is more likely to lose office by being replaced as leader of the party than by being defeated in parliament on a vote of confidence': 'Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale?)' (2014) 62 *American Journal of Comparative Law* 613, 634. The replacement four sitting Prime Ministers in recent years (Kevin Rudd in 2010, Julia Gillard in 2013, Tony Abbott in 2015 and Malcolm Turnbull in 2018) appears to confirm that observation in the Australian context.

[19] After the Liberal-National Party Coalition acquired a majority of seats in the House of Representatives and Senate in 2005, it used its majority to undermine the effectiveness of the existing legislative committee system by, for example, 'chang[ing] the structure of the Senate committee system to give itself the majority and the chairs of all of the legislative and general purpose standing committees, which are the main inquiry vehicles for the chamber': Harry Evans, 'The Senate, Accountability and Government Control', *Papers on Parliament No 48* (January 2008), available at www.aph.gov.au/senate/~/~/link.aspx?_id=17EF4947DD5D4214BC6C1162200D893E&_z.

disagreement between the executive and legislature in the form of an upper chamber with almost co-equal powers to the lower chamber that is not necessarily, or even generally,[20] controlled by the same political party that has the confidence of the House of Representatives. Responsible government supported the position of the Whitlam Government while bicameralism supported the position of the Fraser opposition. The events of 1975 left this tension unresolved, leaving open the question of which should prevail when they come into direct conflict.[21]

The tension highlighted by the 1975 constitutional crisis has relevance for the present discussion of the dialogue model. While the principle of responsible government can frustrate the operation of legislative committee review, other features of Australia's constitutional system of government can work to assist its operation by facilitating disagreement between the executive and legislature. And bicameralism is a cogent example. An upper legislative chamber can strengthen legislative committee review if it is structured and empowered in a way that limits the executive's ability to control or ignore it. If half (or more) of the committee's members come from the upper legislative chamber, its electoral system will assume particular significance. An electoral system that generally precludes the same political party from winning a majority of seats in both legislative chambers will reduce the executive's ability to influence the composition of the committee. The upper legislative chamber's powers to affect the passage of proposed laws will also assume considerable importance. The power to block proposed laws, for instance, will give the legislative committee a part of the legislature to which it can appeal to ensure the consideration of its recommendations (ie the upper legislative chamber can ensure that proposed laws are not passed until the legislative committee's report is given careful consideration).

Other aspects of the constitutional system can also affect the patterns of interaction between the executive and legislature. The electoral system for the lower legislative chamber is an obvious example. The likelihood of executive-legislative disagreement is increased under a system where a single political party is unlikely to win a majority of seats at an election (eg a system of proportional voting). The reason is that, if the executive is a coalition of political parties, there is a greater likelihood of disagreements within the executive, some of which may manifest in the legislature (eg one member of the coalition may express its disagreement by speaking out, or even voting, against a proposed law supported by the other members of the coalition).[22]

The normative trade-off to be made is, therefore, a complex one. It not only involves evaluating the respective merits of legislative committee review and responsible government.

[20] 'Since 1949 there have been only four relatively short periods (1951–56, 1959–62, 1976–81, 2005–07) in which a ministry has had a majority in the Senate': Harry Evans (Rosemary Laing (ed)), *Odgers' Australian Senate Practice,* 14th edn (Department of the Senate, 2016) 13.

[21] For a discussion of the unresolved constitutional dimensions of the events of 1975, see Brendan Lim, *Australia's Constitution after Whitlam* (Cambridge, Cambridge University Press, 2017).

[22] For an evaluation of the precise extent to which this has occurred in New Zealand since the introduction of a new electoral system that tends not to give a single political party a majority of seats, see, eg, Ryan Malone, 'Who's the Boss?: Executive-Legislature Relations in New Zealand under MMP' (2009) 7 *New Zealand Journal of Public and International Law* 1; Jonathan Boston and David Bullock, 'Experiments in Executive Government under MMP in New Zealand: Contrasting Approaches to Multi-Party Governance' (2009) 7 *New Zealand Journal of Public and International Law* 39; Nicholas Aroney and Steve Thomas, 'A House Divided: Does MMP Make an Upper House Unnecessary for New Zealand?' (2012) 3 *New Zealand Law Review* 403.

It also involves evaluating other features of a constitutional system of government that alter the patterns of agreement and disagreement between the executive and legislature.

B. Separation of Powers

The dialogue model is in tension with the separation of powers because the former often seeks to invest courts with novel powers while the latter, in Australia, seeks to confine the powers courts may exercise. One of the dialogue model's principal innovations is the development of a suite of new powers that courts can exercise when a statute is found to be incompatible with rights. As mentioned in Part II(A), courts no longer need to be given the power to invalidate statutes. In addition to, or as a substitute for, the traditional power of invalidation, they can be given the power to rewrite a statute to remove the incompatibility with rights and/or they can be given the power to issue declarations of incompatibility, which have no effect on the validity or operation of the statute, but serve as a public statement alerting the executive and legislature to the court's findings.

As Australian constitutional lawyers know all too well, the High Court has interpreted the Constitution, and Chapter III in particular, as requiring a separation of judicial powers that prevents courts exercising federal jurisdiction from being vested with non-judicial power. The Court has never defined the concept of judicial power with complete precision because it generally considers the concept incapable of an exhaustive definition.[23] Nevertheless, it has tended to construe judicial power in a narrow manner, confining it to the issuance of binding and authoritative decisions resolving disputes about the existing rights and obligations of the parties.[24] This conception of judicial power is at odds with the power to rewrite statutes because that power goes beyond the resolution of the dispute between the parties and is at odds with the power to issue declarations of incompatibility because they are not binding.

Indeed, the Court has said as much, holding that these two powers would be incompatible with the exercise of judicial power in *Momcilovic v The Queen*.[25] In that case, the Court was asked to determine the scope of the interpretive power in Victoria's bill of rights (section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)). The provision states that, '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.' French CJ,[26] Gummow,[27] Hayne,[28] Crennan and Kiefel,[29] and Bell JJ[30] held, with Heydon J dissenting,[31] that the provision does not grant courts the power to rewrite statutes. As a result, it does not confer a non-judicial power on courts and is, therefore, compatible with the separation of judicial powers doctrine. As Gummow J said, 'the provision does not confer upon the courts a function of a law-making character which for that reason is repugnant to

[23] See, eg, *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188–89.
[24] See, eg, *Huddart, Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330, 367 (Griffith CJ).
[25] (2011) 245 CLR 1.
[26] Ibid, 50 [51].
[27] Ibid, 92–93 [171].
[28] Ibid, 123 [280].
[29] Ibid, 210 [545].
[30] Ibid, 241 [661].
[31] Ibid, 181–82 [450].

the exercise of judicial power. Section 32(1) is not invalid.'[32] If the provision were construed to permit courts to rewrite statutes, it was clear that it would have been declared invalid for violating the separation of judicial powers doctrine.[33] This restriction is a well-established aspect of the separation of judicial powers doctrine. In 1948, Latham CJ stated that '[t]he Court cannot re-write a statute and so assume the functions of the legislature.'[34]

In *Momcilovic*, the Court was also asked to determine whether the power to issue declarations in incompatibility (section 36(2) of the Act)[35] was an exercise of judicial power. The Court unanimously answered no.[36] As French CJ said:[37]

> a declaration of inconsistent interpretation made under s 36 does not involve the exercise of a judicial function. … The declaration sets down no guidance for the disposition of future cases involving similar principles of law. It has no legal effect upon the validity of the statutory provision which is its subject. … The declaration of inconsistent interpretation cannot be regarded as analogous to the judicial function nor to any functions historically exercised by courts and which, for that reason, have been regarded as judicial.

Gummow J observed that the issuance of a declaration was, in effect, the provision of formal advice to the executive about the Court's view on a statute's compatibility with rights,[38] which is foreign to the conception of judicial power in Australia:[39]

> It is no part of the judicial power, in exercise of a function sought to be conferred on the courts by statute, formally to set in train a process whereby the executive branch of government may or may not decide to engage legislative processes to change existing legislation.

In sum, the Court held that both the power to rewrite statutes and the power to issue declarations of incompatibility are not judicial in character.

The most important point for the purposes of the present discussion is that a normative trade-off must be made because a tension exists between the creative forms of judicial power in the dialogue model and the narrow conception of judicial power in the Australian Constitution, and each principle is capable of reasonable justification. On the one hand, the creative forms of judicial power offer courts greater flexibility to tailor the remedy they issue to the circumstances of the case. Declarations of incompatibility, for instance, may prove to be a useful mechanism for a court to state to the public and the other arms of government that it has found a statute to be incompatible with rights in circumstances where invalidation of the statute might cause considerable problems and generate few, if any, benefits (eg where invalidation would cause significant disruption to the way private persons order

[32] Ibid, 92–93 [171]. See also Heydon J: 158 [398].

[33] See, eg, ibid, 208 [537] (Crennan and Kiefel JJ).

[34] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 164, cited by Heydon J in *Momcilovic*: ibid 159 [399].

[35] The provision calls it's a 'declaration of inconsistent interpretation' rather than a 'declaration of incompatibilty'.

[36] (2011) 245 CLR 1, 44 [37] (French CJ), 97 [188] (Gummow J), 123 [280] (Hayne J), 185 [457] (Heydon J), 222 [584] (Crennan and Kiefel JJ), 241 [661] (Bell J). A majority of the Court (Gummow, Hayne and Heydon JJ dissenting) held that s 36(2) did not violate the separation of judicial powers doctrine. For the purposes of the present discussion, it is unnecessary to consider those reasons in detail. In short, while the doctrine prevents the Commonwealth Parliament from conferring non-judicial power on courts, it does not prevent state Parliaments from conferring non-judicial power on courts unless that power is incompatible with the exercise of institutional integrity of state courts: see, eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[37] (2011) 245 CLR 1, 65 [89].

[38] Ibid, 95 [181].

[39] Ibid, 96 [184]. Cf Crennan and Kiefel JJ: 222 [584].

their affairs, and the executive and legislature are already in the process of considering reforms to the statute to redress the incompatibility with rights). Furthermore, the creative forms of judicial power may help to reduce the democratic concerns associated with rights-based judicial review. As declarations of incompatibility do not affect the validity or operation of a statute, they do not encroach on the legislature's ability to determine the state of the law as much as invalidations of a statute.[40]

On the other hand, the narrow conception of judicial power arguably restricts courts to the issuance of remedies best tailored to their expertise and resources. The power to rewrite statutes, for example, requires courts to engage with the complexities of statutory lawmaking without the expertise and resources that are available to members of the legislature (eg drafts from parliamentary counsel and review by specialist committees). Furthermore, the narrow conception of judicial power may reduce the potential for injustice for successful rights claimants. A wide range of remedies provides potential rights claimants with less certainty about the type of relief they can reasonably expect if they are successful in their claim. More specifically, declarations of incompatibility have the potential to cause injustice because they leave successful rights claimants without a remedy even though a court has found that one of their fundamental rights has been unjustifiably infringed.

The purpose of this part of the chapter is not to resolve this normative trade-off one way or the other. Instead, it is to emphasise that each principle is capable of reasonable justification and that, therefore, the narrow conception of judicial power is not merely an inconvenient feature of a constitutional system of government that should, to the best of one's ability, be avoided or circumvented. There is a normative trade-off. And the fact that one exists should have implications for the design and drafting process of a dialogue bill of rights, as will be discussed below in Part IV.

C. The Rule of Law

The dialogue model is in tension with the rule of law because the former empowers the political arms of government to avoid the legal effects of judicial decisions on rights while the latter suggests that no one, including the political arms of government, is above the law. The dialogue model's most well-known innovation is the legislative override mechanism.[41] Having the ability to empower legislatures to override judicial decisions on rights through the ordinary lawmaking process constitutes a significant departure from the traditional conception of a bill of rights whereby courts issue judgments that are not easily reversible by the political arms of government.[42]

[40] A declaration of incompatibility may still place some burden on the legislature to determine the state of the law. It would be possible to draft a bill of rights that requires the legislature to consider each declaration of incompatibility issued by the judiciary. The ACT, Queensland and Victorian bills of rights, for example, impose a similar obligation on the executive: *Human Rights Act 2004* (ACT), s 33; *Human Rights Act* (Qld), s 56; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 37.

[41] See, eg, Tushnet, 'Dialogic Judicial Review', above n 5, 205.

[42] Functional equivalents to the legislative override mechanism do, however, exist. A well-known example is the power to amend constitutions, which serves as a functional equivalent to legislative override in jurisdictions where constitutional amendment is not an onerous task: see Rosalind Dixon & Adrienne Stone, 'Constitutional Amendment & Political Constitutionalism: A Philosophical & Comparative Reflection' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford, Oxford University Press, 2016) 95.

The rule of law is a complex, contested concept that is capable of multiple, divergent definitions.[43] However, one well-established feature of the rule of law that is at the core of the concept is the proposition that no one is above the law. Tom Bingham described it in the following terms:[44]

> … all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.

In 2015, Lord Neuberger of the UK Supreme Court expressed it even more directly:

> … one of the "fundamental components of the rule of law … is … that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive."[45]

The dialogue model's legislative override mechanism does not directly violate this aspect of the rule of law. It does not allow a government official, state authority or the executive to avoid compliance with a judicial decision. Only the legislature has the power to override a judicial decision under the dialogue model. And there is nothing inherently or necessarily offensive to the rule of law with the legislature overriding a judicial decision. It occurs all the time when legislatures enact statutes to override aspects of the common law and amend statutes to override judicial decisions interpreting that statute in a particular way. Indeed, part of a legislature's constitutional responsibility in a democracy is to update the law in response to changing circumstances and community requirements. This task requires the legislature to make changes that will affect the continued applicability of common law decisions and judicial interpretations of statutes.

Although the dialogue model does not directly violate the rule of law, the two concepts are nevertheless in tension with each other for the following reason. There is a risk that legislative override will, in effect, operate as a form of executive override. As mentioned above in Part III(A), the executive typically exerts a large degree of control over the legislature in a system of responsible government. In particular, it generally has the ability to introduce proposed laws into the legislature, use its control over the legislative timetable to ensure proposed laws are debated according to its preferred schedule, and secure the passage of proposed laws through the lower legislative chamber. As discussed above, other features of the constitutional system of government will alter the precise degree of control the executive exercises over the legislature. The presence of an upper legislative chamber dilutes the executive's control to the extent that the chamber is not controlled by the executive and is able to block the passage of the executive's proposed laws. However, an upper legislative chamber tempers rather than eliminates the executive's position of superiority in the legislature. Even if the executive does not hold a majority of seats in the upper legislative chamber, it is generally in a strong position to negotiate with other members and parties to secure

[43] For an overview of the debate about its meaning and utility, see, eg, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, Oxford University Press, 1979) ch 11; Judith Shklar, 'Political Theory and the Rule of Law' in Allan C Hutchinson & Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 1; Richard H Fallon Jr, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1; Brian Z Tamanaha, *On the Rule of Law* (Cambridge, Cambridge University Press, 2004).

[44] Tom Bingham, *The Rule of Law* (London, Allen Lane, 2010) 8.

[45] *Evans v Attorney General* [2015] 1 AC 1787, 1818 [51]–[52].

their support (eg it can agree to take action on a separate issue in exchange for the member or party's support for the proposed law).

The greater the degree of control the executive exercises over the legislative process, the more that legislative override will operate, and appear to operate, as executive override. When legislative override is, in effect, executive override, the risk is that invocations of the override mechanism will constitute attempts by the executive to avoid unfavourable judicial decisions on rights, which would offend the rule-of-law notion that no one is above the law, rather than constitute attempts by the legislature to express reasonable, good faith disagreement with the judiciary about the scope and limit of rights, which is the purpose of the override mechanism.

The issue of executive dominance of the legislature in parliamentary systems is a potential concern that affects the resolution of all issues, not just rights. Whenever the executive exerts a large degree of control over the legislature, there is a risk that this control will be used to avoid unfavourable judicial decisions (ie to put the executive above the law). There is, in short, a general point of tension between the rule of law and executive-dominated legislatures. However, the tension is particularly acute in the context of rights issues and thus particularly relevant to discussions about the dialogue model.

The executive is rarely, if ever, the plaintiff and typically, if not always,[46] the defendant in human rights cases. As a result, it seldom has anything to gain, in a direct and immediate sense,[47] from human rights litigation and frequently has much to lose in the form of adverse verdicts preventing it from taking particular actions and requiring it to pay damages to successful claimants. Thus, the issue of rights is an area where the executive is likely to be strongly tempted to use its control of the legislature to avoid the effects of judicial decisions because they generally hinder and rarely help it.

Furthermore, judicial decisions on rights often concern the most fundamental interests of the most vulnerable persons in society. A racial or religious minority seeking to be treated in a non-discriminatory manner, a prisoner seeking not to be subject to cruel or unusual punishment, and a group of indigent persons seeking access to healthcare or shelter are paradigmatic instances of the types of cases that arise in the rights context. If the executive should comply with any category of unfavourable judicial decisions, it is arguably those that touch on these types of interests and protect these types of persons in society.

This point of tension may manifest in practice in one of two ways. It may lead to the overuse and abuse of the override power. In this scenario, the executive uses its control of the legislature to invoke the override mechanism on a regular basis whenever it receives an unfavourable judicial decision. Or it may lead to the atrophy of the override power.[48] In this scenario, the executive refuses to exercise the override power even when it has a reasonable, good faith disagreement with the judiciary because its control of the legislature makes any invocation of the override mechanism appear to be a violation of the rule of law. Put alternatively, the executive's control of the legislature makes any use of the override mechanism appear to be the pursuit of executive self-interest. It is also possible for both scenarios

[46] The executive will not always be the defendant where the bill of rights has horizontal effect. On the concept of horizontal effect of rights, see Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 *Michigan Law Review* 387.

[47] There the executive does, of course, gain in a less direct and immediate sense through the creation of a society where human rights are respected.

[48] On the concept of atrophy, see Adrian Vermeule, 'The Atrophy of Constitutional Powers' (2012) 32 *OJLS* 421.

to occur at the same time. The executive may refuse to exercise the override power even when it has reasonable, good faith disagreements with the judiciary except for in relation to discrete policy areas where it is determined to avoid any unfavourable judicial decision (eg a policy area where the executive obtains electoral advantages by disagreeing with the judiciary even if it has no justifiable reason for doing so).

IV. Implications for the Design and Drafting Process

In light of the foregoing discussion highlighting that a dialogue model will give rise to a number of normative trade-offs, this Part makes three suggestions for the design and drafting process of a bill of rights to ensure that they are identified, analysed and, as far as is reasonably possible, resolved prior to enactment.

A. Beyond the Bill of Rights

The normative trade-offs indicate that the design and drafting process must extend beyond the four walls of the bill of rights. In previous processes relating to dialogue bills of rights in Australia, the focus of discussion and debate has typically been on the terms of the legal instruments – the rights to be included, and the powers and responsibilities that will be conferred on each arm of government. Committees of inquiry have directed their work to answering questions such as whether the bill of rights should include economic, social and cultural rights,[49] which public entities should be subject to the bill of rights,[50] whether courts should have the power to award damages for violations of rights,[51] and whether the executive and legislature should be placed under an obligation to respond to judicial declarations of incompatibility.[52]

The surrounding constitutional environment factors into discussion, but only as a relevant piece of contextual information. It informs, for example, which jurisdictions are chosen to guide the design and drafting of the legal instrument. The ACT Consultation Committee, for example, analysed the bills of rights in Canada, New Zealand, South Africa, the UK and the US on the basis that they were 'countries with similar legal systems to Australia's.'[53] For those discussions that are centred on statutory instruments, the surrounding constitutional environment is also considered to the extent that it may pose a potential obstacle to reform. The National Consultation Committee, for example, considered whether the judicial power to issue declarations of incompatibility would be compatible with the Constitution's separation of judicial powers doctrine.[54]

[49] ACT Consultation Committee, above n 3, ch 5; Victorian Consultation Committee, above n 4, ch 2; National Consultation Committee, above n 2, [14.5].

[50] ACT Consultation Committee, above n 3, [4.53]–[4.54]; Victorian Consultation Committee, above n 4, ch 3; National Consultation Committee, above n 2, [14.3].

[51] ACT Consultation Committee, above n 3, [4.72]–[4.78]; Victorian Consultation Committee, above n 4, ch 6; National Consultation Committee, above n 2, [14.11].

[52] ACT Consultation Committee, above n 3, [4.36]; National Consultation Committee, above n 2, 329–30.

[53] ACT Consultation Committee, above n 3, [3.1].

[54] National Consultation Committee, above n 2, 327–29.

Importantly, however, in these discussions the surrounding constitutional environment was taken as a given. There was no consideration of the possibility that the introduction of a dialogue bill of rights might require reforms to other aspects of Australia's constitutional system of government. The foregoing discussion of normative trade-offs indicates that this omission is a serious mistake. As the dialogue model may give rise to points of tension with a number of features of the surrounding constitutional environment such as responsible government, the separation of powers and the rule of law, the design and drafting process must address the following three questions.

First, what are the pertinent points of tension between the dialogue model and the surrounding constitutional environment? While Part III of this chapter and other works have identified some of the most salient points of tension that are likely to arise,[55] there may, of course, be more. Furthermore, the points of tension will differ depending on the version of the dialogue model under consideration. For example, only the versions that incorporate the novel judicial remedies create a point of tension with the separation of powers.

Second, what are the respective merits of each principle? As mentioned in Part III, it is possible to advance reasonable justifications for both the dialogue model and for each competing principle. This step thus requires careful consideration of these justifications. For instance, what is the value of, on the one hand, facilitating disagreement between the executive and legislature on rights issues (ie the objective of the dialogue model's system of legislative committee review) and, on the other hand, minimising disagreement between the executive and legislature on rights (and other) issues (ie the objective of responsible government)?

Third, how should each normative trade-off be resolved? This step involves identifying the different ways in which the points of tension can be reconciled and selecting the option that most closely accords with the answer obtained to the previous question. If, for example, responsible government was considered to be a principle of fundamental importance and great value, one might decide to remove legislative committee review from the dialogue model so as not to risk facilitating any disagreement between the executive and legislature on rights issues. If, by contrast, legislative committee review was considered to be of fundamental importance and great value, one might decide to undertake sweeping reforms to the system of responsible government, even going so far as to move away from a parliamentary system (eg to a semi-presidential system) to ensure legislative disagreement with the executive on rights (and other) issues. If, however, both principles were considered to be of some merit, one might decide to undertake reforms that would adjust the balance between the two without eliminating either. For example, one could alter the upper legislative chamber's structure and powers to ensure it had sufficient incentive and capacity to draw on the legislative committee's findings to challenge the executive's positions on rights without abolishing the system of responsible government.

The important point is that resolution of these normative trade-offs requires reform of the surrounding constitutional environment to be put on the table. It requires Australia's conceptions of, inter alia, responsible government, the separation of powers and the rule of

[55] See, eg, Will Bateman & James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36 *Melbourne University Law Review* 1; Janet L Hiebert & James B Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge, Cambridge University Press, 2015); Stephenson, above n 1, ch 7.

law to be carefully scrutinised and, depending on the answers reached to the second and third questions, open to modification. While putting such well-established principles on the table for discussion may appear to be a large, daunting step, it is no less significant than seeking to introduce a bill of rights into a constitutional system that has, since its founding, not had one. Broadening the inquiry to include these matters is not akin to undertaking a wholesale revision of the constitutional system of government. A dialogue model does not create normative trade-offs with every aspect of the system. However, as it does interact closely with some features of the surrounding constitutional environment, those features must also form part of the conversation about reform.

B. Constitutional vs Statutory Reform

Given the constitutional dimensions of many normative trade-offs, the design and drafting process should include, and indeed prioritise, the possibility of introducing a bill of rights by means of constitutional, as opposed to statutory, reform. The risk with a statutory bill of rights is that all the normative trade-offs will be resolved in favour of the competing constitutional principles or features, leading the dialogue model to fail to achieve its stated objectives. Put alternatively, the features of Australia's constitutional system of government that operate to interfere with, and even suppress, aspects of the dialogue model will take precedence, causing the bill of rights to founder.

It is important to note that the points of tension mentioned in Part III are not directly embedded in the text of the Australian Constitution. The system of responsible government is principally a product of constitutional convention (eg the convention that the executive is formed by the political party (or coalition of parties) that holds a majority of seats in the House of Representatives) and statute (eg the *Commonwealth Electoral Act 1918* (Cth) establishes the voting system that generally results in one or two parties gaining a majority of seats in the House of Representatives). The narrow conception of judicial power embedded in the separation of powers doctrine is a product of judicial interpretation.[56] The notion that no one is above the law is a product of political norms (ie a member of the executive would face censure in the legislature if they sought to ignore a judicial decision) reinforced by judicial statements[57] and scholarly writings.[58]

As a result, it is theoretically possible to resolve these normative trade-offs in favour of the dialogue model with a statutory instrument. The introduction of a statutory bill of rights *could* prompt the legislature to challenge the executive's positions on rights on a regular basis in a robust manner and *could* prompt the judiciary to revisit its definition of judicial power. However, it is unlikely to occur for two reasons. First, the relevant institutional actors have incorporated the existing state of affairs into their conception of the constitutional system of government and thus understand a constitutional amendment to be the sole method of altering it. For example, the High Court understands the narrow definition of judicial power to form part of the separation of powers created by

[56] See above n 20.

[57] Courts are not able to enforce their judgments directly because, in the well-known words of Alexander Hamilton in *The Federalist No 78*, they have 'no influence over either the sword or the purse': 'The Judiciary Department', *The Federalist Papers* (McLean's edn, 1810), available at http://avalon.law.yale.edu/18th_century/fed78.asp.

[58] See above n 39.

the Constitution, as evidenced by the fact that it is willing to invalidate statutes that do not comply with it. As it is a well-established element of its case law, it is unlikely to alter this definition unless prompted to do so by an amendment to the Constitution.[59] Second, some of the options for altering the existing state of affairs will require constitutional amendment. For example, one method of facilitating legislative disagreement with the executive is, as mentioned above, to alter the structure and powers of the upper legislative chamber. As some aspects of the Senate's structure (eg the ability of Ministers to be selected from the Senate[60]) and powers (eg the Senate's power to block proposed laws[61]) are set out in the Constitution, they can only be changed via the formal amendment procedure.

From a design and drafting standpoint, therefore, constitutional reform should be put on the table. Furthermore, it should not be considered a subsidiary or second-best option. If anything, it should be prioritised over statutory reform because only constitutional reform allows the full range of reform options to be open for discussion.

C. Elite vs Popular Reform

Given the foregoing preference for a constitutional rather than statutory instrument, the design and drafting process will need to be inclusive and popular rather than exclusive and elite.[62] The principal reason is that an exclusive, elite reform process would generate the narrative for the proposed instrument's defeat at the referendum – that the bill of rights is an attempt to take power away from the people's representatives and place it in the hands of elite judges. While this observation may appear to be a straightforward one, to follow it would require a complete rethink about the process of rights reform that has developed in Australia over the last two decades.

Since the failed attempt to amend the Constitution to broaden its protection for rights in 1988,[63] reform efforts have focused on options that do not require popular ratification. First, energy shifted from the federal to the state and territory level where their traditions of uncodified constitutions, similar to that of the UK, impelled them towards the pursuit of bills of rights introduced by means of an ordinary Act of Parliament. In addition to the three jurisdictions (the ACT, Queensland and Victoria) that enacted statutory instruments, reports have also been produced in Tasmania and Western Australia recommending the

[59] There are, of course, no guarantees in constitutional design. Even a clear constitutional amendment purporting to alter the definition of judicial power could be ignored by the Court. On the potential for this issue to arise in the rights context in Australia, see Rosalind Dixon, 'An Australian (Partial) Bill of Rights' (2016) 14 *International Journal of Constitutional Law* 80.

[60] Australian Constitution 1901, s 64.

[61] Ibid, s 53.

[62] While it is beyond the scope of this chapter to provide a detailed account of what an inclusive and popular design and drafting process might look like, there are no shortage of examples of such processes, including the First Nation Regional Dialogues on the constitutional recognition of Indigenous Australians (Referendum Council, *Final Report* (2017)) and the constitutional conventions in Ireland (Scott Stephenson, 'Reforming Constitutional Reform' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (Canberra, ANU Press, 2017) 369).

[63] Brian Galligan, 'The 1988 Referendums and Australia's Record on Constitutional Change' (1990) 43 *Parliamentary Affairs* 497.

introduction of reforms along similar lines.[64] Second, when energy did shift back to the federal level in the late 2000s, constitutional reform was taken off the table. The National Human Rights Consultation Committee was directed by the government not to recommend a constitutionally entrenched bill of rights.[65]

This preference for statutory reform prioritised achievability at the cost of ambition and acceptance. While it maximised the likelihood of securing the enactment of a bill of rights (though even the attempt to introduce a statutory instrument at the federal level failed), it precluded the more comprehensive and far-reaching types of reforms mentioned above and meant that the public's direct approval did not need to be sought. As a result, the Australian experience to date is at risk of aligning with two hypotheses put forward by political scientists about the origins of bills of rights in other liberal democracies, neither of which should be a cause for celebration.

David Erdos has argued that inter-party competition lies behind the adoption of the bills of rights in Canada, New Zealand and the UK.[66] In each country, one of the main political parties shifted its stance from opposing to supporting the introduction of a bill of rights while in opposition during a period in which the governing political party was perceived to have abused its power. It thus used its support for a bill of rights as a policy position to defeat the governing political party at the next election by claiming it would stop future abuses of power. When that party next formed government, it followed through on its commitment and led the enactment of a bill of rights.

Ran Hirschl has argued that elite self-interest lies behind the adoption of the bills of rights in Canada, Israel, New Zealand and South Africa.[67] In each country, political, economic and judicial elites worked together to enact a bill of rights not out of a genuine commitment to human rights, but instead as a mechanism for preserving their interests by transferring power from legislatures, where their hegemony was under threat, to courts, where their interests would be protected from the vicissitudes of democratic politics.

In Australia, the pursuit of statutory reform has allowed one main political party to pursue the enactment of a bill of rights over the opposition of the other main political party,[68] aligning with Erdos' thesis about inter-party competition, and has allowed the pursuit of rights reform to be portrayed as a project principally to benefit lawyers (irrespective of the actual design of the bill of rights),[69] aligning with Hirschl's thesis about elite self-interest. By contrast, the pursuit of constitutional reform would force advocates to seek, as far as is reasonably possible, cross-party support for the proposal and inclusion of the public at

[64] Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (Report No 10, 2007); Western Australian Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act* (2007). Developments continue to occur at the state and territory level: see Legal Affairs and Community Safety Committee (Queensland), *Inquiry into a Possible Human Rights Act for Queensland* (Report No 30, 55th Parliament, 2016).

[65] National Consultation Committee, above n 2, 383.

[66] David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford, Oxford University Press, 2010).

[67] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass, Harvard University Press, 2007).

[68] In Victoria, for example, the opposition, the Liberal Party, voted against the bill establishing Victoria's bill of rights and, when elected to office in 2010, made public statements indicating a desire to repeal the law, though never followed through on them: Alexander Williams & George Williams, 'The British Bill of Rights Debate: Lessons from Australia' [2016] *Public Law* 471, 475–76.

[69] See, eg, Susan Harris Rimmer, 'Some Lawyers Take Cheap Shots, Some Even Work Pro Bono', *Analysis & Policy Observatory*, 27 January 2009, available at http://apo.org.au/node/6318.

the drafting and design stages to increase its chances for success at the referendum. As a result, a dialogue bill of rights implemented by means of a constitutional instrument not only increases its likelihood of success in practice, but also enhances its normative appeal by reducing the risk that it can be criticised on the basis that it is the product of inter-party competition and/or elite self-interest.

V. Conclusion

One might assume that the advent of the dialogue model created a more straightforward and easier path to the achievement of a bill of rights in Australia. With its legislative override mechanism, one might assume that it cleared away the largest normative impediment to rights reform – the democratic concerns that surround the exercise of rights-based judicial review. And with its ability to be implemented by means of a statute, one might assume that it cleared away the largest practical impediment to rights reform – meeting the requirements of section 128 of the Australian Constitution. This chapter challenges these assumptions.

While the dialogue model has a number of significant advantages over the traditional constitutional approaches to rights protection,[70] its numerous stages of rights review require a sophisticated and meticulous design and drafting process. That process must be one capable of undertaking a number of normative inquiries (ie identifying, analysing and resolving the various normative trade-offs) and, as a consequence, must keep the option of constitutional reform on the table despite its practical difficulties. While that may be unwelcome news for advocates of rights reform, it will help ensure that any bill of rights that does result is the product of an inclusive, popular process, a cause for celebration.

[70] Stephenson, above n 1, ch 6.