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In 1990 the New Zealand Parliament enacted the New Zealand Bill of Rights Act (NZBORA).¹ It purported to protect fundamental rights through a statute that did not claim to be a form of higher law: and as such, it did not compromise the ability of the Parliament to breach those fundamental rights if it so chose, even though that would be contrary to the country's international obligations. There was a precursor in the form of the Canadian Bill of Rights Act 1960. Canada was to adopt a supreme law approach to the protection of human rights, in the form of the Canadian Charter of Rights and Freedoms 1982, part of the Constitution Act 1982. This was planned for New Zealand, but did not achieve the necessary political support.

The New Zealand statute's methodology has been followed by the UK (Human Rights Act 1998, and also in various statutes devolving powers to some of the constituent jurisdictions of the country), Ireland (European Convention on Human Rights Act 2003), the Australian Capital Territory (ACT) (Human Rights Act 2004) and Victoria (Charter of Human Rights and Responsibilities Act 2006).

¹ So called because the Bill of Rights 1688, the English statute, remains part of the statute law of New Zealand.

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- 3 This book is concerned with the methodologies in these statutes. They have various commonalities:
- (i) They accept the relevance of international human rights standards.
 - (ii) They impose or have given rise to processes whereby the legislature has to be alerted to potential concerns about the compatibility of proposed legislation with the relevant human rights standards.²
 - (iii) An interpretive obligation is placed on the courts to strive to find a rights-compliant outcome.
 - (iv) A corollary of the this third feature combined with the lack of supreme law status for the statutes is that an outcome not compliant with rights standards remains possible, and will be a valid law.
 - (v) There is a prohibition on public bodies acting in a way that breaches fundamental rights unless the law (as subject to the interpretive obligation) requires it.
 - (vi) There are enforcement processes.
- 4 Inevitably, questions arise as to the correct interpretation of these statutes. Whilst most of the debate is in relation to what the substantive rights require, the mechanics adopted have also come in for scrutiny. The aim of this text is to review the questions of interpretation of the mechanics; and to do so in the international and comparative context in which they occur, namely that the statutes each make reference to the international context and the precursors from other jurisdictions are acknowledged.
- 5 In order better to outline some of the questions of mechanics that have arisen, the statutes themselves will be described.

I. THE STATUTES OUTLINED

A. The Canadian Bill of Rights 1960 and Charter of Rights and Freedoms 1982

- 6 The Canadian Bill of Rights 1960 and its supreme law effective replacement, the Canadian Charter of Rights and Freedoms 1982, were of central importance in the development of the New Zealand Bill of Rights Act 1990. This latter statute is the modern starting point for the other statutory bills of rights: but it would not be right to avoid giving appropriate recognition to its Canadian forebears.
- 7 It is perhaps not surprising that the first statutory bill of rights would come from Canada in 1960, given the developments in the neighbouring USA, which was beginning the active period of human rights protection with the Supreme Court headed by Chief Justice Warren, who took up that office in

² See also the Australian Commonwealth statute the Human Rights (Parliamentary Scrutiny) Act 2011, described below.

1953.³ Its purpose, as set in its preamble, reveals one of the tensions arising, namely the respective role of the courts and legislators.

The preamble states that:

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The Parliament of Canada, ... being desirous of enshrining ... human rights and fundamental freedoms ... in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada.

This affirms the centrality of those rights in the constitutional setting, but it also confirms that Parliament has the ultimate authority in this context. This provides a reminder of the difference with the USA and the power of the courts in this regard. Certainly, the mechanisms of the statute made clear that, whilst the judges had an important interpretive role, the legislature retained the final say.

The methodology adopted was as follows:

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- (i) There was a declaration that rights ‘have existed and shall continue to exist’ which was combined with the reminder that this situation had to be ‘without discrimination by reason of race, national origin, colour, religion or sex’.
- (ii) Those rights were listed.⁴ Section 5, it should be noted, preserves other rights.
- (iii) An interpretive obligation was imposed by section 2, that statutes ‘be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared’.⁵
- (iv) However, Parliament was able to override these fundamental rights: section 2 noted that the rights to be secured by interpretation were subject to Parliament requiring that a statute ‘shall operate notwithstanding the Canadian Bill of Rights’.
- (v) It was also provided that Parliament should have the relevant information before legislating: section 3 required that regulations and Bills be reviewed by the Minister of Justice to identify and report to the House of Commons on any inconsistency with the Bill of Rights.

Canada was to decide on supreme law protection for human rights. Section 52(1) of the Constitution Act 1982⁶ asserts that ‘The Constitution of Canada

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³ The famous school segregation case of *Brown v Board of Education* 347 US 483 was in 1954.

⁴ The rights to life, liberty, security of the person, property, equality before the law, and the freedoms of religion, speech, assembly and association, and of the press.

⁵ Section 2 sets out interpretations that would be prohibited, including detention that was arbitrary and treatment or punishment that was cruel and unusual; and it noted procedural rights that should be guaranteed for people arrested or detained or involved in court proceedings.

⁶ Schedule B to the UK Parliament’s Canada Act 1982, under which the UK Parliament relinquished any further legislative mandate for Canada; the preamble to the Act notes that it was passed at the request and with the consent of Canada. The UK Parliament granted independence to many former colonies in the second half of the twentieth century, typically on the basis of a Constitution with built-in protection of fundamental rights. The decolonisation process was

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is the supreme law of Canada' and sets out that the consequence of this is that 'any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect'. Section 52(2) and a schedule set out the various parts of the Constitution, in a non-exhaustive fashion.⁷ They include the British North America Act 1867, which was renamed the Constitution Act 1867, and which states in its preamble that various provinces wished to become federal dominions 'with a Constitution similar in Principle to that of the United Kingdom'.

11 Fundamental rights protection is found in Part 1 of the Constitution Act 1982, the Canadian Charter of Rights and Freedoms. However, it also has an important feature in common with the Canadian Bill of Rights, namely the 'notwithstanding clause'; and it contained a general limiting clause in relation to the rights set out, which was also to be adopted in New Zealand, the ACT and Victoria. The Charter's mechanisms are as follows:

- (i) It sets out a list of fundamental freedoms and rights.⁸
- (ii) The rights are expressed in ways that make clear they belong to everyone or all citizens, and so they impose obligations on others, including public officials.
- (iii) These rights are subject to a general limitation clause in section 1, namely the rights can be 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.
- (iv) Under the heading 'application of Charter', section 32 provides that it applies to the Federal and provincial legislatures.
- (v) However, section 33 allows these legislatures to expressly declare that a statute or provision in a statute 'shall operate notwithstanding' the various rights: this can before a five year period, which can be renewed.

B. The New Zealand Bill of Rights Act 1990 and Human Rights Act 1993

12 The New Zealand Bill of Rights Act 1990 was initially proposed as legislation of higher law status that would require a 75 per cent vote in Parliament or a majority in a referendum to be amended or repealed:⁹ but, after an extended period of discussion, it passed as a normal statute with no claim for special status.

encouraged by the United Nations, at the same time as it was also developing human rights norms, as described in Chapter 2.

⁷ See *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319 for discussion of the additional elements of the Constitution (on the basis that section 52(2) is not a comprehensive list).

⁸ They are the rights to freedom of conscience, religion, thought, belief, opinion and expression, assembly and association; the right to vote; mobility rights; the right to life, liberty, security of person, no unreasonable search and seizure or arbitrary detention, and rights on detention to reasons, to counsel and to seek habeas corpus; various fair trial rights; the right not to be subject to cruel and unusual treatment or punishment; and various equality rights.

⁹ This is described in Chapter 4.

It is a relatively short 29-section statute, the majority of which—Part 2—sets out various civil and political rights. Its mechanics, mainly contained in Part 1, are as follows:

- (i) The purpose, according to its preamble, is to affirm the country's commitment to the International Covenant on Civil and Political Rights 1966 (ICCPR) (which is discussed in Chapter 2) and to 'affirm, protect and promote human rights and fundamental freedoms'.
- (ii) It affirms the rights set out (section 2);¹⁰ other rights are expressly preserved (section 28).
- (iii) It applies to the acts of the legislative, executive and judicial branches of government and anyone performing a public function (section 3).
- (iv) But it confirms that a statute that is inconsistent with the Bill of Rights remains valid (section 4).
- (v) There is a general limiting clause, namely any rights and freedoms can be limited if that is 'demonstrably justified' (section 5).
- (vi) It imposes an interpretive obligation on judges to seek to find a rights-consistent meaning whenever that can be done (section 6).
- (vii) It requires the Attorney-General to report on Bills that appear to be inconsistent (section 7).
- (viii) One final element to note is that it is expressly provided that legal persons can benefit, which is not required by the ICCPR (section 29).¹¹

This clearly borrows from the Canadian Bill of Rights 1960 in several regards: 13

- the rights are similar;
- they are declared in a way that indicates that they already exist rather than that they are new;
- judicial interpretation to avoid a breach of rights is key;
- but there is no claim to prevent parliamentary breaching of rights;
- and to assist the parliamentary process, there is to be a review by a suitable government minister.

In addition, the New Zealand statute borrows the process of a general limitation clause from the Canadian Charter 1982. 14

¹⁰ These are the rights to life (section 8), to be free from torture or cruel treatment (section 9), to be free from medical or scientific experimentation (section 10), to be able to withhold consent to medical treatment (section 11), to vote (section 12), to freedom of thought, conscience and religion (section 13), to freedom of expression (section 14), to be able to manifest religion and belief (section 15), to assemble peacefully (section 16), to associate (section 17), to move (section 18), to be free from discrimination (section 19), to enjoy the culture, practise the religion and use the language of a minority grouping of which one is a member (section 20), and to enjoy various rights in criminal investigations and trials and other court proceedings (sections 21 to 27—though one of these, the right to liberty in section 22, is of wider application, as is the right to justice in section 27). Missing is a general right to privacy, though freedom from unreasonable search and seizure is set out in section 21 and the autonomy right in relation to medical treatment is set out in section 11.

¹¹ See Chapter 2 and Chapter 9; note that whilst the ICCPR does not apply to legal persons, the European Convention on Human Rights (ECHR) is not so limited.

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- 15 There are some developments from the Canadian model:
- (i) There is an express reference to the international framework; the rights listed are affirmed, rather than there being any suggestion that they are created, but the reference in the preamble to the commitment to the ICCPR supports the view that the rights have an international pedigree as well.
 - (ii) There is clarification that all public bodies are covered; this is perhaps implicit in the Canadian Bill of Rights, and more obviously so in the Charter.
 - (iii) The ‘notwithstanding’ clause is omitted: of course, a sufficiently clear indication in legislative language can exclude an interpretation that gives priority to a right (and without it being limited in time).
- 16 The New Zealand regime also includes the Human Rights Act 1993.¹² This continues the existence of the Human Rights Commission (which had been established by the Human Rights Commission Act 1977) and sets its functions. It also provides a detailed prohibition on discrimination and methodology for dealing with that. This right to non-discrimination is one of the rights contained in the NZBORA. The following aspects of the 1993 Act are worth noting:
- (i) The preamble notes that its purpose includes the provision of ‘better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights’.
 - (ii) The Human Rights Commission is given the remit of advocating and promoting respect for human rights in the country and also of securing harmonious relations within the country, and has a number of specific powers and duties designed to secure that, including by promoting understanding and holding inquiries (section 5).
 - (iii) It may also bring legal proceedings (section 5); an Office of Human Rights Proceedings is established to assist with the latter (section 20).
 - (iv) The Commission receives complaints about breaches of the non-discrimination provisions of the statute, and if they are not resolved the matter may be taken by the complainant or the Office of Human Rights Proceedings to the Human Rights Review Tribunal (the existence of which is continued under Part 4 of the statute).
 - (v) If the Tribunal finds a breach of the non-discrimination provisions, it may award appropriate relief, including injunctions, damages or declarations (and the person against whom the complaint is made can seek a declaration that there was no breach of the Act); there are appeal routes to the High Court.
 - (vi) The declaratory power includes that of declaring a statute inconsistent with non-discrimination standards.
 - (vii) Such a declaration has to be reported to Parliament.

¹² Note that Canada also has its Human Rights Act 1977, which indicates in its preamble that its purpose is to extend the prohibition on discrimination, and establishes the Canadian Human Rights Commission and a Human Rights Review Tribunal to adjudicate on disputes arising.

The Human Rights Act 1993 contains express provisions as to remedies that are absent from the NZBORA; as noted, one of those remedies is the power to grant a declaration that a statute breaches the non-discrimination obligation, which has to be reported to Parliament to allow a decision to be taken as to corrective action. This power was added by the Human Rights Amendment Act 2001, which also applied the non-discrimination provisions to central government (adding Part 1A to the 1993 Act). 17

C. UK—The Human Rights Act 1998

Next in the chronology of statutes, the Human Rights Act 1998 followed the model adopted by the NZBORA, with some modifications and supplements. It is somewhat longer, with 22 sections supplemented by four schedules. Its key features are as follows: 18

- (i) There is purposive reference in the preamble to transnational obligations, namely those arising under the European Convention on Human Rights 1950 (ECHR) (which is described in Chapter 2).
- (ii) The relevant rights are set out by reference to selected rights in the ECHR, which are set out in a schedule;¹³ a Minister may amend the Act to allow additional rights set out in protocols to the ECHR to be secured under the Act (section 1(4)).
- (iii) Other rights are expressly preserved (section 11).
- (iv) The ECHR-based rights are subject to any derogation or reservation (section 1); the making or continuation of such derogations or reservations is governed by sections 14–17, including time limits and reviews.
- (v) The jurisprudence of the bodies that exist under the ECHR must be taken into account (section 2(1)); the statute also makes provision for the method of appointing the UK judge to the European Court of Human Rights (ECtHR) (section 18).

¹³ Section 1 of the Act defines the relevant provisions of the ECHR, which are set out in Schedule 1. They are the rights to life (Article 2; and note also that the Thirteenth Protocol, which abolishes the death penalty in any circumstance, was added to the Schedule by the Human Rights Act 1998 (Amendment) Order 2004, SI 2004/1574, to reflect the ratification of the Thirteenth Protocol in place of the Sixth Protocol, which allowed the death penalty in time of war); to be free from torture or inhuman or degrading treatment or punishment (Article 3); to be free from slavery or forced labour (Article 4); to liberty, including ancillary protections (Article 5); to a fair trial, including various specifics in a criminal context (Article 6); to be free from retrospective criminalisation or heavier penalties (Article 7); to respect for private and family life (Article 8); to freedom of thought, conscience and religion (Article 9); to freedom of expression (Article 10); to peaceful assembly and association (Article 11); to marry and found a family (Article 12); to freedom from discrimination in relation to other fundamental rights (Article 14); to peaceful enjoyment of property (Protocol 1, Article 1); to education (Protocol 1, Article 2); to free elections (Protocol 1, Article 3). Also included are Article 16 (allows restrictions to be imposed on the political activity of those from overseas, notwithstanding Articles 10, 11 and 14), Article 17 (prevents the misuse of rights so as to limit the rights of others beyond what is permitted), and Article 18 (any limitations on rights cannot be misused).

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- (vi) A strong interpretive obligation is imposed to find a Convention-compliant reading of statutes (both primary¹⁴ and secondary) 'so far as it is possible to do so' (section 3).
- (vii) If the process of interpretation of a primary statute cannot secure compatibility, a declaration of incompatibility can be granted by the higher courts; in relation to secondary legislation, the declaration can be made if primary legislation requires the incompatible situation (section 4).
- (viii) The Crown is entitled to intervene in any proceedings which might lead to a declaration of incompatibility and so must be given notice (section 5).
- (ix) The incompatible legislation must be followed (section 4(6)), but a Minister may amend it if there are 'compelling reasons' to do so (section 10).¹⁵
- (x) It is unlawful for a public authority to act incompatibly with the Convention rights set out in the statute unless primary legislation requires it (section 6).
- (xi) This unlawfulness can be raised as a defence but can also give rise to proceedings by any victim of the breach of Convention rights (section 7), which may lead to a remedy including damages (section 8), even against a court if there was a deprivation of liberty (section 9(3)).¹⁶
- (xii) Proposed legislation promoted by the government must be accompanied by a statement to Parliament from the relevant Minister that the Bill is compatible with the Convention rights or, if not compatible, that it is wished that Parliament proceed in any event.

19 Again there are a number of clear similarities with the NZBORA:

- there is the clear reference to international obligations;
- other rights are expressly preserved;
- the application to the various branches of the state and those carrying out public functions is similar;
- there is a strong interpretive obligation;
- but the legislature has retained the power to breach rights (and hence the relevant international obligation).

20 There are also some substantial differences, including some additions and other elements that have been removed:

- (i) The first difference is the reliance on the ECHR; the UK is a party to the ICCPR,¹⁷ but it does not recognise the jurisdiction of the UN Human Rights Committee to consider individual complaints under the First Optional Protocol to the ICCPR;¹⁸ however, applications can be made to the

¹⁴ It is defined very widely in section 21 to include not just Acts of Parliament but also a Measure of the Church Assembly or the General Synod of the Church of England and also an Order in Council reflecting prerogative powers.

¹⁵ This is also permitted if there is a finding by the ECtHR that legislation breaches the Convention.

¹⁶ Section 12 notes the importance of freedom of expression if any relief is being considered that might impinge on that right; and section 13 that special regard be had to the right of freedom of thought, conscience and religion when issues arise relating to religious organisations.

¹⁷ See Chapter 2.

¹⁸ *ibid*; most other parties to the ECHR also allow complaints under the ICCPR.

ECtHR, and part of the rationale for the statute was to domesticate complaints that were otherwise being argued before the ECtHR.¹⁹

- (ii) There is no attempt to define rights to reflect those guaranteed in international law (and indeed there is no indication that the rights already exist and so are merely being affirmed): rather the rights set out in the international treaty are simply incorporated;²⁰ this is also explained by the purpose of allowing arguments based on the ECHR to be resolved in the domestic courts.
- (iii) There is no general limiting clause; this is also explained by the reliance on the text of the international treaty.²¹
- (iv) There is no express indication in the UK statute that both legal and natural persons are covered, but this is readily explicable by the fact that the ECHR may be used by ‘non-governmental organisations’ and so includes corporations; accordingly, the UK statute did not need to make clear that legal persons were also covered.
- (v) The courts are obliged, not merely given a power, to take into account jurisprudence arising from the relevant international bodies.
- (vi) There is express language relating to remedy provisions, including the declaration of incompatibility, missing under the NZBORA but present in relation to discrimination complaints under the Human Rights Act 1993 (NZ) following the latter’s substantial amendment after the UK legislation was introduced.
- (vii) The statements to Parliament differ in several respects as between the two jurisdictions, although there is the similarity that there is no indication of the detail that is required: (a) in the UK, they come not from the Attorney-General but from the Minister in charge of the Bill; (b) they are limited to government bills; (c) the UK statute refers to a statement of either compatibility or not, whereas the New Zealand obligation is limited to inconsistency.

Three other parts of the UK regime should be noted. In the first place, the Westminster Parliament appointed a Joint Committee on Human Rights to carry out scrutiny of proposed legislation for human rights matters; this supplements any statutory obligation placed on Ministers as to statements.²² Secondly, the legislative programme of which the Human Rights Act 1998 was part also included devolution legislation for Scotland, Wales and Northern Ireland. More specifically, the devolved assemblies are limited in relation to the rights protected under the ECHR: they have no power to breach them. The Scottish Parliament and the Northern Ireland Assembly have no competence

¹⁹ See Chapter 4.

²⁰ There is also the language relating to and regulating derogations and reservations, which is missing in the New Zealand statute.

²¹ The explanation for the different approaches to the definition of the substance of rights, where the ICCPR and the ECHR are similar but differ from their predecessor, the Universal Declaration of Human Rights 1948, is developed in Chapter 5.

²² See Chapter 6.

to pass legislation that breaches the ECHR: and a purported legislative measure that was outside competence will not be valid.²³ Similarly, the Welsh Assembly cannot pass secondary legislation in breach; and now that it has some primary legislative powers, those statutes are also invalid if there is a breach of the ECHR.²⁴ In addition, there are restrictions on executive actions, to the effect that there is no power to make secondary legislation or take any other action that breaches the ECHR.²⁵

- 22 Finally, there is also provision for national human rights institutions. The Commission for Equality and Human Rights is established by the Equality Act 2006, its functions under section 3 including developing respect for and protection of human rights; section 9 indicates that this covers both rights guaranteed under the ECHR and Human Rights Act 1998 and other human rights. It replaced three previous commissions, being the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission. The merged Commission operates in England, Scotland and Wales; in Scotland there is also the Scottish Commission for Human Rights, established by the Scottish Commission for Human Rights Act 2006 with the duty of promoting human rights (both the ECHR and other rights) and best practice in human rights matters. In Northern Ireland, similar functions are exercised by the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland, which were both established as part of the devolution legislation, the Northern Ireland Act 1998.²⁶

D. Ireland—The European Convention on Human Rights Act 2003

- 23 The Irish legislature's introduction of a non-higher law statute is interesting in light of the existence of a supreme law Constitution that has some protection for fundamental rights that might have been supplemented. Instead, the Oireachtas chose to offer protection to additional human rights by adopting the statutory model of the strong interpretive obligation. Of course, it is easier to pass a statute than amend a constitution: the process in Ireland requires a Bill passed through its parliamentary stages and an approving referendum,²⁷

²³ Section 29 of the Scotland Act 1998, and section 6 of the Northern Ireland Act 1998.

²⁴ Section 107 of the Government of Wales Act 1998 for the initial position; section 81 of the Government of Wales Act 2006 repeats this, and section 94 provides the limits of legislative competence for the Assembly's Measures.

²⁵ Section 57 of the Scotland Act 1998; section 24 of the Northern Ireland Act 1998; and section 81 of the Government of Wales Act 2006.

²⁶ Paragraph 5 of Part 6 of the Belfast Agreement of 10 April 1998 between the UK and Ireland—the Good Friday Agreement—contains an agreement as to the establishment of the Human Rights Commission and the Equality Commission; para 9 entails the Irish government doing the same. (Available at www.gov.uk/government/publications/the-belfast-agreement (last accessed 4 April 2014).)

²⁷ Article 46 of the Constitution of Ireland 1937.

but there have been a significant number of amendments, including in relation to various aspects of Irish integration with the European Union.

The Irish statute, the European Convention on Human Rights Act 2003, is more akin to the New Zealand model in terms of its length. Its mechanics are as follows: 24

- (i) The purpose noted in the preamble is of giving effect to international obligations (though it is made clear that this is subject to the Constitution).
- (ii) The rights which are domesticated are various ones set out in the ECHR or its protocols (section 1 and various schedules).²⁸
- (iii) This is subject to any derogation (section 1).
- (iv) Judicial notice is to be taken of the Convention and the jurisprudence of the Convention bodies to assist this, giving ‘due account’ to their rulings (section 4).
- (v) There is a strong interpretive obligation: ‘in so far as is possible’ a compatible interpretation shall be given in relation to any statute or rule of law but the obligation is itself subject to rules of law relating to interpretation (section 2).
- (vi) If this interpretive obligation does not run, a declaration of incompatibility may be made in relation to any statute or rule of law (section 5).
- (vii) The Attorney-General and the Human Rights Commission may intervene in proceedings that may lead to a declaration of incompatibility (section 6).
- (viii) Such a declaration shall be laid before the Oireachtas (section 5).
- (ix) Organs of the state have to perform their functions in a manner that is compatible with human rights obligations unless a statutory provision requires otherwise (section 3).
- (x) A breach of these obligations can lead to proceedings and damages (section 3).
- (xi) When a declaration of incompatibility is granted, whilst the law remains in effect, an application may be made to the Attorney-General for *ex gratia* compensation for any damage caused by the situation (section 5).

²⁸ Section 1 defines the Convention rights covered as those in the ECHR and Protocols 1, 4, 6 and 7; these are set out in full in schedules 1–5 to the Act. In addition to the rights covered in the UK statute, listed at n 13 above, the Irish statute has the right to an effective remedy (Article 13), the prohibition on imprisonment for debt (Protocol 4, Article 1), freedom of movement (Protocol 4, Article 2), the right of nationals to enter and be in their territory (Protocol 4, Article 3), the prohibition on the collective expulsion of non-nationals (Protocol 4, Article 4), procedural rights in deportation cases (Protocol 7, Article 1), the right to appeal in criminal cases (Protocol 7, Article 2), the right to compensation for a miscarriage of justice (Protocol 7, Article 3), the prohibition of double jeopardy (Protocol 7, Article 4), and equality between spouses (Protocol 7, Article 5). The non-death penalty provision was the Sixth Protocol, which allows it in wartime, rather than the complete abolition in the Thirteenth Protocol. This was changed by the Irish Human Rights and Equality Commission Act 2014, which updated the scheduled provisions to cover amendments to the Convention and add the Thirteenth Protocol.

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- 25 A review of the mechanics of the 2003 Act shows its similarities with the New Zealand and/or UK precursors. These include the following elements that are express in both of these earlier statutes:
- there is the clear reference to international obligations;
 - the statute applies to the various branches of the state;
 - there is a strong interpretive obligation;
 - but the legislature has retained the power to breach rights (and hence the relevant international obligation).
- 26 Some of the matters added to the statutory language in the UK are also found suitable for the Irish regime:
- (i) The transnational law that is incorporated is the ECHR;²⁹ although Ireland is also a party to the ICCPR, and more importantly follows the majority of European countries in allowing complaints to be taken to the Human Rights Committee of the UN under the First Optional Protocol,³⁰ the purpose behind the statute is to allow arguments in the Irish courts that would otherwise occur in Strasbourg.
 - (ii) Due account has to be given to ECHR case law.
 - (iii) Breaches of rights by organs of the state may lead to a remedy in damages if not protected by a statute.
 - (iv) Declarations of inconsistency can be granted if the interpretive obligation cannot secure compliance with rights.
 - (v) There is a right for central government to intervene in proceedings that might lead to a declaration.
- 27 There are also some noticeable modifications:
- (i) First, the interpretive obligation in section 2 also covers any rule of law, which section 1 defines to include the common law; but it is itself subject to rules of law.
 - (ii) Secondly, there are a number of modifications to the regime relating to declarations of incompatibility: (a) the Human Rights Commission is also given a right to intervene in the proceedings; (b) there is a remedy provision where a declaration of incompatibility is granted, in the form of the possibility to apply for *ex gratia* compensation; (c) there is no power for a Minister to take action on the making of a declaration of incompatibility; rather, there is an express requirement that the legislature be alerted.
 - (iii) Among the additional rights incorporated in the 2003 Act is the Article 13 ECHR right to an effective remedy, which is absent from the UK statute.

²⁹ The use of the ECHR text means that there is no need for general limiting language of the sort found in the NZBORA.

³⁰ See Chapter 2.

- (iv) Missing is an express indication that other rights are preserved, save those in the Constitution; however, it would be an unusual construction to suggest that other rights recognised in the law are removed by implication.
- (v) There is no requirement for parliamentarians to be advised as to the compatibility or not of proposed legislation with the ECHR.³¹

The Irish Human Rights Commission was established by the Human Rights Commission Act 2000 to promote human rights as set out in the Irish Constitution and also in any international treaties to which Ireland is a party; there is also an Equality Authority. At the time of writing, there is a proposal to merge the two bodies, and a Bill to achieve that is before the legislature. 28

E. Australian Capital Territory—The Human Rights Act 2004

The ACT was the first Australian jurisdiction to adopt the New Zealand approach.³² Its Human Rights Act 2004, which has been subject to some amendments, involves the following elements: 29

- (i) Although the preamble makes various comments about the importance of human rights without acknowledging any purpose of implementing international obligations (which would be a function of the Commonwealth Parliament), the statute contains a clear acknowledgement of the international basis for the rights involved: whilst it sets out in Part 3 a list of civil and political rights, and since an amendment in 2012, it also lists a single economic, social and cultural right in Part 3A, being a right to education, it also contains the following: (a) Schedules 1 and 2, which list, respectively, tables setting out which article of the ICCPR and which article of the International Covenant on Economic Social and Cultural Rights (ICESCR) provide the equivalent right in international law;³³ (b) a statutory note at the outset of Part 3, which notes that the primary source of the rights listed is the ICCPR, and a similar note at the outset of Part 3A, which credits the ICESCR; (c) section 7, which notes that the Act is not exhaustive of rights and indicates that there are other rights under the ICCPR and the ICESCR.
- (ii) It sets out the various rights guaranteed.³⁴

³¹ However, see Chapter 5: it is an accepted function of the Attorney-General.

³² Australia is a State Party to the ICCPR, and allows complaints to be taken under its Optional Protocol: see Chapter 2.

³³ Whilst the right to education is part of the First Protocol to the ECHR, which is a convention concerned with civil and political rights, education is classed as an economic, social and cultural right in the UN treaty system.

³⁴ Section 5 of the Act defines 'human rights' for the purposes of the statute as the civil and political rights set out in Part 3 and the economic, social and cultural rights in Part 3A. The rights guaranteed are: recognition and equality before the law (section 8), life (section 9), no torture or

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- (iii) There is a general limiting clause (section 28).
- (iv) It is made clear that only individuals have rights (section 6).
- (v) It is also made clear that there are other rights, including those in international law (section 7).
- (vi) The statute expressly applies to all the laws of the ACT (section 29).
- (vii) This application to laws is accompanied by an interpretive obligation on the courts, namely that ‘so far as it is possible to do so’ the law should be construed so as to comply with human rights; however, it is added that this must be ‘consistently with its purpose’ (section 30).³⁵
- (viii) In carrying out the task of interpretation, foreign and international court and tribunal judgments may be taken into account, but there is guidance on the factors relevant to the exercise of this discretion (section 31).
- (ix) The Attorney-General may intervene in any proceedings relating to the application of the Act (section 35) and the Human Rights Commission may seek leave to intervene (section 36).
- (x) If the interpretive obligation does not succeed in securing a rights-compliant outcome, a declaration of incompatibility can be granted (section 32).
- (xi) The Attorney-General and Human Rights Commission must be given notice of any proceedings that may lead to such a declaration (section 34).
- (xii) If a declaration of incompatibility is granted, the Attorney-General must present it to the legislature and then report on it (section 33).
- (xiii) Public authorities and those carrying out public functions may not act in breach of human rights unless required to do so by the law (section 40B).³⁶
- (xiv) There is significant guidance given on what amounts to a public authority and public function (sections 40 and 40A); and bodies may apply to be considered public authorities (section 40D).
- (xv) Legal proceedings can be taken (section 40C).
- (xvi) It is expressly indicated that damages cannot be awarded unless they arise under another cause of action (section 40C(4)–(5)).
- (xvii) The Attorney-General has to provide written statements as to the compatibility or otherwise of government Bills before the legislative assembly (section 37).

inhuman or degrading treatment, including non-consensual medical or scientific experimentation (section 10), protection of the family and children (section 11), protection of privacy and reputation (section 12), freedom of movement (section 13), freedom of thought, conscience and religion (section 14), assembly and association (section 15), holding and expressing opinions (section 16), taking part in public life (by citizens) (section 17), liberty and security of person and humane treatment in detention (sections 18 and 19), fair trial rights and specific rights in the criminal process, including additional rights for children (sections 20–25), no slavery or forced labour (section 26), and rights for minorities (section 27). There is also the right to education (section 27A).

³⁵ This interpretive obligation was reworded under the Human Rights Amendment Act 2008 to add the ‘consistently with its purpose’ language. This occurred after the enactment of the Victorian Charter of Rights and Responsibilities 2006, which has similar language.

³⁶ These express remedy provisions were added by the Human Rights Amendment Act 2008.

- (xviii) A standing committee of the Legislative Assembly has to consider the human rights implications of any Bill (section 38).
- (xix) Various review processes were established: (a) the initial version of the statute required the operation of the Act as a whole to be reviewed in 2006 and 2009; (b) there is a process for reviewing the effect of territory laws on human rights, involving its Human Rights Commission and the Attorney-General (section 41); (c) the addition of the right to education has brought with it an obligation on the Attorney-General to review the situation of economic, social and cultural rights in 2014 (section 43).

The Human Rights Commission in the territory was set up by the Human Rights Commission Act 2005. It has the function of promoting the Human Rights Act 2004 and also the Equality Act 1991. 30

As is clear from the outline, the Human Rights Act 2004 builds on what had gone before, and involves a significant number of clarifications and extensions, and also some restrictions: 31

- (i) There is the clear indication that people in the ACT have rights that arise from international sources.
- (ii) There is an express limitation that the rights being protected are those of individuals only, which is consistent with the international obligation on Australia, but narrower than the choice made in New Zealand.
- (iii) There is the express indication that the strong interpretive obligation is accompanied by the need to remain faithful to the purpose of the legislation being construed.
- (iv) Decisions as to the use of international and comparative case law to assist in the meaning of rights is a discretionary matter and factors relevant to the discretion are set out.
- (v) There is also significant guidance on what is meant by a public body or a body exercising public functions.
- (vi) Remedies that can be granted under the statute for a breach of rights do not include damages.
- (vii) There is a legislative obligation for Parliament to have a human rights scrutiny mechanism.
- (viii) Reviews of the operation of the statute are required.

F. Victoria—Charter of Human Rights and Responsibilities Act 2006

The ACT legislation was followed after a couple of years by Victoria, which adopted the Charter of Human Rights and Responsibilities Act 2006 (which in turn inspired some amendments to the ACT statute). Its structure involves the following elements: 32

- (i) Its sets its purpose as being the protection and promotion of civil and political rights (section 1; section 3 contains the limitation of civil and political rights).

- (ii) The rights are set out in Part 2 of the Charter.³⁷
- (iii) It is made clear that only individuals have rights (section 6).
- (iv) There is an express limitation clause (section 7(2)).
- (v) In addition, there is also an express power given to Parliament to override the application of the Charter (sections 1(3)(a) and 31).³⁸
- (vi) It is noted expressly that other rights continue to exist, and they may arise under international law, the common law, the Victorian Constitution and Australian Commonwealth law (section 5).
- (vii) There is the strong interpretive obligation in relation to legislative provisions, expressed as 'so far as it is possible to do so consistently with their purpose' (sections 1(2)(b) and 32(1)).
- (viii) It is made clear in section 49, the transitional provisions section, that past and future legislation is covered, and so this interpretive obligation has retrospective effect.
- (ix) It is noted that in applying the interpretive obligation, international and comparative jurisprudence may be considered (section 32(2)).
- (x) There is also a process for lower courts and tribunals to refer cases to the Supreme Court of Victoria (the higher court in the State) to deal with questions arising under the statute (section 33).
- (xi) The Attorney-General may intervene in such proceedings; and notice is to be given to the Equality and Human Rights Commission (sections 34–35).
- (xii) If the interpretive obligation does not allow a right to be secured, declarations of inconsistent interpretation may be granted, unless the legislative override has been used (sections 1(2)(d) and 36).
- (xiii) The Attorney-General and the Equality and Human Rights Commission are given the chance to intervene if such a declaration is being considered (section 36).
- (xiv) If a declaration is made, the Minister in charge of the relevant legislation has to respond to it and cause the legislature to be informed (section 37).
- (xv) There is a duty on public authorities not to breach human rights in their public actions unless the law requires it (sections 1(2)(c) and 38).
- (xvi) There is considerable guidance as to what is a public authority (sections 4 and 6(2)); it is made clear that religious bodies cannot be required to act against their beliefs (section 38).
- (xvii) Legal proceedings may be brought to seek a remedy (though it has to be an existing cause of action) (section 39).

³⁷ The rights guaranteed are: recognition and equality before the law (section 8), life (section 9), no torture or inhuman or degrading treatment, including non-consensual medical or scientific experimentation (section 10), no slavery or forced labour (section 11), freedom of movement (section 12), protection of privacy and reputation (section 13), freedom of thought, conscience and religion (section 14), holding and expressing opinions (section 15), assembly and association (section 16), protection of the family and children (section 17), taking part in public life (section 18), cultural and minority rights (section 19), property rights (section 20), liberty and security of person and humane treatment in detention (sections 21 and 22), and fair trial rights and specific rights in the criminal process, including additional rights for children (sections 23–27).

³⁸ In addition, section 48 makes clear that the law relating to abortion and child destruction is not changed.

- (xviii) Damages may not be awarded for a breach of the Charter (section 39(3), but may arise from the other cause of action (section 39(4)).
- (xix) Statements of compatibility are required from any person introducing legislation (sections 1(2)(d) and 28).
- (xx) There is also a requirement of scrutiny by a parliamentary committee (sections 1(2)(d) and 30).
- (xxi) There is a requirement that the Charter be reviewed after four and eight years, including as to whether it should be extended in scope (sections 44 and 45).³⁹

The Charter also changes the former Equal Opportunity Commission into the Victorian Equal Opportunity and Human Rights Commission (by amending the Equal Opportunity Act 1995) and grants it additional functions (sections 1(3)(b) and 40–43). 33

As was the case with the ACT legislation, the Victorian Charter reflects what had gone before but makes various modifications and clarifications, and takes some things away. These points of difference are as follows: 34

- (i) There is a clear statement of rights arising from other sources being preserved (including at that point a reference to rights arising from international sources); but, aside from the natural implication arising from the fact that international jurisprudence may be relevant, there is much less of an emphasis in the legislative language of the value of international human rights law.
- (ii) As in the ACT, there is an express limitation that the rights being protected are those of individuals only, as is the ICCPR obligation.
- (iii) There is the express indication that the strong interpretive obligation is accompanied by the need to remain faithful to the purpose of the legislation being construed, which was then adopted in the ACT by a legislative amendment.
- (iv) There is also significant guidance on what is meant by a public body or a body exercising public functions.
- (v) The remedy provision depends on other causes of action rather than being a fresh one.
- (vi) There is a legislative obligation for Parliament to have a human rights scrutiny mechanism.
- (vii) But the need for statements of compatibility as to Bills being introduced to the legislature is on whoever introduces the Bill.
- (viii) There is also the express legislative override provision (which is borrowed from the Canadian Bill of Rights and Charter).
- (ix) Reviews of the operation of the statute are required, as in the ACT.

³⁹ The first review was carried out in 2011 by the Equality and Human Rights Commission; the government response was that the Charter remain with some slight modifications: available at www.parliament.vic.gov.au/sarc/article/1446 (last accessed 22 October 2014).

G. Australia—Human Rights (Parliamentary Scrutiny) Act 2011

- 35 Although the Commonwealth of Australia does not have a bill of rights, there is legislation that introduces a regime of scrutiny for compliance of Commonwealth Bills with human rights standards, which borrows from the mechanisms that feature in the statutes described above or in supplemental practice. The Human Rights (Parliamentary Scrutiny) Act 2011 contains the following mechanisms:
- (i) It establishes a Parliamentary Joint Committee on Human Rights to examine Bills for human rights compliance (sections 4–7).
 - (ii) It requires those who propose legislation to make statements as to the compatibility of a Bill with human rights; there is a similar regime in relation to legislative instruments (sections 8 and 9).
- 36 It is to be noted that the human rights that are covered by this legislation are the entirety of Australia’s obligations under the main UN human rights treaties, which are described in Chapter 2:
- (i) the International Convention on the Elimination of All Forms of Racial Discrimination 1965;
 - (ii) the ICESCR 1966;
 - (iii) the ICCPR 1966;
 - (iv) the Convention on the Elimination of All Forms of Discrimination Against Women 1979;
 - (v) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984;
 - (vi) the Convention on the Rights of the Child 1989;
 - (vii) the Convention on the Rights of Persons with Disabilities 2006.

II. THE QUESTIONS TO BE EXPLORED

- 37 Whilst the UK and New Zealand follow a constitutional theory that the legislature can do anything (subject to arguable limits that would be so heinous that no judge would allow the statute to be enforced),⁴⁰ the contrasting tradition of a legislature being bound by a supreme law constitution is followed in Ireland and Australia, and since 1982 in Canada. The latter has a full range of civil and political fundamental rights; Ireland has a limited number in express terms, and Australia none (at least none that are express). Although the

⁴⁰ Note that when New Zealand decided to remove the jurisdiction of the Privy Council as the final appellate court and establish its own Supreme Court, section 3(2) of the Supreme Court Act 2003 (NZ) noted that the statute did not affect ‘New Zealand’s continuing commitment to ... the sovereignty of Parliament’. There is also the Constitution Act 1986 (NZ), which regulates matters such as requiring the Executive to be formed from Parliament and indicating that Parliament has full power to make laws, confirming the Westminster model.

protections being considered in this text are not in supreme law constitutional documents (and even the Canadian situation is one that allows legislatures to override fundamental rights), the different constitutional settings must be borne in mind.⁴¹

All the countries noted follow a dualist tradition such that international treaty law is not part of domestic law,⁴² but have declared themselves to be bound by international human rights standards. In this context, whilst there are varieties in the mechanics in the various bills of rights statutes, the common purpose of protecting human rights and the similarities in the methodologies, a comparative analysis may illuminate controversies that have arisen at the macro and micro level. At the latter level, there have been questions arising as to the proper understanding of various of the mechanics. For example, how far does the concept of a public body go, given the expansion of areas where there some form of state intervention and the countervailing extension of the process of privatising operations previously carried out by a governmental body? This might be assisted by knowing what happens under the other statutes. Another example may be how far the interpretive obligation goes. 38

This interpretive obligation also illustrates the more macro level of tension, which revolves around the propriety of judicial involvement and whether it goes far enough or too far. Some prefer supreme law protection for human rights, and may find that the interpretive obligation is inadequate because the legislature should not be allowed to breach fundamental rights (perhaps particularly as that is impermissible as a matter of international law). Others prefer that legislatures should have the power to determine the content of rights and so are concerned that interpretive obligations be constrained so as not to give too much power to the judiciary, often citing the lack of a democratic mandate for that. 39

What underlies this debate is the fact that the interpretive power has two elements to it. The first is to determine the substantive content of the right in play; the second is to decide whether legislative language is on its normal reading consistent with these standards and, if not, whether there is some other reading available. Since the rights in question are invariably stated at a relatively high level of principle and often involve a balancing process, there may be room for differences of view as to what they mean. Moreover, these meanings may change over time. Who should determine the appropriate priority to the competing elements? If it is to be the judges, which is what these statutes indicate, what level of deference should they give to the elected branch of the state in this regard? 40

A central part of the context for these statutes is the growth of international legal standards designed to secure fundamental rights across national 41

⁴¹ This book cannot do justice to the subtleties of all the constitutional traditions in the several countries with which it is concerned.

⁴² The USA provides a contrast in that Article 6 of its Constitution makes international treaties part of domestic law.

boundaries. These standards are split into two broad categories, those which are civil and political in nature and those which are economic, social and cultural. The former are the ones to which the bills of rights statutes are designed to give effect; they can be found in such treaties as the ICCPR and the ECHR, which are described in Chapter 2. They are designed to secure the imperative identified in the aftermath of the Second World War of the need to have enforceable protection for human rights, both in international and domestic law. Most countries have engaged fully with the international regimes, including those which have statutory bills of rights.

- 42 Indeed, as noted, a common feature of the statutes is a legislative purpose of giving effect to these international obligations. This is why the first substantive chapter of this book examines the state obligation as to compliance. Neither the ECHR nor the ICCPR require direct incorporation. This puts the focus on the domestic arrangements, but also raises the question of the extent to which the content of rights is determined internationally or pursuant to domestic sovereignty. Since the international obligations have existed for longer than the various bills of rights statutes, there are also questions of the extent to which there was compliance in any event, which may raise whether the statutes consolidate or develop what already existed.
- 43 There is an interplay between the different features of the various bills of rights statutes. For example, acts of public authorities that breach the fundamental rights protected will be unlawful unless the authorities are required so to act by another statute (or perhaps another rule of law): but this involves reviewing the extent to which the interpretive obligation allows an apparently inconsistent legal provision or rule to be interpreted in a rights-compliant fashion. And the permissible extent of interpretation may turn on the material that has been put in front of the legislature for them to determine whether or not their perception is that rights-compliant language is being used. In short, the questions discussed are often interlinked. As such, the book could take various orders.
- 44 However, the following order is used.
- Chapter 2 sets out the general obligation to guarantee the standards set out in international human rights treaties, and in particular those involving the civil and political rights that are typically in play; and the specific obligation to have an effective domestic remedy. It also notes the international monitoring regime that is designed to ensure that the international obligation is respected.
 - Chapter 3 examines the extent to which this obligation was met through common law traditions, including the interpretive techniques of legality and taking into account international treaty obligations; the limits of this are noted.
 - Chapter 4 notes the indications given by the various legislatures as to their purposes in introducing the various statutes.
 - Chapter 5 turns to the question of how the substance of the meaning of the rights is worked out, including the relationship between the

international tribunals and domestic bodies, and the roles of legislative and judicial bodies within the domestic regime.

- Chapter 6 examines the mechanism designed to ensure compliance with the international obligation in the legislative process.
- Chapter 7 turns to the question of which bodies are bound to respect the bills of rights statutes, noting the context of state liability at the international level.
- Chapter 8 deals with the technique that is central to the judicial armoury of seeking to ensure an outcome compliant with rights, namely the interpretive obligation.
- Chapter 9 examines the processes in place to allow rights standards to be litigated in the domestic arena, noting the main points of procedural law that have arisen.
- Chapter 10 reviews the remedies that are available, both when a breach of rights is found and also when the courts meet a statute that cannot be construed to support rights.
- Finally, Chapter 11 seeks to draw some brief conclusions about the extent to which the statutes and the case law interpreting them have met their purposes.