

THE PRINCIPLE OF LEGALITY: AN AUSTRALIAN COMMON LAW BILL OF RIGHTS?

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Abstract

This article examines the common law principle of legality, its content, operation and flaws, before turning to discuss the human rights protection afforded to the peoples of the Australian Capital Territory and Victoria through the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Under the common law principle of legality legislation is construed consistently with fundamental rights. The article finally compares the interpretive obligations placed on the courts by both the principle of legality and the current Australian human rights legislation to determine whether there is any weight to the proposition that the principle of legality is a common law bill of rights in Australia.

I INTRODUCTION

Australia is the only democratic country in the world without a national bill of rights of some kind.¹ While there is a plethora of legislation Australia wide dealing with particular rights, for example anti discrimination legislation, there are presently only two Australian jurisdictions that have enacted a kind of bill of rights or human rights Act.² The issue has been debated in New South Wales, Western Australia and Tasmania as well as at the federal level to no avail.³ The release of the *National Human Rights Consultation Report* in 2009 made it evident that a human rights Act of some kind, at a federal level, was desired by the community and

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1 George Williams, 'Critique and Comment, The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880, 883.

2 *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

3 Simeon Beckett, 'Interpreting Legislation Consistently with Human Rights' (2008) 58 *Australian Institute of Administrative Law* 43, 43-44.

indeed recommended by the Committee.⁴ In 2010 however it became apparent that the political inclination to carry out this recommendation did not exist.⁵ This was hardly surprising given that Australia's method of human rights protection has long been influenced by the notion that the best protection for human rights is the 'good sense of our parliamentary representatives as constrained by the doctrine of responsible government and the common law as applied by the judiciary.'⁶

Despite the lack of formal human rights protection, Australia's human rights record is significantly better than many other countries.⁷ It is no longer acceptable to think that Australia's human rights record could not be substantially improved though.⁸ Legislative and executive practices have caused Australia's human rights reputation to deteriorate. Immigration detention and the treatment of asylum seekers and refugees provide an example. Post 9/11 anti- terrorism legislation allowing for the detention of non-suspects, control orders enabling house arrest and preventative detention allowing individuals to be held without charge or trial are others.⁹

Absent a formal bill of rights of some kind, human rights protection to date has largely been an area for the courts through the application of the common law and principles of statutory interpretation. One principle invoked by the courts when a statute before them purports to interfere with human rights is the principle of legality. It provides indirect protection for rights.¹⁰ It has been applied by the courts for over a century to a host of rights.

It has been suggested that the common law rights protected by the application of the principle of legality constitute an attempt by the courts to provide, in effect, a common law bill of rights.¹¹ One of the reasons

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

5 See Attorney-General's Department (Cth), 'Australia's Human Rights Framework' (2010) <<http://www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliasHumanRightsFramework.pdf>>/.

6 Williams, above n 1, 881.

7 Ibid 882.

8 Ibid.

9 Ibid.

10 Jennifer Corrin, 'Australia: A Country Report on Human Rights' (2009) 40 *Victoria University of Wellington Law Review* 37, 41.

11 D C Pearce and R D Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6th ed, 2006) 165 [5.2]; Robin Creyke, 'The Performance of Administrative Law in Protecting Rights' cited in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights* (Ashgate Publishing, 2006) 101, 113; Chief Justice J J Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 23.

frequently cited against the adoption of an Australian bill of rights hinges on this argument. The argument has been made that rights are already adequately protected in Australia through the High Court's interpretation of the *Constitution* and the common law.¹² Further, the arrangements already in place in Australia are strong enough to provide firm rights protection and are flexible enough to respond to changing needs for future protection.¹³ This argument is further supported by the wide coverage offered by the principle of legality.¹⁴

This article does not advocate the position that Australia should not have a federal bill of rights. Human rights protection in Australia would be best afforded through the dialogue model advocated for by the National Human Rights Consultation Committee involving all three arms of government, as is seen in the ACT and Victoria. The desire for a federal bill of rights is there, but unfortunately the political inclination is not. Because of this, the role of the courts and the principle of legality are of relevance, if not importance. It is the responsibility of human rights lawyers to further explore the options available at the present and how best to use them. Looking into the distant future, should the notion of a bill of rights at a federal level gain enough political support to be drafted, it does not automatically preclude the operation of the common law. As will become evident later in this article, the rights desirous of protection under a bill of rights can differ significantly from those already recognised as attracting the operation of the principle of legality. The principle would remain one of the important 'essential tools for the judiciary in enhancing the protection of human rights in Australia.'¹⁵

For these reasons, this article will examine the proposition that the principle of legality constitutes a common law bill of rights in Australia through a detailed statement of the principle in Australia and a comparison with existing ACT and Victorian human rights legislation.

II THE PRINCIPLE OF LEGALITY

The principle of legality has long been a crucial tool of the judiciary when considering questions of statutory interpretation. The principle provides that when interpreting a statute the court will not impute

12 George Williams, *A Bill of Rights for Australia* (University of New South Wales Press, 2000) 35.

13 Hon Daryl Williams quoted in Chief Justice Paul de Jersey, 'A Reflection on a Bill of Rights' in Julian Leaser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Menzies Research Centre, 2009) 3, 13.

14 Creyke, above n 11, 115.

15 Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion & Use of Unincorporated Conventions* (Presidian Legal Publications, 2008) 49.

to Parliament an intention to abrogate fundamental rights unless express language to the contrary appears. It has been long established as part of the Australian common law, having been first articulated in the High Court in 1908 by O'Connor J, quoting from Maxwell, *On the Interpretation of Statutes*, in the case of *Potter v Minaban*:¹⁶

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.¹⁷

This statement has been consistently approved and endorsed by the High Court.¹⁸ A forceful and often cited expression of the principle was given in the joint judgment in *Coco v The Queen*:¹⁹

The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.²⁰

The phrase 'principle of legality' seems to have first been used by Sir Rupert Cross²¹ and then later by administrative law academics.²² Gleeson CJ, as he then was, first used the term in Australia in his 2000 Boyer Lecture series and went on to develop the principle substantially through cases such as *Plaintiff S157/2002 v Commonwealth*,²³ *Al-Kateb v Godwin*²⁴ and *Electrolux Home Products Pty Ltd v Australian Workers' Union*.²⁵ Following on from these cases the principle of legality in Australia represents the interpretive principle that:

16 (1908) 7 CLR 277.

17 Ibid 304, quoting P B Maxwell, *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) 122 (citations omitted).

18 Pearce and Geddes, above n 11, 184 [5.24]. See also *Coco v The Queen* (1994) 179 CLR 427, 437.

19 (1994) 179 CLR 427.

20 Ibid 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) (citations omitted).

21 Rupert Cross, *Statutory Interpretation* (Oxford University Press, 3rd ed, 1995) 165-166.

22 D Dyzenhaus, M Hunt and M Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5.

23 (2003) 211 CLR 476, 492.

24 (2004) 219 CLR 562, 577.

25 (2004) 221 CLR 309.

[C]ourts [will] decline to impute to parliament an intention to abrogate or curtail fundamental human rights or freedoms unless such an intention is clearly manifested by unambiguous language, which indicates that parliament has directed its attention to the rights and freedoms in question, and has consciously decided upon abrogation or curtailment.²⁶

Spigelman CJ of the Supreme Court of New South Wales has stated that the principle of legality should be regarded as a unifying concept incorporating a number of interpretive common law applications.²⁷ These applications illustrate common law rights that the courts have found warrant protection through the principle of legality.

This approach reflects the position in England where Lord Steyn contributed significantly to its introduction.²⁸ The principle has been expressed in cases such as *R v Secretary of State for the Home Department; Ex parte Pierson*²⁹ and *R v Secretary of State for the Home Department; Ex parte Simms*.³⁰ A clear statement of the English position can be seen in the latter by Lord Hoffmann:

In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.³¹

He has stated that the principle requires Parliament to ‘squarely confront what it is doing and accept the political costs’.³² The words of Lord Hoffmann have been subsequently quoted and approved in the High Court.³³

The purpose of the principle of legality is not to provide positive human rights protection but to ensure that parliamentarians are held responsible and accountable for the decisions they make regarding the abrogation of human rights or freedoms.³⁴ The parliamentary process

26 Murray Gleeson, ‘The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights’ (2009) 20 *Public Law Review* 26, 33.

27 Chief Justice J J Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (2005) 79 *Australian Law Journal* 769, 775.

28 *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539; Lord Steyn, ‘Democracy Through Law’ [2002] *European Human Rights Law Review* 723, 729.

29 [1998] AC 539, 587-589 (Lord Steyn).

30 [2000] 2 AC 115, 131 (Lord Hoffmann).

31 *Ibid* 131.

32 *Ibid*.

33 *Daniels Corp International Pty Ltd v ACCC* (2002) 213 CLR 543, 582 (Kirby J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ); *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19] (Gleeson CJ).

34 Wendy Lacey, ‘Liberty, Legality and Limited Government: Section 75(v) of the Constitution’ (Paper presented at the 12th Annual Public Law Weekend, Centre for International and Public Law, Australian National University, 9 November 2007) 23.

must 'operate as it is intended, so that those who [are] depriving people ... of their entitlements and expectations, [have] shouldered the responsibility and assumed public accountability for the amendments which they enacted'.³⁵ It also prevents ordinary words being given a meaning which Parliament did not intend.³⁶

The courts have applied the principle of legality to protect a number of different rights. What constitutes a right capable of protection has been developed as a part of the common law of statutory interpretation over time.³⁷ One of the great mysteries in this area is which rights are collected under the heading of the principle of legality. Commentators have attempted to construct many lists of the applications of the principle of legality which vary in length and content. Despite the many attempts the exact make up of the list is illusory. The list below is predominantly influenced by two of the main list constructors in this area, Spigelman CJ³⁸ and Pearce and Geddes.³⁹ Regardless of the author, most lists share a number of applications in common. These commonly include that Parliament did not intend to:

- 1) Invade fundamental rights, freedoms and immunities⁴⁰
- 2) Retrospectively change rights and obligations⁴¹
- 3) Infringe personal liberty⁴²
- 4) Interfere with freedom of movement⁴³
- 5) Interfere with freedom of speech⁴⁴

35 Ibid, quoting *Chang v Laidley Shire Council* (2007) 234 CLR 1, 27 [85] (Kirby J) (citations omitted).

36 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann).

37 Spigelman, above n 27, 775.

38 Chief Justice J J Spigelman, 'Statutory Interpretation: Identifying the Linguistic Register' (1999) 4 *Newcastle Law Review* 1, 11; Spigelman, above n 27, 775; Chief Justice J J Spigelman, 'Blackstone, Burke, Bentham and The Human Rights Act 2004' (2005) 26 *Australian Bar Review* 1, 6-7; Spigelman, above n 11, 27-29.

39 Pearce and Geddes, above n 11, 168-194 [5.4]-[5.35].

40 *Potter v Minaban* (1908) 7 CLR 277; *Bropbo v Western Australia* (1990) 171 CLR 1; *Plaintiff s157/2002 v Commonwealth* (2003) 211 CLR 476; *Coco v The Queen* (1994) 179 CLR 427; *Al-Kateb v Godwin* (2004) 219 CLR 562; *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2003) 126 FCR 54.

41 *Cox v Hakes* (1890) 15 App Cas 506; *Newell v The King* (1936) 55 CLR 707; *Maxwell v Murphy* (1957) 96 CLR 261; *Fisher v Hebburn Ltd* (1960) 105 CLR 188; *Rodway v The Queen* (1990) 169 CLR 515; *Esber v Commonwealth* (1992) 174 CLR 430.

42 *Re Bolton; Ex parte Bean* (1987) 162 CLR 514; *Al-Kateb v Godwin* (2004) 219 CLR 562; *Uittenbosch v Chief Executive, Department of Corrective Services* [2006] 1 Qd R 565.

43 *Commonwealth v Progress Advertising & Press Agency Co Pty Ltd* (1910) 10 CLR 457; *Potter v Minaban* (1908) 7 CLR 277; *Melbourne Corporation v Barry* (1922) 31 CLR 174.

44 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115.

- 6) Alter criminal law practices based on the principle of a fair trial⁴⁵
- 7) Restrict access to the courts⁴⁶
- 8) Permit an appeal from an acquittal⁴⁷
- 9) Interfere with the course of justice⁴⁸
- 10) Abrogate legal professional privilege⁴⁹
- 11) Exclude the right to claim self-incrimination⁵⁰
- 12) Extend the scope of a penal statute⁵¹
- 13) Deny procedural fairness to persons affected by the exercise of public power⁵²
- 14) Give executive immunities a wide application⁵³
- 15) Interfere with vested property rights⁵⁴
- 16) Authorise the commission of a tort⁵⁵
- 17) Alienate property without compensation⁵⁶
- 18) Disregard common law protection of personal reputation⁵⁷
- 19) Interfere with equality of religion⁵⁸

There are also a number of less common applications that have been included from time to time, or which are recognised by the common

45 *Bishop v Chung Bros* (1907) 4 CLR 1262; *Tassell v Hayes* (1987) 163 CLR 34; *R v Fuller* (1994) 34 NSWLR 233; *Thompson v Mastertouch TV Service Pty Ltd* (1978) 38 FLR 397; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290.

46 *Magrath v Goldsborough, Mort & Co Ltd* (1932) 47 CLR 121; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

47 *Davern v Messel* (1984) 155 CLR 21.

48 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

49 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319; *Daniels Corp International Pty Ltd v ACCC* (2002) 213 CLR 543; *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563.

50 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Crafter v Kelly* [1941] SASR 237; *Hamilton v Oades* (1989) 166 CLR 486; *Rich v Australian Securities and Investment Commission* (2004) 220 CLR 129; *McGee v Glüchbrist-Humbrey* (2005) 92 SASR 100.

51 *Ex parte Fitzgerald; Re Gordon* (1945) 45 SR (NSW) 182; *Krakouer v The Queen* (1998) 194 CLR 202.

52 *Commissioner of Police v Tanos* (1958) 98 CLR 383; *Annetts v McCann* (1990) 170 CLR 596; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

53 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575.

54 *Clissold v Perry* (1904) 1 CLR 363; *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677; *Clunies-Ross v Commonwealth* (1984) 155 CLR 193.

55 *Coco v The Queen* (1994) 179 CLR 427.

56 *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552; *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

57 *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.

58 *Canterbury Municipal Council v Moslem Alaway Society Ltd* (1985) 1 NSWLR 525.

law but have not necessarily been included previously. All of these applications, like those listed above, have a solid foundation at common law. Those applications which are less common include (continuing the prior numbering) that Parliament did not intend to:

- 20) Exclude the *mens rea* element from statutory offences⁵⁹
- 21) Infringe common law rights⁶⁰
- 22) Alter common law doctrines⁶¹
- 23) Deny the right to legal counsel when charged with a serious crime⁶²
- 24) Restrict rights of actions for damages⁶³
- 25) Legislate in conflict with international law.⁶⁴

It is not clear as to why these less common applications are so inconsistently included. No one list of applications is meant to be exhaustive so applications may be overlooked. For example, the application with respect to the exclusion of the *mens rea* element from statutory offences has often been overlooked in recent times despite continual development of the principle and acknowledgement from the High Court in *CTM v The Queen*.⁶⁵ Some of the applications are so widely accepted that express repetition is not necessary.⁶⁶ Indeed this may be the reason why the application regarding the denial of legal counsel when charged with a serious crime is not regularly included. Applications may also weaken over time and lose the status of ‘fundamental’ common law rights. For instance the specific application that Parliament does not intend to infringe common law rights has been

59 *R v Tolson* (1889) 23 QBD 168; *Thomas v The King* (1937) 59 CLR 279; *Proudman v Dayman* (1941) 67 CLR 536; *He Kaw Teh v The Queen* (1985) 157 CLR 523; *CTM v The Queen* (2008) 236 CLR 440.

60 *Sargood Bros v Commonwealth* (1910) 11 CLR 258, 279 (O’Connor J); *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206 (Higgins J); *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 341 (Mason ACJ, Wilson and Dawson JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ).

61 *Potter v Minaban* (1908) 7 CLR 277.

62 *Dietrich v R* (1992) 177 CLR 292.

63 Chief Justice J J Spigelman, ‘Blackstone, Burke, Bentham and The Human Rights Act 2004’ (2005) 26 *Australian Bar Review* 1, 7.

64 *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309, 363 (O’Connor J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ); *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J), 304 (Gaudron J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ).

65 (2008) 236 CLR 440, 498 [202]. See also Susannah Hodson, ‘*CTM v The Queen*: A Challenge to the Fundamental Presumption of Mens Rea’ (2010) 34 *Criminal Law Journal* 187, 191-92.

66 Spigelman, above n 11, 24.

labelled 'weak'.⁶⁷ Likewise the application that Parliament does not intend to alter common law doctrines is also now considered weak.⁶⁸

Some more specific applications are often excluded in favour of more general applications. For example, the application with respect to the restriction of rights of actions to damages is, arguably, a more specific subclass of the application with respect to restricting access to the courts. The inclusion of the more general application encompasses the more specific application and so it is not consistently included separately. Some applications are controversial and are inconsistently included for this reason. For example, the application of international law to domestic affairs has always been an area of great debate and as such the application with respect to conformity with international law is not regularly included although it has found support from the High Court in some instances.⁶⁹

At this stage, it is important to make two points about the principle of legality clear. These points are arguably perceived as weaknesses. The first is that the principle is entirely rebuttable and at the mercy of Parliament just like any other common law doctrine. In recognition of the doctrine of parliamentary supremacy it is an uncontested fact that Parliament may legislate to alter or remove common law rights.⁷⁰ This is to say that the principle of legality is rebuttable. The common law requires that a high level of certainty be satisfied before courts will impute to Parliament an intention to abrogate or curtail fundamental rights.⁷¹ The search will always be phrased in terms of the 'intention' of Parliament. This is deceptive. The courts will look for the intention of Parliament as expressed or necessarily implied in the legislation only.⁷² That is to say that it is all very well for Parliament to have intended for a certain Act to remove a specific right but without a clear expression of this intent or necessary implication the courts will not recognise it.

67 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 284 (McHugh J).

68 Lacey, above n 34, 21.

69 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ); *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J), 304 (Gaudron J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ); *Coleman v Power* (2004) 220 CLR 1, 91–93 (Kirby J).

70 Brendan Lim, 'A Principle of Legality for an Age of Statutes: Part One' (2007) 29(8) *Bulletin (Law Society of S.A.)* 8, 8. Cf *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 570; Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31(1) *University of Tasmania Law Review* 132, 145–47.

71 Spigelman, above n 27, 781.

72 *Ibid.*

This imposes a far more stringent obligation for Parliament to satisfy.⁷³ This is supposed to ensure that Parliament accepts the political costs of such a decision.⁷⁴

Therefore what is required before courts will impute to Parliament an intention to displace the principle of legality is the application of the clear statement principle.⁷⁵ There are a number of different formulations of this principle which reflect how Parliament's intention needs to be expressed.⁷⁶ Regardless of which way it is formulated the clear statement principle requires that Parliament must express its intention to abrogate or curtail fundamental human rights and freedoms in unambiguous language or through necessary implication showing that it has considered and consciously decided upon the abrogation or curtailment.

An example of express abrogation can be illustrated as follows. Section 190(2) of the *Crime and Misconduct Act 2001* (Qld) reads:

- (2) The person is not entitled -
 - (a) to remain silent; or
 - (b) to refuse to answer the question on a ground of privilege, other than legal professional privilege.

It was decided in the cases of *Witness A v Crime and Misconduct Commission (Qld)* ('Witness A')⁷⁷ and *Witness C v Crime and Misconduct Commission (Qld)* ('Witness C')⁷⁸ that this section abrogated the privilege against self-incrimination. In *Witness A*⁷⁹ the applicant refused to answer questions relating to persons and their involvement with illegal drugs.⁸⁰ He had also been conjointly charged with these people for unlawfully supplying methylamphetamines.⁸¹ White J held that it was clear that section 190(2) expressly removed the privilege against self-incrimination.⁸² Her Honour also held that it should be read in conjunction with section 194(2)(a) and (b).⁸³

73 Ibid.

74 Gleeson, above n 26, 33.

75 Spigelman, above n 27, 779.

76 *Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 34, 353, [44] (Spigelman CJ).

77 [2005] QSC 119.

78 (2008) 187 A Crim R 322.

79 [2005] QSC 119.

80 Ibid [2].

81 Ibid.

82 Ibid [31].

83 Ibid.

- (2) If the presiding officer decides, after hearing the person's submissions, that the person has a reasonable excuse based on self-incrimination privilege for not complying with the requirement –
- (a) the presiding officer may require the person to comply with the requirement; and
 - (b) section 197 applies in relation to the answer, document or thing given or produced.

Section 197 provides a limited use immunity which limits the use that can be made of incriminating evidence in criminal, civil and administrative proceedings.⁸⁴ White J concluded that the privilege had been expressly removed by these sections.⁸⁵

Similarly in *Witness C*⁸⁶ the applicant was called to give evidence with respect to the alleged drug activities of an individual. She was also facing several drug charges at the time. Cullinane J followed the reasoning of White J in *Witness A*⁸⁷ and held that the privilege against self-incrimination had been removed by section 190(2). This conclusion was further supported by the fact that 'privilege' was defined in the Act as a reference to the privilege against self-incrimination and legal professional privilege.⁸⁸ Given that section 190(2)(b) expressly preserved the operation of legal professional privilege, the privilege against self-incrimination was obviously intended to be excluded.

It was clear from the purpose of the Act⁸⁹ and the Explanatory Notes to the Bill put before the Court that Parliament had intended to abrogate the privilege against self-incrimination. Therefore, if the Court had not been satisfied that the privilege had been expressly abrogated, sufficient evidence exists to conclude that the privilege would have been abrogated by necessary implication.

Abrogation through necessary implication is to be determined by examining the language, character and purpose of the Act as a whole.⁹⁰ The necessarily implied removal of fundamental rights will occur where to support any other interpretation would render the Act or section thereof inoperative or meaningless.⁹¹ Where there is a failure to unambiguously express intent, ie, where only general words are used, the instances of an Act or provision becoming inoperative or meaningless

84 *Crime and Misconduct Act 2001* (Qld) s 197(2).

85 [2005] QSC 119, [41].

86 (2008) 187 A Crim R 322.

87 [2005] QSC 119.

88 *Crime and Misconduct Act 2001* (Qld) sch 2.

89 *Ibid* ss 4, 5.

90 *A v Boulton* (2004) 136 FCR 420, 335, [55].

91 Pearce and Geddes, above n 11, 167, [5.3].

should theoretically be minimal.⁹² The necessarily implied removal of a fundamental right does not arise as a matter of absolute necessity, in other words, the prior exhaustion of all alternative implications is not a requirement.⁹³ Simply put, an interpretation that removes a fundamental right by necessary implication must have been necessary to keep the Act or section thereof from becoming inoperative.

Abrogation by necessary implication can be illustrated by looking at a series of cases again examining the privilege against self-incrimination. Section 30(2) of the *Australian Crime Commission Act 2002* (Cth) ('*ACC Act 2002* (Cth)') reads as follows:

- (2) A person appearing as a witness at an examination before an examiner shall not:
 - (a) ...
 - (b) refuse or fail to answer a question that he or she is required to answer by the examiner; or
 - (c) refuse or fail to produce a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed.

While the words of the section do not expressly remove the privilege, however, the courts have found that the privilege is removed through necessary implication.

In *Mansfield v Australian Crime Commission*⁹⁴ the applicant was being investigated in relation to Commonwealth fraud, while confiscation proceedings were on foot. The applicant was required to answer questions in relation to the confiscation proceedings, the answers to which would be open to use by the State DPP. The applicant argued that he was entitled to claim the privilege against self-incrimination, and being compelled to answer the questions would impede his defence in the confiscation proceedings.⁹⁵ The respondent argued that section 30(2)(b) of the *ACC Act 2002* (Cth) expressly removed the privilege against self-incrimination.⁹⁶ Carr J of the Federal Court held that there were no words in section 30(2)(b) to expressly remove the privilege against self-incrimination.⁹⁷ He did find however that a legislative intent to exclude the privilege could be found by reading section 30(2) alongside sections 30(4) and (5).⁹⁸ Those sections read:

92 *Coco v R* (1994) 179 CLR 427, 437.

93 *A v Boulton* (2004) 136 FCR 420, 335 [55].

94 (2003) 132 FCR 251.

95 *Ibid* 258 [31].

96 *Ibid* 259 [35].

97 *Ibid* 260 [43].

98 *Ibid* 260 [48].

- (4) Subsection (5) limits the use that can be made of any answers given at an examination before an examiner, or documents or things produced at an examination before an examiner. That subsection applies if:
- (a) a person appearing as a witness at an examination before an examiner:
 - (i) answers a question that he or she is required to answer by the examiner; or
 - (ii) produces a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed; and
 - (b) ...
 - (c) before answering the question or producing the document or thing, the person claims that the answer, or the production of the document or thing, might tend to incriminate the person or make the person liable to a penalty.
- (5) The answer, or the document or thing, is not admissible in evidence against the person in:
- (a) a criminal proceeding; or
 - (b) a proceeding for the imposition of a penalty;
- other than:
- (c) confiscation proceedings; or
 - (d) a proceeding in respect of:
 - (i) in the case of an answer - the falsity of the answer; or
 - (ii) in the case of the production of a document - the falsity of any statement contained in the document.

These sections provide protection from the consequences stemming from the abrogation of the privilege. Carr J went on to say that he could think of no other reason for the inclusion of these provisions if the intent of Parliament was not to remove the privilege against self-incrimination.⁹⁹ Further he referred to the comments of Mason, Wilson and Dawson JJ in *R v Sorby*¹⁰⁰ where they stated that when a legislature abrogates the privilege it will also often give compensatory protection to those affected by the abrogation.¹⁰¹ Carr J held that section 30(2) removed the common law privilege against self-incrimination by necessary implication.

In *A v Boulton*¹⁰² the respondent issued a summons requiring the appellant to appear before it and answer questions regarding an alleged illegal importation of cigarettes.¹⁰³ The appellant submitted that he was not obliged to answer any questions of the respondent on the basis that they would tend to incriminate him and the true construction of the *ACC Act 2002* (Cth) did not remove the common law privilege against

99 Ibid 261 [49].

100 (1983) 152 CLR 281, 310-311.

101 (2003) 132 FCR 251, 261, [49].

102 (2004) 136 FCR 420.

103 Ibid 422 [5].

self-incrimination.¹⁰⁴ The Full Federal Court (Beaumont, Dowsett and Kenny JJ) followed Carr J's decision in *Mansfield v Australian Crime Commission*¹⁰⁵ and held that while section 30(2) did not expressly remove the privilege it did do so through necessary implication.¹⁰⁶ Kenny J, with whom the others agreed, also considered these provisions as well as the purpose and character of the Act in coming to her decision.¹⁰⁷ Her Honour did note that the phrase 'necessary implication' did not mean that all other possible implications had to have been excluded nor did abrogation need to arise as a matter of absolute necessity.¹⁰⁸

*Loprete v Australian Crime Commission*¹⁰⁹ and *X v Australian Crime Commission*¹¹⁰ were parallel proceedings heard by Finn J. Both of these cases again involved the question of whether section 30(2) had abrogated the privilege against self-incrimination specifically in relation to the commission of foreign offences. Once again, in both cases, the decision in *A v Boulton*¹¹¹ meant that the privilege had been abrogated by necessary implication.¹¹² The privilege had been removed with respect to foreign offences.¹¹³

These examples illustrate how the clear statement principle operates and demonstrates abrogation, both express and by necessary implication. Other examples exist including section 250 of the *Companies Act 1961* (Qld),¹¹⁴ section 541(12) of the *Companies (NSW) Code*,¹¹⁵ section 77(1) of the *Bankruptcy Act 1966* (Cth)¹¹⁶ and section 155(7) of the *Trade Practices Act 1974* (Cth).

By way of contrast in *McGee v Gilchrist-Humphrey*¹¹⁷ the Full Court of the Supreme Court of South Australia (Doyle CJ, Perry and Sulan JJ) held that the *Royal Commission Act 1917* (SA) did not remove the privilege against self-incrimination either expressly¹¹⁸ or by necessary

104 Ibid.

105 *Mansfield v Australian Crime Commission* (2003) 132 FCR 251.

106 *A v Boulton* (2004) 136 FCR 420, 435 [56].

107 Ibid 435 [57].

108 Ibid 435 [55].

109 [2004] FCA 1476.

110 (2004) 139 FCR 413.

111 (2004) 136 FCR 420.

112 *X v Australian Crime Commission* (2004) 139 FCR 413, 422-3 [39].

113 Ibid.

114 *Mortimer v Brown* (1970) 122 CLR 493.

115 *Hamilton v Oades* (1989) 166 CLR 486.

116 *Griffin v Pantzer* (2004) 137 FCR 209.

117 (2005) 92 SASR 100.

118 Ibid 107 [29].

implication.¹¹⁹ This was despite the fact that a limited use immunity was provided for in section 16 of the Act:

A statement or disclosure made by any witness in answer to any question put to him by the commission or any of the commissioners shall not (except in proceedings for an offence against this Act) be admissible in evidence against him in any civil or criminal proceedings in any court.

A section such as this has, from time to time, been indicative of Parliament's intention to abrogate the privilege against self-incrimination.¹²⁰ Nothing about the subject matter or purpose of the Act indicated that Parliament's intention was to abrogate the privilege though.¹²¹

The second point worthy of mention is that there is much debate and uncertainty regarding which rights are considered 'fundamental', and how or why they achieve this status, and therefore come under the banner of the principle of legality.¹²² Each attempt at identifying the common law rights to which the principle of legality applies produces a combination of the above applications but no one list is the same as the next. No one combination is right or wrong. There are no relevant definitions or tests to tell us which common law rights attract the 'fundamental' label. Indeed, whether a common law right is fundamental or not is essentially a matter for the courts to decide, informed by the history of the common law.¹²³ Courts should always recognise shifts in community values though.¹²⁴ Once a particular right attains 'fundamental' status, it does not mean that it will continue to hold this status indefinitely. Rights which are considered 'fundamental' now may not be at a later date or in a different context.¹²⁵ In other words these rights gain or lose strength over time.¹²⁶ Therefore, judges make their decisions as to which rights are fundamental after detailed analysis of the

119 Ibid 112 [50].

120 Ibid 108 [35].

121 Ibid 109 [37].

122 For example, in *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 619 [166], Heydon J (in his dissenting judgment) made the following comment with respect to the existence of a right against spousal incrimination in response to the appellant's argument that fundamental status depended on recognition as such by decided cases: 'But a right does not become fundamental merely because cases call it that. And a right does not cease to be fundamental merely because cases do not call it that.' His Honour went no further to clarify the test. See also Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449, 457-59.

123 Spigelman, above n 11, 26.

124 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298 (McHugh J).

125 Pearce and Geddes, above n 11, 168 [5.3].

126 Catriona Cook, Robin Creyke, Robert Geddes and David Hamer, *Laying Down the Law* (LexisNexis Butterworths, 6th ed, 2005) 266 [11.3].

history of the common law, but in the end, common law development stems from judicial choice.¹²⁷

A good example to illustrate this point comes from the High Court decision of *Australian Crime Commission v Stoddart*.¹²⁸ This case is the most recent instalment in a series of cases on whether or not there is a separate and distinct fundamental common law right against spousal incrimination. The question was first raised in recent times in the Queensland Court of Appeal case *Callanan v B*¹²⁹ with reference to section 190(2) of the *Crime and Misconduct Act 2001* (Qld). The right not to incriminate one's spouse had not often been acknowledged by academic commentators or judges alike. The Court held, after referring to an article by David Lusty¹³⁰ in which historical authorities were discussed,¹³¹ that there was a common law privilege against spousal incrimination.

This line of reasoning was subsequently followed and developed by the Federal Court in *Stoten v Sage*,¹³² *S v Boulton*,¹³³ and *Stoddart v Boulton*¹³⁴ with respect to section 30(2) of the *ACC Act 2002* (Cth). In *Stoten v Sage*¹³⁵ the applicant was summoned to give evidence in relation to the involvement of a number of individuals in certain offences. One of the individuals in question was the applicant's husband. Dowsett J recognised that there was a common law privilege against spousal incrimination and it could be claimed in non-judicial proceedings. It was also held however that section 30(2) removed this privilege.¹³⁶

In *S v Boulton*¹³⁷ the appellant was summoned to give evidence before the respondent about the alleged criminal activities of her de facto spouse.¹³⁸ The Full Federal Court (Black CJ, Jacobson and

127 Meagher, above n 122, 459.

128 (2011) 244 CLR 554.

129 (2004) 151 A Crim R 287.

130 David Lusty, 'Is there a Common Law Privilege against Spouse-Incrimination' (2004) 27 *University of New South Wales Law Journal* 1.

131 *Riddle v The King* (1911) 12 CLR 622, 627-629 (Griffith CJ); *Tinning v Moran* (1939) AR (NSW) 148, 151; *Re Wagner* [1958] QWN 49; *Re Intercontinental Development Corporation Pty Ltd* (1975) 1 ACLR 253, 259; *Navair Pty Ltd v Transport Workers' Union of Australia* (1981) 52 FLR 177, 193; *Metroplaza Pty Ltd v Girvan NSW Pty Ltd* (in liq) (1992) 37 FCR 91, 92; *Re New World Alliance Pty Ltd (rec and mgr apptd)*; *Syncotex Pty Ltd v Baseler* (1993) 47 FCR 90, 96.

132 (2005) 144 FCR 487.

133 (2006) 151 FCR 364.

134 (2010) 185 FCR 409.

135 (2005) 144 FCR 487.

136 *Ibid* 493 [14].

137 (2006) 151 FCR 364.

138 *Ibid* 377-78 [66]-[67].

Greenwood JJ) held that there was a common law privilege against spousal incrimination.¹³⁹ This privilege did not, however, extend to a de facto spouse.¹⁴⁰ It was therefore not necessary to decide whether the privilege had been abrogated in that case. Obiter comments were divided on the subject though. Jacobson and Greenwood JJ indicated that the privilege had been removed.¹⁴¹ Black CJ disagreed on the basis that there was no evidence that Parliament had turned its mind to the abrogation of such a privilege and so it remained untouched.¹⁴²

Finally in *Stoddart v Boulton*¹⁴³ the Full Federal Court (Spender and Logan JJ, Greenwood J dissenting) followed the reasoning of Black CJ in *S v Boulton*.¹⁴⁴ Spender and Logan JJ held that the privilege against spousal incrimination is a distinct and separate common law privilege and had not been removed by section 30(2).¹⁴⁵ No evidence existed showing that Parliament's attention was turned to spousal privilege and abrogation subsequently decided upon. The Court held that the right to claim spousal privilege had not been removed by section 30. Greenwood J on the other hand maintained his reasoning from *S v Boulton*¹⁴⁶ and held that whether or not it was an extension or a separate privilege, the privilege against spousal incrimination had been removed.¹⁴⁷

These authorities seemed to show historical common law backing and some academic support for recognising the privilege against spousal incrimination as a distinct and separate common law right to the privilege against self-incrimination. The decision in *Stoddart v Boulton*¹⁴⁸ was appealed to the High Court.¹⁴⁹ During the course of argument in the High Court, counsel for the appellant argued that the historical authorities referenced in favour of a privilege against spousal incrimination were in fact to do with the issue of a spouse as a competent and compellable witness and therefore the historical backing of the privilege was weak at best and the policy considerations underlying them were no longer consistent with community values on the subject.¹⁵⁰ The High Court agreed, stating that the authorities relied upon were with regard to the question of compellability and

139 Ibid 370 [28], 381 [99], 389 [171].

140 Ibid 375 [50], 383 [119], 390 [172].

141 Ibid 387 [143], 390 [173].

142 Ibid 377 [59].

143 (2010) 185 FCR 409.

144 (2006) 151 FCR 364.

145 Ibid 371 [29], 389 [163].

146 (2006) 151 FCR 364.

147 Ibid 383 [126].

148 (2010) 185 FCR 409.

149 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554.

150 Ibid 557.

not privilege.¹⁵¹ No distinct and separate privilege against spousal incrimination exists at common law.¹⁵² The court also noted that as the historical foundation of the privilege is weak, it was not expected that Parliament should have to legislate with the privilege in mind, thus not having to choose to abrogate the privilege expressly or not.¹⁵³

The reasoning provided by the Queensland Court of Appeal and the Federal Court over the course of *Callanan v B, S v Boulton* and *Stoddart v Boulton*, based on the work of David Lusty,¹⁵⁴ seemed to provide an historical back drop capable of accepting a distinct and separate privilege against spousal incrimination. Indeed, until this decision of the High Court, this author's list of applications capable of attracting the principle of legality did in fact number 26, including this privilege against spousal incrimination. The work of Lusty relied upon by previous cases to help establish a common law history of the privilege is indeed persuasive. The comments of the High Court regarding there being no need for Parliament to legislate with this particular privilege in mind because of the lack of historical founding seems extreme. In fact Lusty gives numerous examples of legislation in at least five Australian jurisdictions that makes some reference to the privilege against spousal incrimination. In the High Court's defence, none of these jurisdictions include the Commonwealth or indeed Queensland (in the case of *Callanan*). This author's list now, reluctantly, numbers 25. But this discussion should illustrate the difficulty inherent in trying to determine which rights attract 'fundamental' status at common law. As with all areas of common law development, this too is an area developed through judicial choice.¹⁵⁵

When assessing the claim that the principle of legality constitutes a common law bill of rights these points should not be overlooked. They paint a bleak picture of the strength of the principle as a bill of rights. Both Parliament and the courts are well aware of the existence of the principle of legality.¹⁵⁶ Courts are able to interpret legislation on the assumption that if the principle is not to be applied then Parliament would have indicated it.¹⁵⁷ If however Parliament intends to abrogate or curtail fundamental rights and this intention is made inescapably clear, then the courts must obey regardless of the consequences and this

151 *Ibid* 571 [41], 636-7 [231], [232].

152 *Ibid* 571 [41].

153 *Ibid* 571 [41], 636-7 [231], [232].

154 Lusty, above n 130.

155 Meagher, above n 122, 459.

156 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).

157 Spigelman, above n 11, 36.

has happened on more than one occasion. It is obvious that something more is needed to aid in the protection of human rights, something that engages with the other arms of government as well.¹⁵⁸

III AUSTRALIAN HUMAN RIGHTS LEGISLATION

The Australian Capital Territory was the first Australian jurisdiction to enact a bill of rights, either statutory or entrenched, in 2004.¹⁵⁹ Victoria followed suit in 2006.¹⁶⁰ Both the *Human Rights Act 2004* (ACT) (*ACT Act*) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*Victorian Charter*) are based largely on the *New Zealand Bill of Rights Act 1991* (NZ) and the United Kingdom *Human Rights Act 1998* (UK).¹⁶¹ Both of these Acts were designed as alternatives to stronger Constitutional rights instruments, such as that found in the United States, which lead to a significant imbalance in power.¹⁶² These Acts set up a dialogue model which allows for each arm of government to contribute to human rights protection but the final authority on the matter rests with the legislature.¹⁶³ Neither the ACT nor Victoria has granted the human rights in the respective Acts free standing force. Protection is achieved through an intricate statutory framework preserving parliamentary sovereignty.¹⁶⁴

Part 3 of the *ACT Act*¹⁶⁵ and Part 2 of the *Victorian Charter*¹⁶⁶ set out the human rights protected under the respective instruments. These rights can be described as follows:¹⁶⁷

158 Gray puts forward the proposition that rights such as the presumption of innocence may be able to be constitutionally protected as being a part of the right to a fair trial as recognised in *Dietrich v The Queen*: Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31(1) *University of Tasmania Law Review* 132. To date however, a majority of the High Court has not found any human right or individual guarantee to be implied from Chapter III of the *Constitution*. See Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the *Constitution*' (2003) 31 *Federal Law Review* 57; Lacey, above n 15, Chapter 6. See also *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 (French CJ).

159 *Human Rights Act 2004* (ACT).

160 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

161 Beckett, above n 3, 44.

162 Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33 *University of New South Wales Law Journal* 136, 138.

163 *Ibid.*

164 Alistair Pound and Kylie Evans, *An Annotated Guide to The Victorian Charter of Human Rights and Responsibilities* (Thomson Lawbook Co, 2008) [120].

165 Sections 8-28.

166 Sections 8-27.

167 Pound and Evans, above n 164, xv-xvii.

- Right to recognition before the law;¹⁶⁸
- Enjoyment of rights without discrimination;¹⁶⁹
- Equality before the law;¹⁷⁰
- Right to life;¹⁷¹
- Freedom from torture and cruel, inhuman or degrading treatment or punishment;¹⁷²
- Freedom from forced work;¹⁷³
- Freedom of movement;¹⁷⁴
- Privacy and reputation;¹⁷⁵
- Freedom of thought, conscience, religion and belief;¹⁷⁶
- Freedom of expression;¹⁷⁷
- Freedom of assembly;¹⁷⁸
- Freedom of association;¹⁷⁹
- Protection of families;¹⁸⁰
- Protection of children;¹⁸¹
- Right to participate in public affairs;¹⁸²
- Right to vote and be elected;¹⁸³
- Right of access to the public service;¹⁸⁴
- Cultural rights;¹⁸⁵
- Right to liberty and security;¹⁸⁶
- No imprisonment for failure to perform contractual obligations;¹⁸⁷
- Humane treatment when deprived of liberty;¹⁸⁸
- Rights of children in the criminal process;¹⁸⁹
- Right to a fair hearing;¹⁹⁰

168 *ACT Act* s 8(1); *Victorial Charter* s 8(1).

169 *Ibid* s 8(2); s 8(2).

170 *Ibid* s 8(3); s 8(3).

171 *Ibid* s 9(1); s 9.

172 *Ibid* s 10; s 10.

173 *Ibid* s 26; s 11.

174 *Ibid* s 13; s 12.

175 *Ibid* s 12; s 13.

176 *Ibid* s 14; s 14.

177 *Ibid* s 16; s 15.

178 *Ibid* s 15(1); s 16(1).

179 *Ibid* s 15(2); s 16(2).

180 *Ibid* s 11(1); s 17(1).

181 *Ibid* s 11(2); s 17(2).

182 *Ibid* s 17(a); s 18(1).

183 *Ibid* s 17(b); s 18(2)(a).

184 *Ibid* s 17(c); s 18(2)(b).

185 *Ibid* s 27; s 19(1).

186 *Ibid* ss 18(1)-(7); ss 21(1)-(7).

187 *Ibid* s 18(8); s 21(8).

188 *Ibid* s 19; s 22.

189 *Ibid* s 20; s 23.

190 *Ibid* s 21; s 24.

- The presumption of innocence and other rights in criminal proceedings;¹⁹¹
- Prohibition on double jeopardy;¹⁹²
- Prohibition on retrospective criminal laws.¹⁹³

Cultural rights of Aboriginal persons and the right to property are also protected by the *Victorian Charter*.¹⁹⁴

The application of these human rights to the laws of the respective jurisdictions is dealt with by Part 4 of the *ACT Act* and Part 3 of the *Victorian Charter*. Both instruments require that so far as it is possible to do so having regard to purpose, all Territory/State laws should be interpreted consistently with human rights.¹⁹⁵ Additionally both instruments provide for the use of international law and the judgments of foreign and international courts and tribunals relevant to a human right to be considered in interpreting the right.¹⁹⁶ The *Victorian Charter* also specifically refers to the use of judgments of domestic courts.¹⁹⁷

In the event that a Supreme Court of the Territory/State is satisfied that a law cannot be interpreted consistently with human rights, the court may issue a declaration of incompatibility in the ACT¹⁹⁸ or a declaration of inconsistent interpretation in Victoria.¹⁹⁹ This is a discretionary power; there is no obligation to issue a declaration. Such a declaration does not affect the validity or operation of such a law.²⁰⁰ This declaration must then be presented to the Legislative Assembly of each jurisdiction within six months accompanied by a written response from the Attorney-General (ACT) or the relevant Minister (Victoria).²⁰¹

Scrutiny of all proposed Bills with regard to human rights is provided for in Part 5 of the *ACT Act* and Part 3 of the *Victorian Charter*. Both instruments require a Bill to be accompanied by a statement from the Attorney-General (ACT) or the responsible Member of Parliament (Victoria) regarding the human rights compatibility of the proposed Bill.²⁰² The human rights compatibility of a proposed Bill must also be

191 *Ibid* s 22; s 25.

192 *Ibid* s 24; s 26.

193 *Ibid* s 25; s 27.

194 Sections 19(2), 20.

195 *ACT Act* s 30; *Victorian Charter* s 32(1).

196 *Ibid* s 31; s 32(2).

197 Section 32(1).

198 *ACT Act* s 32(2).

199 *Victorian Charter* s 36(2).

200 *ACT Act* s 32(3)(a); *Victorian Charter* s 32(3).

201 *Ibid* ss 32(4), 33; s 37.

202 *Ibid* s 37; s 28.

examined by the relevant parliamentary committee.²⁰³ Failure to comply with these procedures does not affect the validity or operation of the law in question.²⁰⁴ The *Victorian Charter* also provides parliament with the option of issuing an override declaration with respect to human rights which states that an Act or section of an Act is intended to be inconsistent with human rights.²⁰⁵ It is intended that this will only be done in exceptional circumstances however.²⁰⁶

Both the *ACT Act* and *Victorian Charter* impose obligations on public authorities to act consistently with human rights.²⁰⁷ Part 5A of the *ACT Act* is a recent amendment after the required review took place in 2008.²⁰⁸ The obligation has always been present in the *Victorian Charter* in Part 3. The ACT provision currently goes further than the Victorian provision by allowing individuals to launch legal proceedings against a public authority for a failure to comply with this obligation.²⁰⁹ The ACT Supreme Court is able to grant any relief except damages.²¹⁰ This is a unique feature of the *ACT Act* and goes further, at the present, than anything provided for in the *Victorian Charter*.²¹¹

Recent legislative activity has seen the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) passed by the federal government. The Act provides for the appointment of the Parliamentary Joint Committee on Human Rights.²¹² The Committee is to examine Bills that come before either House of Parliament, Acts and any matter relating to human rights referred to it by the Attorney-General for compatibility with human rights and report back to both Houses.²¹³ A member of Parliament who proposes to or does introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared and presented to the House.²¹⁴ This statement must include an assessment of whether the Bill is compatible with human rights.²¹⁵ A compatibility statement is not binding on any court or tribunal.²¹⁶ Failure to prepare a compatibility statement for a Bill that later becomes an Act does not affect the validity,

203 *Ibid* s 38; s 30.

204 *Ibid* s 39; s 29.

205 *Victorian Charter* s 31(1).

206 *Ibid* s 31(4).

207 *ACT Act* s 40B; *Victorian Charter* s 38.

208 *Human Rights Amendment Act 2008* (ACT).

209 *ACT Act* s 40C.

210 *Ibid* s 40C(4).

211 Watchirs and McKinnon, above n 162, 140.

212 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 4.

213 *Ibid* s 7.

214 *Ibid* ss 8(1), (2).

215 *Ibid* s 8(3).

216 *Ibid* s 8(4).

operation or enforcement of that Act.²¹⁷ While the Act does not dictate a format for the compatibility statement, it is intended to be ‘succinct assessments aimed at informing Parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights.’²¹⁸ At this point in time, this is the extent of the powers under this Act.

IV THE PRIVILEGE AGAINST SELF-INCRIMINATION - COMPARABLE?

The privilege against self-incrimination is protected under both the *ACT Act* and the *Victorian Charter*. Section 22(2)(i) of the *ACT Act* reads as follows:

- (2) Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else:
 - (i) Not to be compelled to testify against himself or herself or to confess guilt.

Section 25(2)(k) of the *Victorian Charter* is identical to this section. Both of these sections refer specifically to the privilege in the context of criminal proceedings. None of the cases already discussed arose out of the removal of the privilege in a criminal proceeding. Therefore had these cases been heard in the ACT or Victoria, these human rights instruments would have been of no assistance. It should be noted for completeness that it is possible for terms in these human rights instruments to take on a meaning which may be different from their ordinary meaning.²¹⁹ It would be doubtful however for the meaning of ‘charged with a criminal offence’ to include answering questions before a Commission.

In the event that these cases were to fall inside the scope of sections 22(2)(i) and 25(2)(k) there would be a general requirement that the *ACC Act 2002* (Cth) and the *Crime and Misconduct Act 2001* (Qld) be interpreted consistently with those sections so long as the purpose of the Acts allowed it. The Court’s comments in *Callanan v B*²²⁰ would indicate, at least in reference to the *Crime and Misconduct Act 2001* (Qld), that the purpose of the Act is not consistent with the right against self-incrimination. There it was stated, with reference to sections 4 and 5 of the Act, that one of the main purposes was “to combat and reduce the incidence of crime”, and to arm the Commission with investigative powers not ordinarily available to the police service.²²¹ Additionally, as is consistent with the

217 Ibid s 8(5).

218 Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth) 4.

219 Pound and Evans, above n 164, [2620].

220 (2004) 151 A Crim R 287.

221 Ibid 191-92 [14], quoting *Crime and Misconduct Act 2001* (Qld) ss 4-5.

purposive approach to statutory interpretation, extrinsic materials before the court in the form of the Explanatory Note to the Bill that later became the Act supported the conclusion that the removal of all privilege, save legal professional privilege, had been intended.²²² Arguably the purpose of the *ACC Act 2002* (Cth) would be along the same lines. The purpose of neither Act supports an interpretation that allows the privilege against self-incrimination to remain.

In the event that the Supreme Courts of the ACT/Victoria were satisfied as to an inconsistency, the privilege against self-incrimination would still be removed. A declaration of incompatibility or inconsistent interpretation could then be issued but this would have no effect on the validity of the section. The declaration would need to be presented to the Legislative Assembly and a written response required from the responsible minister but this does not in itself impose an obligation on Parliament to then amend the inconsistent Acts or sections thereof.²²³

This analysis shows that even if the privilege against self-incrimination in the investigative context, in the absence of criminal charges, was protected under the current human rights instruments it is highly unlikely that the outcome of the cases would have been any different. The most glaringly obvious distinction between the principle of legality and the human rights instruments is the rights they protect. Out of the 25 identified applications of the principle of legality, there are approximately only nine corresponding human rights in the *ACT Act*²²⁴ and 10 in the *Victorian Charter*.²²⁵ Not all rights recognised at common law are given legislative protection under these instruments. Likewise, not all of the human rights enumerated in the human rights instruments have also been previously specifically protected at common law.

Additionally, the human rights instruments provide a comprehensive codified framework for human rights protection. They also provide for detailed pre-enactment procedures designed to promote human rights debate and prevent damage stemming from inconsistencies where possible. Further, the *ACT Act* provides for an independent cause of action against a public authority in breach of its human rights obligations. The principle of legality is a common law instrument consisting of a single rebuttable presumption only. These features are clearly outside the scope of the principle of legality.

222 *Ibid.*

223 Pound and Evans, above n 164, [5020].

224 *Human Rights Act 2004* (ACT) ss 12(b), 13, 14, 16(2), 18(1)-(7), 22, 24, 25.

225 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 12, 13(b), 14, 15(2)(a), 20, 21(1)-(7), 24, 26, 27.

Further, even though neither mechanism is safe from further legislative interference, amendment and possible removal, it could be argued that the political consequences of removing a statutory bill of rights would be far more detrimental than those stemming from the removal of a common law doctrine. In this respect, the human rights instruments provide a more stable framework for protection.

The more obvious parallels between the two are that both the human rights instruments and the principle of legality can be altered or removed by Parliament. The *ACT Act* and *Victorian Charter* are ordinary Acts of Parliament capable of amendment or repeal. Likewise the principle of legality is a common law principle also capable of being altered or removed. Additionally, neither the lists of rights in the *ACT Act* and *Victorian Charter* nor the list of the applications of the principle of legality are intended to be exhaustive, fixed lists of rights. Furthermore, neither mechanism creates a prohibition on making laws inconsistent with human rights or gives courts the power to invalidate legislation for a failure to comply with human rights.

The main likeness between the two mechanisms is the operation. For instance, both require legislation to be interpreted consistently with human rights except where it is not possible to do so having regard to the purpose of the legislation, under the human rights instruments, or evidence of a contrary intention, under the principle of legality. The principle of legality requires an express statement. Similarly, the Victorian Parliament may issue an override declaration which has the same effect as an express statement of intent. In the absence of this express statement of intent, the courts look for a necessarily implied intention to the contrary. This involves adopting a construction that does not frustrate the purpose of the Act being interpreted. Likewise the ACT and Victorian courts look for a construction that is consistent with the purpose of the legislation. Under both mechanisms the interpretation that is consistent with the purpose of the Act will be accepted.

The principle of legality does not prevent legislation inconsistent with rights being passed. Similarly, despite requirements for compatibility statements to be prepared prior to enactment, a Bill that is inconsistent with human rights can still be passed. A finding by the courts that a law is inconsistent with rights does not affect the validity or operation of such a law under either mechanism. If a court finds that it is not possible to interpret a law consistently with either the principle of legality or one of the human rights instruments then it may say as much but there is no further obligation to amend the law after such a finding is made. Even in cases where courts issue declarations of incompatibility or inconsistent interpretation, no further action need be taken once the formalities

have been dealt with. Failure to comply with such formalities does not affect the validity or operation of the law though. This means that even though the procedures may be worded slightly differently, the effect is relatively similar.

Obviously the fact that both mechanisms protect a different set of rights provides a strong distinction between the two. Given that the overlap between the rights protected under the principle of legality and those protected under the human rights instruments in a comparable form is minimal, it would be a risk to conclude that the two mechanisms were interchangeable. In addition, the scope of the *ACT Act* and *Victorian Charter* far exceeds that of the principle of legality as does the stability and permanency of the protection on offer.

The parallels between the human rights instruments and the principle of legality are significant though. Indeed it would seem that despite being formulated differently, both produce a potentially similar outcome. The Victorian Court of Appeal held in *R v Momcilovic*²²⁶ that the interpretive obligation in section 32 of the *Victorian Charter* did not support an interpretation that would not otherwise be arrived at by applying regular interpretive rules.²²⁷ The range of possible interpretations is governed by existing interpretive rules, including ‘of course the presumption against interference with rights.’²²⁸ The court went on to liken the interpretive obligation in section 32 to a codified version of this common law presumption and is enhanced only so far as ‘the rights which the interpretive rule is to promote are those which Parliament itself has declared.’²²⁹ It must be noted that this was a tentative comment.²³⁰ On appeal to the High Court, this construction of section 32 was accepted and confirmed.²³¹

V CONCLUSION

Despite the failure of the founding fathers to include a bill of rights as part of the Australian *Constitution*, there is no evidence suggesting that Australia was to have no human rights protection at all.²³² Until recently human rights protection was provided by the courts through the common law and principles of statutory interpretation.

226 (2010) 265 ALR 751.

227 *Ibid* 760 [33]-[35].

228 *Ibid* 779 [103].

229 *Ibid* 779-80 [104].

230 *Ibid* 779 [101].

231 *Momcilovic v R* (2011) 245 CLR 1, 50 [51] (French CJ), 210 [544]-[545], 217 [565]-[566] (Crennan and Kiefel JJ).

232 Anthony Gray, ‘The Common Law and the Constitution as Protectors of Rights in Australia’ (2010) 39 *Common Law World Review* 119, 156.

The question remains as to whether the principle of legality is in fact a common law bill of rights. From a purely definitional point of view, it is obvious that the principle is not

[a] statement of civil and political human rights, guaranteeing to a large extent freedom from government interference in matters private and personal to the individual.²³³

The nature of the rights protected by the principle make it unable to conform to such a definition. As has been seen, the principle is not able to provide any guarantees as to freedom from government interference given the rebuttable nature of the principle. The ACT and Victorian legislation would be unable to conform to such a definition either. As has been established, those Acts are unable to provide such guarantees either. There is a considerable difference between the rights protected by the principle of legality and the human rights protected by the human rights instruments.

The principle of legality and the current human rights legislation vary considerably in the rights they protect but the mechanisms are substantially similar. The protection on offer from the principle of legality is not positive.²³⁴ It is not a prohibitory mechanism. It is still possible for Parliament to enact legislation which is inconsistent with rights and the validity of such legislation is not affected. The principle is invoked once the common law right has been breached. At the heart of the principle of legality is an interpretive obligation. This same interpretive obligation is found in the *ACT Act* and the *Victorian Charter*. The *ACT Act* and *Victorian Charter* impose an obligation on the courts to interpret legislation consistently with human rights so far as it is consistent with the purpose of the legislation.²³⁵ The validity and operation of inconsistent legislation is not affected.

If it is accepted that the operation of both the principle of legality and the human rights instruments are the same then this author would conclude that the principle of legality operates in the same, yet limited, way as the current Australian human rights instruments. Both mechanisms are founded on an obligation to interpret legislation consistently with the rights each protects. While it is obvious that the *ACT Act* and *Victorian Charter* provide a more extensive and detailed procedure than the principle of legality, both mechanisms have the same interpretive presumption at their core. This conclusion has found support in the

233 Peter Butt (ed), *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 3rd ed, 2004) 50.

234 Lacey, above n 34, 22.

235 *ACT Act* s 30; *Victorian Charter* s 32(1).

High Court, at least in relation to the *Victorian Charter*: 'Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.'²³⁶

The principle of legality, therefore, is a common law bill of rights in Australia to the extent that it provides a non-exhaustive list of rights protected at common law and an interpretive obligation on the courts. It should be made clear that due to the common law nature of the principle and the rights protected by it, it is in no way interchangeable with or substitutable for an actual bill of rights, either legislative or entrenched. Indeed, as stated at the beginning, this article does not advocate against the adoption of a federal bill of rights but supports the notion. One point that may be worth pondering is, if the principle of legality and the current human rights legislation employ the same mechanisms to achieve rights protection, do we need something 'stronger' at a federal level?

²³⁶ *Momcilovic v R* (2011) 245 CLR 1, 50 [51] (French CJ).