What’s the story? The instability of the Australasian bills of rights

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The three Australasian statutory human rights charters have proved surprisingly unstable in their interpretation and application. In the New Zealand context, a reason that has been suggested for this is that there are two competing explanatory narratives underlying the instrument, neither of which has been able to achieve ascendency. This article adopts that account and suggests that it also has explanatory power in the Australian context. The article then uses this “two stories” analysis to explore similarities and differences between the two jurisdictions and, in particular, to reflect on the broader constitutional cultures in which the Australasian statutory human rights charters must operate.

1. Introduction

Of the five Commonwealth jurisdictions to have adopted statutory (rather than fully constitutionalized) bills of rights, three are located in Australasia—New Zealand, the Australian Capital Territory (ACT), and the Australian state of Victoria.¹ A phenomenon that has been remarked upon by commentators in both New Zealand and Australia is the high degree of confusion and instability that has attended the interpretation and application of these three human rights instruments.² This article explores the underlying causes of that uncertainty and asks what that has to tell us, both about the instruments themselves, and about the wider constitutional cultures in which they operate.

The article draws inspiration from an astute observation made by Professor Paul Rishworth in respect of the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights).³ Rishworth suggested that the lack of resolution of key methodological questions

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1 The other jurisdictions are the United Kingdom and Canada, though in the latter the statutory instrument is largely superseded by the fully constitutionalized Canadian Charter of Rights and Freedoms.


3 Rishworth, supra note 2.
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concerning the interpretation and application of the N.Z. Bill of Rights stems from an absence of agreement over the underlying foundational question of what it means “to have a Bill of Rights in New Zealand.” He pointed out that there are two competing narratives underlying the New Zealand instrument—a constitutional law narrative and an ordinary law narrative—and he suggested that it is hard to settle second-order methodological questions about how to apply the legislation before this first-order constitutive question has been satisfactorily addressed.

This article suggests that Rishworth’s analysis also provides us with a tool for thinking about the Australian bills of rights. In Australia, as in New Zealand, two competing explanatory narratives have emerged in relation to the foundational question of what it means (in Australia) to have a statutory human rights charter—an “internationalist” narrative and an “Australian exceptionalism” narrative. And in Australia, as in New Zealand, second-order methodological controversies are, at least in part, manifestations of this unresolved debate over the conceptual underpinnings of these statutory instruments.

Having identified these points of similarity, this article also uses the “two stories” analysis as a lens through which to reflect on fundamental differences between the two jurisdictions. The article suggests that in Australia and New Zealand, the competing narratives ultimately play different functions. In New Zealand—a unitary state, operating under a Westminster-style unwritten constitution—the contest between the constitutional law and ordinary law narratives has at its heart a descriptive question (albeit inevitably bolstered by normative perspectives) about what kind of bill of rights it is that, as a factual matter, New Zealand has acquired. The contest between the two Australian narratives has descriptive and normative dimensions, too, but it also has a third dimension: it is an argument about what kinds of bills of rights are permissible in Australia’s federal system of government. This validity-related dimension makes the battle for ascendancy between the two narratives far more debilitating in Australia than New Zealand, though it may also mean that the contest between the two Australian narratives is likely to be forced to some sort of resolution in the medium to longer term.

Ultimately, the “two stories” analysis presented here seeks to illuminate both the richness and the perils of comparative analysis. The New Zealand and Australian human rights charters, together with their counterparts in the United Kingdom and Canada, are identified in the literature as members of a family of human rights instruments that cumulatively represent an innovative new model of Commonwealth constitutionalism. This strand in the literature, together with similarities in the common law heritage of the various jurisdictions, and the undoubtedly high level of textual and conceptual borrowing between the respective instruments, makes comparison between them both inevitable and, indeed, fruitful. But it is also fraught with danger. Beneath the surface

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4 Id. at 1 (original emphasis).
5 The nomenclature is mine. More recently, Rishworth has contrasted a “parliamentary” and “constitutional” narrative: Paul Rishworth, The Supreme Court and the Bill of Rights, in The New Zealand Supreme Court: The First Ten Years (Andrew Stockley & Michael Littlewood eds., 2015).
lie profound differences in constitutional and legal culture which have the potential to impact on the operation of these instruments in significant and sometimes unexpected ways. The story of the new Commonwealth “model” (if it can even be called that) is thus as much one of divergence as convergence in human rights protection.

2. The Australasian bills of rights

I begin with some necessary background. New Zealand is a small unitary state, operating under a Westminster-style unwritten constitution (though modified by the adoption of a proportionality-based electoral system). The N.Z. Bill of Rights, enacted in 1990, is one of the earliest examples of the statutory bill of rights model.

The Commonwealth of Australia is comprised principally of six states and two mainland territories, governed by a federal constitution. The Constitution of Australia contains very few express human rights protections, but in the last decade, two Australian jurisdictions have enacted statutory charters of rights at the local level. First, the ACT—a small self-governing territory consisting primarily of the federal capital, Canberra—enacted ACT’s Human Rights Act 2004. The state of Victoria followed with the Charter of Human Rights and Responsibilities Act 2006 (“Victorian Charter”).

These three Australasian statutes each enumerate a (non-comprehensive) list of rights sourced principally from the International Covenant of Civil and Political Rights and, in the case of New Zealand, the Canadian Charter of Rights and Freedoms. The three instruments share, in general terms, a number of operational features.

First, all three instruments contain a freestanding limitation clause, legitimizing limits on rights that are reasonable, provided for by law, and “demonstrably justified in a free and democratic society.” In all three jurisdictions, this has been held to give rise to a proportionality test.

Secondly, all three instruments seek to bring human rights assessments into the legislative process by requiring either the Attorney-General or, in the case of Victoria, the member introducing the bill, to report to the legislature on the human rights implications of new legislation. (The two Australian charters additionally require

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8 Austl. Const. Australia also governs a number of island territories.


10 The operational reach of this instrument was expanded significantly in 2008: Human Rights Amendment Act 2008 (ACT) (Austl.).

11 New Zealand Bill of Rights Act 1990 § 5 (N.Z.) [hereinafter N.Z. Bill of Rights]; ACT Human Rights Act (Austl.) s. 28; Charter of Human Rights and Responsibilities Act 2006 (Vic) (Austl.) § 7(2) [hereinafter Victorian Charter]. The two Australian instruments also specify certain mandatory considerations that must be taken into account in determining whether a limit is reasonable.


13 N.Z. Bill of Rights § 7; Victorian Charter § 28; ACT Human Rights Act § 37 (though in New Zealand, a report need only be tabled if the Attorney-General judges the legislation to be inconsistent with the protected rights).
human rights scrutiny of the legislation, once introduced, by a dedicated parliamentary committee.)\textsuperscript{14}

Thirdly, all three instruments bind government officials to act consistently, or “compatibly,” with human rights (and, in the case of the two Australian instruments, to give human rights “proper consideration”).\textsuperscript{15}

Fourthly, all three instruments stipulate that legislation must be interpreted in a way that is “consistent” or “compatible” with human rights—at least in so far as it is possible to do so consistently with the purpose of the relevant legislation.\textsuperscript{16} Where legislation cannot be interpreted compatibly with human rights, the legislation must be applied according to its terms.\textsuperscript{17} However, the two Australian instruments confer on the superior courts a jurisdiction to make non-binding declarations of legislative incompatibility (or inconsistency) with human rights.\textsuperscript{18} The N.Z. Bill of Rights confers no such express power but, after much vacillation, the New Zealand High Court has recently confirmed and exercised an implied power to make such a declaration.\textsuperscript{19}

3. The methodological instability of the N.Z. Bill of Rights

Although it is now twenty-five years old, the N.Z. Bill of Rights has been beset during its life by ongoing equivocation as to the meaning and effect of its operative provisions.

At the heart of this instability lies § 5 of the Act—the provision that legitimizes proportionate limits on rights. What is the function of this provision and how, if at all, does it inform the various tasks that courts and other state actors must perform?

For example, how does it intersect with the obligation to interpret statutes “consistently” with human rights? Under statutory bills of rights, the courts’ interpretive function is a central mechanism through which rights-consistent outcomes are to be obtained. To that end, § 6 of the N.Z. Bill of Rights states that: “Wherever an enactment can be given a meaning that is consistent with [the rights contained in the Act], that meaning shall be preferred to any other meaning.” But how does this direction to prefer rights-consistent meanings interact with the legitimization of proportionate limits on rights in § 5. Must the courts eschew meanings of legislation that limit rights, even if those limits are proportionate? Or are the courts only required to avoid meanings of legislation that place disproportionate limits on rights?

This methodological question was a major source of instability during the N.Z. Bill of Rights’ first two decades.\textsuperscript{20} In 2007, in \textit{R v. Hansen}, the New Zealand Supreme Court purported to resolve the question in favor of the latter view: that achieving “consistency”

\textsuperscript{14} Victorian Charter § 30; ACT Human Rights Act § 38.

\textsuperscript{15} N.Z. Bill of Rights § 3; Victorian Charter §§ 38 and 39; ACT Human Rights Act, pt 5A.

\textsuperscript{16} N.Z. Bill of Rights § 6; Victorian Charter § 32(1); ACT Human Rights Act § 30.

\textsuperscript{17} N.Z. Bill of Rights § 4; Victorian Charter § 32(3); ACT Human Rights Act § 32(3).

\textsuperscript{18} Victorian Charter § 36; ACT Human Rights Act § 32.


with rights means avoiding *disproportionate* limits on rights.\(^{21}\) However, this resolution (which was reached by a narrow three/two majority) has not proved particularly stable. The new methodology set out by the Supreme Court is not always followed by lower courts or tribunals, and its implications for the role of § 5 beyond the specific context of statutory interpretation remain far from settled.\(^{22}\) For example, although some commentators have suggested that *Hansen* confirms the role of the New Zealand courts in making non-binding indications (and perhaps declarations) of legislative incompatibility with human rights,\(^ {23}\) the subsequent case law discloses considerable ongoing reluctance on the part of New Zealand judges to exercise such a function.\(^ {24}\) The role of § 5 proportionality in relation to the constraint of administrative action also remains unresolved.\(^ {25}\)

### 4. The methodological instability of the Australian bills of rights

The haze of confusion presently enveloping the Victorian and ACT human rights charters is even more striking. The direct cause of this confusion is *Momcilovic v. The Queen*\(^ {26}\)—the first decision of the High Court of Australia to contain substantial discussion of the *Victorian Charter*. For the purposes of this article, three examples of the confusion generated by *Momcilovic* will suffice.\(^ {27}\)

#### 4.1. Relationship between proportionality and interpretation

The first concerns the same issue that caused so much difficulty for the New Zealand courts: the relationship between proportionality analysis and statutory construction. Early appellate authority in Australia split on this question. In *R v. Fearnside*, the ACT Court of Appeal followed the New Zealand Supreme Court in deciding (unanimously) that, at least on the specific facts before it, legislative “compatibility” with rights equated to the absence of disproportionate limits.\(^ {28}\) Conversely, in *Momcilovic*, the Court of Appeal of Victoria decided (unanimously) that the interpretive direction in § 32(1) of the Victorian Charter required “compatibility” with rights in their undiluted form, without reference to proportionality.\(^ {29}\)

On further appeal in *Momcilovic*, the High Court of Australia failed spectacularly to resolve the issue. A narrow majority of four (out of seven) judges agreed, in essence, with

\(^{21}\) Hansen [2007] 3 NZLR 1.


\(^{23}\) See, e.g., *Garkauf*, supra note 6, at 146–147.

\(^{24}\) See Geiringer, supra note 22. But see supra note 19 and accompanying text.


\(^{26}\) *Momcilovic* (2011) 245 CLR 1.

\(^{27}\) For broader discussion, see, especially, Bateman & Stellios, supra note 2; Bryan Horrigan, *Commonalities, Intersections, and Challenges for the Scrutiny and Interpretation of Legislation in Trans-Tasman Jurisdictions and Beyond*, 27 AUSTRALASIAN PARLIAMENTARY REV. 4, 15 (2012).


the New Zealand and ACT courts: that proportionality analysis is at the heart of the concept of “compatible” interpretation found in § 32(1) of the Victorian Charter. However, one of those four judges—Heydon J.—also held that, for this very reason (the intrusion of proportionality analysis into the interpretive process), the entire Charter is outside of the legislative power of the Victorian Parliament and therefore invalid. In his view, the proportionality test found in the Charter (and perhaps proportionality tests generally) is so vague as to constitute a constitutionally impermissible delegation of legislative power to the judiciary.

The result of this “precedential mess” is, as Bryan Horrigan put it, a “nice jurisprudential question” as to what now represents the law. Both the Victorian and Federal Courts of Appeal have held that the High Court’s decision in *Momcilovic* cannot be said to disclose any formal ratio on this issue. But where does that leave the earlier (and contrary) ratio from the Victorian Court of Appeal in *Momcilovic*; not to mention the ratio from the ACT Court of Appeal in *Fearnside*? In the case of Victoria, does the Court of Appeal’s ratio survive even though its decision in *Momcilovic* was, in fact, reversed by the High Court on other grounds? And if the Court of Appeal’s ratio does technically survive, is it likely to be reversed in subsequent cases? Has the High Court’s decision unsettled, for example, the default rule that an intermediate court can only depart from its earlier ratio if it is plainly wrong?

### 4.2. Relationship between proportionality and “compatibility” more generally

The High Court’s equivocation in *Momcilovic* over the relationship between proportionality and “compatibility” destabilizes the operation of the two Australian human rights charters well beyond the statutory interpretation context. This is because the concepts of “compatibility”/“incompatibility” (as well as the arguably synonymous concepts of “consistency”/“inconsistency”) are deployed throughout the two Acts. For example, both Acts require statements to be tabled in the legislature when new bills are introduced, stating whether the bill is “compatible” (Victoria) or “consistent” (ACT) with human rights; both Acts make it unlawful for a public authority to act in a way that is “incompatible” with human rights; and both Acts confer on the superior courts the power to make non-binding declarations if legislation is not “consistent” with human rights.

Although the matter was not determined, three High Court judges in *Momcilovic* expressed the (understandable) view that the concept of “compatibility” in the

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30 *Momcilovic* (2011) 245 CLR 1, ¶ 168 (opinion of Gummow, J.); ¶ 280 (opinion of Hayne, J.); ¶ 426–427 (opinion of Heydon, J.); ¶ 683 (opinion of Bell, J.).
31 *Id.* ¶¶ 428–439 (opinion of Heydon, J.).
35 Victorian Charter § 28; ACT Human Rights Act § 37.
36 Victorian Charter § 38(1); ACT Human Rights Act § 40B.
37 Victorian Charter § 36; ACT Human Rights Act § 32.
Victorian Charter must be given a coherent meaning across all the contexts in which it appears. And all seven judges held that the jurisdiction to declare legislation “inconsistent” with human rights arises whenever a “compatible” construction of legislation cannot be reached as a matter of interpretation. The failure to resolve the relationship between proportionality and “compatibility” thus cross-infects a range of different settings in which the two Australian human rights instruments apply, including the work of courts, members of Parliament, state officials and other public authorities. Again, four years after *Momcilovic*, these matters remain unresolved.

4.3. Validity of the power to make declarations of “inconsistent interpretation”

The High Court’s failure to resolve the relationship between proportionality and “compatibility”/“consistency” also casts uncertainty over the constitutional validity of the power to declare legislation inconsistent with human rights. In *Momcilovic*, a narrow majority of four judges upheld the validity of this power—at least insofar as it was exercised by state courts applying state (rather than federal) jurisdiction. But three of those four judges were in the minority on the question of whether proportionality analysis was relevant to determining legislative “compatibility” with human rights. They believed that under the Victorian Charter, legislation is “incompatible” with human rights (and the jurisdiction to make a declaration of inconsistent interpretation accordingly arises) whenever legislation limits rights at all (that is, even if the limit is proportionate).

If the opposing majority view on that question of construction ultimately achieves ascendency, where does that leave the constitutional validity of the declaration power? Bear in mind Heydon J.’s view that the proportionality criteria in the Victorian Charter are so vague as to constitute a constitutionally impermissible delegation of legislative power to the judiciary. If it were clearly accepted that proportionality analysis is, after all, a necessary prerequisite to the exercise of the power to make a declaration of inconsistent interpretation, would the majority shift in favor of the view that the power is therefore constitutionally invalid? The answer to this question is by no means clear.
5. The two stories of the N.Z. Bill of Rights

How, then, might we account for the degree of instability that has beset the three Australasian bills of rights? Paul Rishworth has given a persuasive answer to this question specifically in relation to the New Zealand instrument. He suggests that a key underlying cause of methodological confusion is that “foundational” or “constitutive” questions about what it even means to have a bill of rights in New Zealand remain unsettled. The root of the problem, he says, is that there are two competing narratives about the significance of the N.Z. Bill of Rights, neither of which has achieved ascendancy. According to the first “constitutional” narrative, the Act “occupies . . . the same space that higher law bills of rights occupy in other countries—with only such differences as are demanded by its explicit preservation of an ultimate parliamentary supremacy in s 4.” Conversely, the second narrative emphasizes the document’s status as part of ordinary law and regards the instrument as fundamentally different in kind from fully constitutionalized bills of rights.

Rishworth’s astute observation is that it is hard to settle second-order methodological questions before this first-order constitutive question has been addressed. Take the debate (discussed above) over the role of the proportionality analysis. One way of thinking of this controversy, Rishworth suggests, is as a manifestation of ongoing ambivalence over the first-order constitutive question. The constitutional law narrative aligns with the view that proportionality analysis is integral to the concept of “consistency” under the Act. On this account, the N.Z. Bill of Rights performs much the same function as a fully constitutionalized bill of rights—of setting a constitutional standard or baseline below which the state (including its legislative branch) should not fall, and of empowering the courts to evaluate whether or not that baseline is met (albeit not to strike down legislation). In order to perform this function of setting a minimum constitutional standard, the concept of “consistency” with rights deployed in § 6 (the interpretive direction) must necessarily incorporate any constitutionally legitimate limits on rights. That is the only way to determine the true baseline—the acceptable cutoff point between legitimate and illegitimate conduct.

Further, on this conception of “what it means to have a bill of rights,” it is necessarily part of the courts’ role to indicate or declare its view as to whether the constitutional baseline has been met. This speaks to the question whether the New Zealand courts have (and whether they should exercise) an “implied” power to make declarations of legislative inconsistency with human rights.

On the other hand, the idea of the courts evaluating legislative performance against a constitutional baseline sits uncomfortably with the ordinary law narrative. This narrative sees the Act as legitimizing and perhaps enhancing tools that are already available to the common law (such as requiring clear parliamentary language in order

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44 Rishworth, supra note 2. See, more recently, Rishworth, supra note 5, in which he suggests that the Supreme Court in its first decade has shown a preference for the constitutional law narrative.
45 Rishworth, supra note 2, at 1–3.
46 Id. at 1.
47 Id. at 3–6.
to overcome fundamental values). But it does not, or at least not intuitively, envisage a role for the courts in measuring legislative conduct against baseline constitutional standards and pronouncing on their adequacy.

6. The two stories of the Australian bills of rights

This article adopts Rishworth’s “two stories” analysis and suggests that it also provides a tool for thinking about the instability of the two Australian human rights statutes. The article suggests that the Australian and New Zealand experiences are similar in two respects. First, in Australia, as in New Zealand, two competing explanatory narratives have emerged in relation to the foundational question of what it means (in Australia) to have a statutory bill of rights. Second, as in New Zealand, second-order controversies about the interpretation and application of the Australian statutes are, at least in part, manifestations of this broader underlying debate.

The first Australian narrative has at its heart an outward-looking conception of what it means to have a bill of rights, and emphasizes the familial relationship between the two Australian statutes and other international (and, especially, Commonwealth) human rights instruments. More specifically, this “internationalist” narrative tends to include the following elements.

(1) It draws on a body of Commonwealth scholarship which suggests that an important innovation of modern Commonwealth human rights charters is the way that they share the responsibility for human rights protection between different institutions of government and thus promote inter-branch “dialogue” over human rights. The internationalist narrative sees the two Australian human rights charters as explicit instantiations of this dialogue model.

(2) It sees the two Australian human rights charters as powerful new tools that, at least on some level, shift the balance of power between courts and legislatures in relation to the protection of human rights. Consistently with the notion of “dialogue,” the courts are not seen as the only (perhaps not even as the most important) branch of government with responsibilities for the protection of human rights. Nevertheless, the internationalist narrative envisages a role for the courts in enforcing the two instruments that is both qualitatively and quantitatively different from the role they have traditionally performed in the common


50 See, e.g., ACT BILL OF RIGHTS CONSULTATIVE COMMITTEE, supra note 48, ¶¶ 3.50–3.55, 4.5–4.7; VICTORIAN HUMAN RIGHTS CONSULTATION COMMITTEE, supra note 48, at ii, 67–68, 86; Williams, supra note 48, at 901–902.

51 See, e.g., VICTORIAN HUMAN RIGHTS CONSULTATION COMMITTEE, supra note 48, ch. 5.
human rights doctrines developed in other jurisdictions, of which proportionality is of proportionality analysis. The internationalist narrative favors the borrowing of key this more foundational underlying debate. Take, again, the controversy over the role how to apply the ACT and Victorian statutes are, at least in part, manifestations of (3) features.

(1) The first is a suspicion of comparative methodology. This narrative emphasizes the sui generis character of the two Australian statutes and/or suggests that Australians should be slow to look to other jurisdictions for inspiration for how to protect rights.  

(2) More specifically, the Australian exceptionalism narrative emphasizes the distinctive Australian constitutional backdrop and, in particular, sees the separation of federal judicial powers doctrine contained in the Australian Constitution as in tension with some of the methods for human rights protection developed in other jurisdictions.  

(3) Finally, this narrative shares with the New Zealand ordinary law narrative a sense that the two Australian charters ought to be regarded as no different in kind from other statutes, and that the rules contained in them are best understood as instantiations of existing statutory and common law techniques for protecting human rights.  

In Australia, as in New Zealand, second-order methodological controversies about how to apply the ACT and Victorian statutes are, at least in part, manifestations of this more foundational underlying debate. Take, again, the controversy over the role of proportionality analysis. The internationalist narrative favors the borrowing of key human rights doctrines developed in other jurisdictions, of which proportionality is


56 See, e.g., Momcilovic (2011) 245 CLR 1, ¶¶ 146–183 (opinion of Gummow, J.); ¶¶ 436–439, 450–454 (opinion of Heydon, J.); ¶ 537 (opinion of Crennan and Kiefel, J.J.).  

perhaps an archetypal example. This narrative also shares with the New Zealand constitutional narrative the view that these human rights charters seek to facilitate the identification of a baseline or minimum standard of performance, below which, the state should not fall. For both these reasons, the internationalist narrative tends to support the view that proportionality analysis is integral to the concept of “compatibility” in the two Acts.

On the other hand, the Australian exceptionalism narrative tends to support the view that proportionality analysis is, at best, peripheral to the operation of the charters in the courts. That is because proportionality analysis is foreign to traditional common law method and invites the courts into a task not ordinarily exercised by judges outside of the context of the federal constitution—that of evaluating the adequacy or legitimacy of legislation. On this view, proportionality analysis is, at best, an alien interloper that involves a significant departure from the ordinary judicial role; at worst, a technique that involves the exercise of non-judicial power and thus brings the courts into conflict with constitutional doctrine.

The High Court’s decision in *Momcilovic* does not resolve the contest between these two narratives (indeed, it is its failure to do so that is the cause of the confusion). Nonetheless, the decision does reject some specific aspects of the internationalist narrative. First, the judges in *Momcilovic* evinced a very strong hostility to the notion of “dialogue” as an explanation of what is at stake under the Australian bills of rights. Their Honors saw this notion as fundamentally incompatible with Australian understandings of the judicial role, as informed by the constitutional doctrine of separation of federal judicial power. 59

As well, *Momcilovic* rules out one particularly potent manifestation of the internationalist narrative, which analogizes the interpretive direction in the Victorian Charter to the strong “remedial” obligation found in § 3 of the Human Rights Act 1998 (UK). Six out of seven judges in *Momcilovic* rejected this analogy, holding that the interpretive obligation in the Victorian Charter is weaker and is bounded by the concept of legislative intention. 60

In Victoria, the two narratives are also hotly contested in the arena of state politics. In 2010, a Liberal/Nationals Coalition Government was elected against the background of vague threats to repeal the Charter or substantially limit its operation. The Government delegated responsibility for conducting a statutorily designated four-year review of the Charter to the (parliamentary) Scrutiny of Acts and Regulations Committee (SARC). In the report that resulted, the Government majority on SARC recommended that the Charter should be taken away from the courts and retained only as a tool for facilitating human rights scrutiny of legislation during the parliamentary...
process. Should the Government not wish to pursue that heady course of action, SARC recommended (unanimously) an alternative set of amendments to the Charter. This latter prescription is of particular interest here because of the hostility it evinced to the internationalist narrative.

For example, SARC argued that the wording of the proportionality provision (which borrows from international precedents) is unsuitable for the Victorian context, and should be redrafted “in plain language that is accessible to Victorians without reference to comparative jurisprudence.” Similarly, SARC recommended that a provision in the Charter inviting recourse to international and comparative precedents be repealed, and that the provision stating the obligations of public authorities be redrafted in “plain language” that is “accessible . . . without recourse to overseas precedents.”

This hostility to comparative methodology was accompanied by a preference for limiting Charter remedies to those already available under statute and at common law. For example, SARC recommended that consideration be given to whether the interpretive direction in the Charter is necessary in light of common law presumptions of interpretation, and suggested that if it was to be retained, it should be redrafted to clarify that it is limited to “traditional approaches to interpretation.” The Committee also recommended that the Charter’s (already weak) remedies provision be rewritten to ensure that the only remedies available for breach of the Charter are those provided for expressly by particular statutes in specific legislative contexts.

The adoption of these recommendations would have represented a near complete victory for the Australian exceptionalism narrative. In the event, though, no concrete steps were taken to move on Charter reform during the Coalition Government’s four-year term. The new Labour Government (elected in 2014) delegated responsibility for conducting a (statutorily designated) eight-year review of the Charter to a lawyer, whose report swung firmly back in the other direction. It explicitly embraced the language of “dialogue,” reinforced the central role of proportionality in determining “compatibility” with the Charter, characterized the interpretive direction in the Charter as a “stronger rule of interpretation” than a common law presumption, and recommended the introduction of a freestanding remedy for breach of the Charter.

61 Scrutiny of Acts and Regulations Committee, supra note 55, recommendation 35 (2011). This would have brought it into line with the Human Rights (Parliamentary Scrutiny) Act 2011 (Austl.)—a Commonwealth Act that operates only in the legislative sphere.

62 Id., recommendation 13.

63 Id., recommendation 27.

64 Id., recommendation 23. See also id. recommendation 24.

65 Id., recommendation 24.

66 Id., recommendation 32.


68 Id., e.g., at 138–139, 159–161, 174, and 198–199.

69 Id., recommendation 29 (though the report’s specific recommendations in relation to the interpretive direction were not entirely consistent with this: see, especially, recommendation 28(a) and (b)).

70 Id. at 144 and 146.

71 Id., recommendation 27.
At the time of writing, the Victorian Government’s response to the report is not yet known. Nevertheless, it is clear that in Victoria, the competing narratives identified in this article are the subject of intense political contestation.

7. Big “C” and small “c” constitutionalism: A tale of trans-Tasman divergence

So far, the analysis has highlighted points of similarity in the New Zealand and Australian experience. It has suggested, in particular, that in both countries, difficulties in resolving methodological questions about how to interpret and apply the respective human rights instruments reflect more foundational underlying controversies about what it means to have a statutory bill of rights at all.

When one excavates further, however, significant differences emerge in the character of the competing narratives and in the functions that they perform in each jurisdiction. These points of divergence provide a useful lens through which to view broader dissimilarities in the legal and constitutional cultures of the two countries and, in particular, through which to reflect on the differences between written and unwritten constitutionalism.

7.1. The character of the competing narratives

As might be expected, there is a great deal of crossover between the narratives that have emerged in each country. The Australian internationalist narrative aligns at a number of points with the New Zealand constitutional law narrative. Both see their respective bills of rights as potent new tools that shift the balance of power away from legislatures and towards courts and that, specifically, imagine a role for the courts in evaluating whether or not state conduct (including legislative conduct) meets a baseline or minimum standard set by the human rights instrument. The Australian exceptionalism narrative, on the other hand, aligns in at least one respect with the New Zealand ordinary law narrative. Both share a sense that these statutory human rights charters ought to be regarded as no different in kind from other statutes, and that the rules contained within them are best understood as instantiations of existing statutory and common law techniques for protecting human rights.

There is, however, a key difference between the two sets of stories. It lies in the way in which the language of “constitutional” and “unconstitutional” is deployed in the two jurisdictions. The New Zealand constitutional law narrative emphasizes the status of the N.Z. Bill of Rights as a document of constitutional character. In the context of New Zealand’s unwritten constitution, that language does not imply a supreme law status of the kind that would attach to a written constitution. Nevertheless, the terminology is deployed to underscore the special character of the document and to advance the case for its expansive interpretation and application.72 The descriptor “constitutional” also serves to highlight the need for the instrument to be considered in a comparative context. It emphasizes the

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close relationship between the New Zealand instrument and fully blown constitutional
human rights documents such as the Canadian Charter of Rights and Freedoms, and
legitimizes recourse to them in exploring the instrument’s meaning and effect.73

In contrast, the Australian internationalist narrative cannot and does not use the
adjective “constitutional” to describe the Victorian and ACT human rights charters.
That terminology is monopolized instead by the Australian exceptionalism narrative.
And it does so not in aid of an extended interpretation of the Australian human rights
charters but in aid of a restrictive interpretation that confines the two instruments to
a policy space that does not encroach on settled understandings of the respective roles
of courts and legislatures under the Australian federal constitution.74 Further, the
language of “constitutional” (and “unconstitutional”) is deployed by the Australian
exceptionalism narrative not to invite recourse to the experience of comparator juris-
dictions but to highlight the sui generis character of the two Australian instruments
and the unique constitutional context in which they must be applied.75

7.2. The origins and functions of the competing narratives

Already, then, we can see that the competing narratives underlying the Australian and
the New Zealand bills of rights underscore the fundamentally different constitutional
environments in which the instruments operate. This sense of difference is heightened
when one considers the way in which these competing narratives emerged, and the
precise functions that they play in each jurisdiction.

As Rishworth suggests, the seeds of ambivalence in New Zealand lie in the genesis
of the N.Z. Bill of Rights.76 As is well known, the Act had its origins in a white paper
(including a draft text) that proposed a supreme law bill of rights, modeled in large
part on the Canadian Charter of Rights and Freedoms.77 When it became clear that
there was inadequate support for such a significant constitutional change, the bill
was remodeled as an ordinary statute. Significantly, though, this remodeling exercise
stopped short of a complete rewrite. As a result, the instrument retained much of
the structure of a higher law bill of rights—still resembling, in some key respects, the
Canadian Charter.78

The amended bill was pushed through Parliament without cross-party support and
with little discussion of its constitutional significance. This was in part a function of
the lack of international precedents for a statutory bill of rights. With the exception of
the Canadian Bill of Rights, S.C. 1960, c. 44 (which had proved something of a dead

73 See, e.g., Simpson v. Attorney-General (Baigent’s Case) [1994] 3 NZLR 667 (C.A.) (especially opinion of
Cooke, P.J.); Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, The New Zealand Bill of
74 See, e.g., Momcilovic (2011) 245 CLR 1, ¶¶ 537, 590 (opinion of Crennan and Kiefel, J.J.).
75 See, e.g., Momcilovic (2011) 245 CLR 1, ¶ 155 (opinion of Gummow, J.).
76 Rishworth, supra note 2, at 4–8. See also Paul Rishworth, The Birth and Rebirth of the Bill of Rights, in
Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, at 1 (Grant
78 See, especially, N.Z. Bill of Rights ss 3, 5.
New Zealand politicians and commentators had nothing to draw on to assist them in imagining what it might mean to have a statutory bill of rights. Indeed, the bill was perceived by its disappointed sponsors not so much as a constitutional innovation as a consolation prize, salvaged from the scrap heap of the desired reform.79

In short, the N.Z. Bill of Rights was an unstable and under-explored compromise, erected on uncertain constitutional terrain. Against that background, it is perhaps not surprising that there was (and that there continues to be) genuine disagreement as to what kind of bill of rights it is that, as a descriptive matter, New Zealand has ended up with. Naturally, there are also normative arguments at play—proponents of the constitutional law narrative are more likely (though not certain) to favor strong human rights protection and proponents of the ordinary law narrative are more likely (though not certain) to favor judicial abstention.80 But importantly, the contest between the two New Zealand narratives is not one about what kind of bill of rights we could have if our legislature clearly provided for it—that is to say, the New Zealand debate is not about whether either of the competing conceptions at play is outside the law-making powers of Parliament. Indeed, under New Zealand’s unwritten constitution, arguments that any activity is beyond Parliament’s law-making power have little purchase. Even the once fashionable argument that a Westminster-style Parliament cannot bind its successors through an entrenchment clause has little traction in the contemporary New Zealand debate.81 The controversy, then, is less about what it means “to have a bill of rights in New Zealand” as about what it means in all the circumstances to have this particular bill of rights.

The genesis of the two Australian instruments could not have been more different. First, they were both imagined from the beginning as statutory (rather than capital “C” constitutional) human rights charters. Secondly, their drafting post-dated the enactment of both the New Zealand and United Kingdom statutory instruments. There was thus significant comparative experience to draw on, as well as an emerging body of scholarship engaging with the statutory bill of rights model as a constitutionally innovative new wave of human rights protection.82

Against that background, those involved in the conception and, indeed, early implementation of the two Australian instruments in fact presented a strikingly homogenous narrative about what it would mean to have a statutory human rights charter. The internationalist narrative was promoted consistently by the two consultation committees that first proposed the Australian instruments, by the government

ministers sponsoring the legislation, and by agencies (such as the Victorian Equal Opportunity and Human Rights Commission) with key roles in their early implementation.\textsuperscript{83} It was also reinforced by early decisions from the Victorian courts, including by the Chief Justice of Victoria.\textsuperscript{84}

At first blush, therefore, it is surprising that such a powerful competing narrative nevertheless emerged. This fact becomes somewhat less surprising, however, when one focuses attention on the function performed by the Australian narratives. In particular, it is important to understand that although the Australian debate shares with the New Zealand one a descriptive and a normative dimension (it is in part an argument about what \textit{is} and what \textit{should be}), it also performs a third function that is not present in the New Zealand debate: it is an argument about what is permissible in Australia’s system of government. This, I suggest, is why a competing narrative was able to emerge in Australia \textit{notwithstanding} the clear intentions of the drafters and the enacting legislature—in Australia (but not in New Zealand) the intention of the enacting legislature can always be trumped by an argument derived from the (federal constitutional) limits on state power.

When identifying the two stories of the N.Z. Bill of Rights, Rishworth described the contest between them as a “constitutive” dialogue.\textsuperscript{85} That language resonates in New Zealand because under the unwritten constitution, we are constantly reconstituting ourselves. There is no one constitutive moment; just a series of constitutive iterations, in which we reexamine, refine or redefine our constitutional signposts.\textsuperscript{86} In Australia, however, it would be difficult to describe this question—what does it mean to have a statutory bill of rights?—as “constitutive.” There cannot be a true “constitutive” narrative for the Australian bills of rights because the constituting has already been done—by the federal constitution. The stories of the Australian bills of rights must be able to exist within the confines of this preexisting constitutional (and constitutive) narrative.

Thus the proponents of the Australian exceptionalism narrative do not need to be deterred by the lack of support for this narrative in the drafting history. It is sufficient if they can make the case that the internationalist narrative steps outside the bounds of state power.

7.3. Written and unwritten constitutions: What space for ongoing controversy?

The fact that the Australian narratives perform this third function—of supporting arguments about what is permissible in Australia’s system of government—is thus significant for another reason. It suggests that the ongoing controversy over the meaning and effect of the Australian bills of rights has the potential to be far more debilitating than the


\textsuperscript{84} Major Crime (2009) 24 VR 415.

\textsuperscript{85} Rishworth, supra note 2, at 3.

\textsuperscript{86} See Janet McLean, \textit{The Unwritten Political Constitution and its Enemies}, 14(1) \textsc{Int’l J. Const. L.} 119 (2016).
ongoing uncertainty over the New Zealand instrument. That is because the descriptive (what the Australian bills of rights mean), normative (what they ought to mean) and validity-related (what is within power) dimensions to the Australian narratives intersect with each other in complex and sometimes unpredictable ways. Take the *Momcilovic* decision. In it, the Chief Justice took an approach that was more consistent with the Australian exceptionalism narrative in order to read down the role of proportionality analysis in the Victorian Charter (the descriptive dimension) and thus support an argument for the constitutional validity of the Charter (the validity-related dimension). Conversely, one of the other judges, Bell J., took an interpretive approach that was more consistent with the internationalist narrative in order to read up the role of proportionality analysis (but still to support the constitutional validity of the Charter). On the other hand, Heydon J. used the internationalist narrative to read up the meaning of the Charter as a question of construction, but then made normative and validity-related arguments that were more aligned to the Australian exceptionalism narrative (he argued that the Charter, interpreted in the way he said it must be, was both ill- advised and outside power). The difficulty in assessing the import of some of the other opinions in *Momcilovic* is that it is unclear to what extent the judges’ descriptive findings align with a validity-related conclusion (that if the Charter meant something else, it would be invalid).

In short, the real difficulty in assessing the implications of *Momcilovic* lies not in determining where the majority sits on the descriptive point (four/three in favor of including proportionality analysis in the assessment of compatibility) but in determining how this descriptive finding is unsettled (and vice versa) by the intersecting views expressed by various judges on the validity-related question. Not only does this lend a special character (not present in New Zealand) to the nature of the uncertainty over the meaning of the Australian bills of rights but it also underscores the seriousness of what is at stake. If local institutions misread the tea leaves strewn by the High Court in *Momcilovic*, they may find themselves promoting readings of their statutory bills of rights that increase the likelihood of provisions in the two instruments (or indeed the instruments as a whole) being held to be invalid. It is also worth noting in passing that this exercise in tealeaf reading is inevitably complicated by periodic changes to the composition of the High Court.

The post-*Momcilovic* case law from the Victorian Court of Appeal certainly shows signs that these factors may have induced a form of paralysis or at least sluggishness in relation to the development of Victorian Charter jurisprudence and that the state courts (and state litigants) may be reaching to other tools to resolve the disputes before them. In particular, although the Court of Appeal has had several opportunities to

88 *Id.* (opinion of Bell, J.).
89 *Id.* (opinion of Heydon, J.).
90 See especially *Id.* opinion of Crennan and Kiefel, J.J.
91 Justice Pamela Tate describes it an “impasse”: Pamela Tate, *Statutory Interpretive Techniques under the Charter: Three Stages of the Charter—Has the Original Conception and Early Technique Survived the Twists of the High Court’s Reasoning in Momcilovic?*, 2 JUD. C. VICT. ONLINE J. 43, 44 (2014).
What’s the story? The instability of the Australasian bills of rights

Reexamine the interrelationship between proportionality and statutory interpretation, it has consistently found ways to avoid having to so. Sometimes that has been because the Court has concluded (quite properly) that the Charter right being relied on was simply not engaged. In other cases, though, the Court has either been content to reach the rights-compatible meaning in reliance on “ordinary” principles of construction including common law presumptions of interpretation (making recourse to the Charter unnecessary); or has moved straight to the conclusion that, regardless of any Charter right, the statute is only capable of one meaning (making recourse to the Charter ineffective).

This approach is invited by the fact that the High Court in Momcilovic rejected a strong “remedial” approach to the interpretive direction. But, as Tate J.A. suggested in her concurring decision in Victorian Police Toll Enforcement v. Taha, it does not follow from the High Court decision that the interpretative direction in the Charter is nothing more than a codification of a common law presumption, with nothing at all to add to the interpretive exercise. The willingness of some members of the Victorian Court of Appeal to read the Charter out of litigation in this way suggests a degree of paralysis engendered by the broader controversies over what the Charter means and which readings of the Charter can survive constitutional scrutiny.

Of course, it does not necessarily follow that the Charter has had no impact on these cases. For example, it may well be functioning as an invisible hand that pushes the courts towards reliance on common law presumptions in circumstances in which they would not otherwise have done so. If that is happening, though, it is more consistent with the Australian exceptionalism narrative than the internationalist one. And it also suggests a possibility that the Australian exceptionalism narrative may gain de facto ascendency in Victoria simply because it is the path of least resistance for state courts.

Whether or not that happens, it is difficult to imagine that this controversy over the foundational question of what it means to have a charter of rights will remain unresolved by the time the Australian instruments reach the vintage of the New Zealand one. The validity-related dimension to the Australian controversy will surely force either confrontation and resolution or, as I have suggested may be happening in Victoria, de facto acceptance of the constitutionally safest course of action.

If this prediction is correct then what becomes noteworthy about the New Zealand experience is the way in which the two stories of the N.Z. Bill of Rights have been able to co-exist alongside each other over a period of more than two decades. Rishworth suggests that this is puzzling. I want to suggest here, though, that the explanation may lie deeper than in the ambivalent drafting history of the N.Z. Bill of Rights and may be found in the very nature of the unwritten constitution. The unwritten

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94 Nigro v. Secretary to the Department of Justice (2013) 304 ALR 535.
96 Momcilovic (2011) 245 CLR 1.
98 Rishworth, supra note 2, at 2.
constitution is Janus-faced; it contains at its core an ambivalence about the role of ordinary statutes as sources of constitutional value. They are always both ordinary and special.\textsuperscript{99} The contest between the “two stories” of the N.Z. Bill of Rights may not just be unresolved; it may thus be unresolvable.

Constitutional lawyers trained in “the mysteries of the [unwritten] constitution”\textsuperscript{100} thrive on this ambivalence. They (we) are adept at accepting paradox, equivocation and contradiction as an ingrained part of our constitutional practice. The upside of this habit of equivocation is that it leaves room for contested meanings to be thrashed out over a long period of time and in a range of different fora.\textsuperscript{101} Further, as Rishworth has suggested elsewhere, it allows the jurisprudence to shift up and down across a spectrum, depending on factors such as the perceived degree of invasion of rights and the judicial inclination to grant a remedy.\textsuperscript{102}

The danger is that we are not always forced to confront as clearly as we could the real-world limitations of our system of constitutional law and practice. In the case of the N.Z. Bill of Rights, there is a danger that the ongoing vitality of the constitutional law narrative may in fact serve the function of obscuring the extent to which, in practice, our bill of rights has turned out to be little more than an “ordinary law.”\textsuperscript{103}


\textsuperscript{101} See Elliott, supra note 99, at 618–620, suggesting similarly that interpretive bills or rights help to obviate the need to confront the ultimate question of whether legislative power is subject to ultimate unwritten limits.

\textsuperscript{102} Paul Rishworth, Reflections on the Bill of Rights after Quilter v. Attorney-General, N.Z. L. Rev. 683, 689 [1998].