THE COMMON LAW PRINCIPLE OF LEGALITY IN THE AGE OF RIGHTS

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[In April 2010 the Australian government released its Human Rights Framework *('*HRF*'). The HRF was its formal response to the report of the National Human Rights Consultation Committee, chaired by Father Frank Brennan AO. Importantly, the HRF rejected the key recommendation of the* Brennan Report*: that the Australian Parliament ought to enact a statutory bill of rights. So at least in the federal sphere the key tool to facilitate the judicial protection of rights remains what has become known as the principle of legality. Notwithstanding its contemporary significance, however, it remains a principle for which there is little meaningful judicial exegesis. Its content and application remain unclear. For example, what rights are fundamental at common law and how do they become so? Should the courts use international rights norms as the rights touchstone for the principle? And should the application of the principle of legality ever involve the kind of balancing that is central to the proportionality analysis under a bill of rights? These are the key issues that will be explored in this article.]*

CONTENTS

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I INTRODUCTION

In April 2010, the Commonwealth government released *Australia's Human Rights Framework* ('*HRF*').[1] The *HRF* was the government's formal response to the report of the National Human Rights Consultation Committee ('*Brennan Report*'), chaired by Father Frank Brennan AO.[2] The *HRF* contains a number of important human rights initiatives. These include the establishment of a Joint Parliamentary Committee on Human Rights — modelled on the United Kingdom ('UK') Parliament's respected and influential Joint Committee on Human Rights[3] — to scrutinise all Commonwealth 'Bills and legislative instruments for consistency with the seven core United Nations human rights treaties to which Australia is a party.'[4] Further, there will be a legal requirement that each new Bill introduced into the Australian Parliament must be accompanied by a statement of its compatibility (or otherwise) with these seven human rights treaties.[5] These developments provide for what Janet Hiebert calls 'political rights review'[6] and their significance in terms of improving the rights sensitivity of legislation ought not to be underestimated.[7]

However, as has been well documented,[8] the *HRF* did not accept the key recommendation of the *Brennan Report*: that the Australian Parliament enact a statutory bill or charter of rights of the kind operating in the Australian Capital

1 Attorney-General's Department (Cth), *Australia's Human Rights Framework* (2010) <http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_AustraliasHumanRightsFramework_AustraliasHumanRightsFramework>.

2 National Human Rights Consultation Committee, *National Human Rights Consultation — Report* (2009) <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads>.

3 On the UK's Joint Parliamentary Committee on Human Rights, see generally UK Parliament, *Joint Select Committee — Human Rights* <http://www.parliament.uk/business/committees/committees-archive/joint-committee-on-human-rights/>.

4 *HRF*, above n 1, 8.

5 Ibid. The seven human rights treaties are the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

6 Janet L Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 *Modern Law Review* 7, 9.

7 For a generally positive assessment of the impact of political rights review under the *Human Rights Act 1998* (UK) c 42 on the development of law and policy, see Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006) <http://www.justice.gov.uk/guidance/docs/full_review.pdf>.

8 See, eg, Sean Lau, 'Editorial: The Future of Human Rights in Australia' (2010) 33 *University of New South Wales Law Journal* 5. See further a collection of eight articles in (2010) 33 *University of New South Wales Law Journal* 8–238, a special issue on the future of human rights in Australia following the release of the *HRF*.

Territory ('ACT'), New Zealand, the UK and Victoria.[9] In doing so the Australian government has, at least for the time being, rejected the increased judicial role in the protection of rights that inevitably attends the application of a bill of rights.[10] The *HRF* did, however, note that 'Australian courts interpret and apply legislation every day using well established common law and statutory rules of interpretation.'[11] It noted further that

> [i]n the event of ambiguity, the courts construe legislation consistently with fundamental rights unless Parliament has expressly indicated a contrary intention. Similarly the courts construe ambiguous legislation on the basis that it is presumed that Parliament does not intend to breach Australia's human rights obligations.[12]

Consequently, in the absence of a bill of rights interpretation provision, these two common law statutory presumptions remain the key interpretive tools to facilitate the judicial protection of human rights in the federal sphere in Australia.[13] The primary concern of this article is with the first of the presumptions noted above — that legislation is construed consistently with fundamental rights — which courts and commentators now increasingly refer to as the principle of legality.[14] In particular, I wish to explore the curious fact that notwithstanding its contemporary significance in the construction of statutes at common law, it remains a principle for which there is little meaningful judicial exegesis. However, in order to do so, it is also necessary to consider the relationship between the principle of legality and the presumption of international law consistency for the common law protection of human rights in Australia.

In most instances where the principle of legality is applied there is little beyond the now ritual — though clearly important — incantations that '[f]undamental rights cannot be overridden by general or ambiguous words'[15] or that '[i]t 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'.[16] These statements give a sense of *what* (fundamental rights) the principle of legality seeks to protect and *how* (strong interpretive presumption) it seeks to do so. Yet its content and scope remains unclear. If we are to better understand the (constitu-

9 *HRF*, above n 1, 1.

10 See Sir Gerard Brennan, 'The Constitution, Good Government and Human Rights' (2008) 16 *Australian Law Librarian* 83, 94.

11 *HRF*, above n 1, 10.

12 Ibid.

13 See Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion and Use of Unincorporated Conventions* (Presidian Legal Publications, 2008) 94–109.

14 See, eg, *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 130 (Lord Steyn) ('*Simms*'); Claudia Geiringer, 'The Principle of Legality and the *Bill of Rights Act*: A Critical Examination of *R v Hansen*' (2008) 6 *New Zealand Journal of Public and International Law* 59, 62–3; Sir Philip Sales, 'A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*' (2009) 125 *Law Quarterly Review* 598, 611.

15 *Simms* [2000] 2 AC 115, 131 (Lord Hoffmann).

16 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J), quoting Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) 122.

tionally appropriate) role of the principle of legality in the age of rights these important theoretical and methodological issues need to be addressed.

In order to do so, this article will proceed as follows. A brief history of the principle of legality — including an account of its contemporary judicial re-assertion — is provided in Part II. An examination of relevant Australian cases is undertaken in Part III in order to ascertain the content of the principle of legality and how Australian courts currently apply it. This analysis raises important methodological issues for the principle in the age of rights: should the courts increasingly use international human rights norms as the rights touchstone for the principle? If so, what role (if any) does the common law presumption of international law consistency have in the human rights context? And in the age of (international human) rights, should the application of the principle involve a balancing or proportionality analysis? If so, do Australian judges have the expertise, experience and democratic mandate to undertake such an inquiry? These issues are considered in Part IV. Finally, in Part V, the likely impact on the principle of legality if proportionality is incorporated into its methodology is considered.

II THE COMMON LAW PRINCIPLE OF LEGALITY: A BRIEF HISTORY

There is nothing particularly new about judges construing statutes and deploying their interpretive powers more broadly to protect rights and interests considered fundamental at common law. Indeed, it may even be possible to trace the origins of such an approach back to Lord Mansfield's judgment in *Somerset v Stewart* ('*Somerset's Case*'), the famous King's Bench decision of 1772 regarding the law of slavery.[17] In the transcript of his judgment, Lord Mansfield held that English common law did not authorise slavery:

> The state of slavery is of such a nature, that it is incapable of now being introduced by Courts of Justice upon mere reasoning or inferences from any principles, natural or political; it must take its rise from positive law.[18]

This conclusion followed Lord Mansfield's revolutionary adoption of the 'principle that English common law provided certain minimum levels of substantive protection to anyone who came to England'.[19] George Van Cleve considers that

> [t]his represented the emergence of a new English concept of legal freedom that divorced fundamental legal rights from race, birth, or free/servile status and based them instead on an individual's status as political subject.[20]

[17] (1772) Lofft 1; 98 ER 499.

[18] 'The Substance of Lord Mansfield's Speech on the Case between Mr Stuart and Somerset the Black, which was Determined on Monday the 21st June' (1772) 41 *The London Magazine or Gentleman's Monthly Intelligencer* 267, 268.

[19] George Van Cleve, '*Somerset's Case* and Its Antecedents in Imperial Perspective' (2006) 24 *Law and History Review* 601, 636.

[20] Ibid.

In doing so Lord Mansfield, arguably, laid the normative foundations for the common law to protect fundamental rights so far as interpretively possible, subject only to statute law clearly to the contrary.

Similarly in Australia, the principle of legality has a significant common law lineage.[21] As early as 1908, the High Court recognised and applied the principle to protect the right of any Australian-born member of the Australian community to re-enter the country after a period of absence.[22] However, for a good part of the 20th century the common law courts only applied the principle of legality to protect a narrow set of rights. In this regard, Lord Browne-Wilkinson, in a seminal 1992 article, highlighted the traditional rights concerns of the courts before, importantly, describing the fundamental societal and legislative changes effected by the emergence of the modern welfare state and the increased regulatory role of government:

> Until comparatively recently, government was seldom concerned in matters affecting freedom of the individual outside the realms of criminal law, taxation and, to a lesser extent, property rights. In those fields where government intervention was common, the courts consistently stood as defenders of the individual against the state. Penal and tax statutes were strictly construed; there was a presumption against a statute interfering with property rights. …
>
> But the world has changed. The growing complexity of life has necessarily led governments, of all political shades, to intervene in many aspects of our daily lives. Legislation now authorises direct executive intervention in our education, our food, our transport, our health, our use of our property, what is shown on television or broadcast and a host of other areas. The pressure of parliamentary business means that Parliament has not got time to ensure that invasions of personal freedom are kept to the essential minimum.[23]

In contemporary parlance, the common law principle of legality was applied by judges 'in favour of a narrow vision of classical economic liberalism and against incursions from a modern, collectivist state.'[24] As a consequence, the rights considered fundamental — and therefore protected — by the courts became increasingly at odds with those favoured by the political arms of government and the general public who stood to benefit from the socially progressive and economically redistributive legislation.[25] As Lord Browne-Wilkinson observed, 'the courts, when construing statutory powers to interfere with personal freedoms, have not invariably applied the same strict criteria applied to penal or taxing statutes.'[26]

The catalyst for the contemporary renaissance of the principle of legality can be traced to '[t]he rise and rise of human rights' — in shocked response to the

21 See Chief Justice J J Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 774–5, 780–1.

22 *Potter v Minahan* (1908) 7 CLR 277, 288–9 (Griffith CJ), 299 (Barton J), 306–7 (O'Connor J).

23 Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] *Public Law* 397, 397.

24 Geiringer, 'The Principle of Legality', above n 14, 88.

25 See Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 33–4.

26 Lord Browne-Wilkinson, above n 23, 398.

horrors of World War II — as a core concern of the international legal order.[27] As a consequence:

> During the second half of the 20th century, the international human rights movement and its various regional and domestic offshoots have provided common law judges with an updated set of values to protect and with an enhanced constitutional expectation that they will act in a guardianship role with respect to them. This development provides the context for the judicial reassertion during the 1990s of a common law 'principle of legality' that fundamental rights cannot be overridden by general or ambiguous words.[28]

In any event, and some time before the Westminster Parliament incorporated the *European Convention on Human Rights* ('*ECHR*')[29] into English domestic law,[30] Lord Browne-Wilkinson argued that courts already had the capacity — if not the duty — to robustly deploy their interpretive powers to protect fundamental rights:

> Even though the *ECHR* forms no part of our law, it contains a statement of fundamental human rights (accepted by this country) much wider than the freedoms of the person and of property which have, of late, become the only rights afforded special treatment by our courts. We must come to treat these wider freedoms on the same basis and afford to freedom of speech, for example, the same importance as we have afforded to freedom of the person.[31]

Interestingly, the judicial reassertion of the principle of legality was already well underway in Australia. It underpinned the 1987 decision of the High Court in *Re Bolton; Ex parte Beane* ('*Re Bolton*'),[32] where the fundamental right at common law to personal liberty (and the corollary remedy to seek a writ of habeus corpus) was not displaced by a statute that failed to

> express that intention with unmistakable clarity … Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation.[33]

The Court then confirmed the centrality of the principle of legality to the construction of statutes in its important 1990 decision in *Bropho v Western Australia*,[34] and once again in 1992 in *Coco v The Queen*[35] where it noted the consistency of its interpretive approach with that advocated by Lord Browne-Wilkinson:

27 Conor Gearty, *Can Human Rights Survive?* (Cambridge University Press, 2006) 25–8.
28 Geiringer, 'The Principle of Legality', above n 14, 89.
29 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).
30 The *ECHR* was incorporated into English domestic law by the *Human Rights Act 1998* (UK) c 42.
31 Lord Browne-Wilkinson, above n 23, 409.
32 (1987) 162 CLR 514.
33 Ibid 523 (Brennan J). See also at 518 (Mason CJ, Wilson and Dawson JJ).
34 (1990) 171 CLR 1, 17–18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
35 (1994) 179 CLR 427.

> In England, Lord Browne-Wilkinson has expressed the view that the presence of general words in a statute is insufficient to authorize interference with the basic immunities which are the foundation of our freedom; to constitute such authorization express words are required. That approach is consistent with statements of principle made by this Court …[36]

In the years to follow, judges throughout the common law world began to routinely apply the principle of legality in cases[37] and promoted its constitutional significance in extra-curial papers.[38] Its most famous contemporary judicial exposition probably comes from the judgment of Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms*.[39] In a passage that has become the quintessential statement of the principle, Lord Hoffmann wrote:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights … The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. 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.[40]

Importantly, in Australia Gleeson CJ also emphasised the constitutional significance of the principle of legality for the maintenance of the rule of law:

> The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.[41]

These are ringing statements of principle, and their widespread acceptance clearly demonstrates that judges throughout the common law world now recognise their capacity (if not constitutional responsibility) to protect rights whenever interpretively possible.

It may, however, be the case that questions as to the content and scope of the principle of legality are no longer so pressing in those jurisdictions where statutory bills of rights now operate and the judicial protection of rights is undertaken primarily by the application of interpretive provisions which require

36 Ibid 436 (Mason CJ, Brennan, Gaudron and McHugh JJ) (citations omitted).

37 See, eg, in Australia, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ); in New Zealand, *R v Pora* [2001] 2 NZLR 37, 50 [53] (Elias CJ); and in the UK, *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 573–5 (Lord Browne-Wilkinson).

38 See, eg, in the Australian context, Gleeson, above n 25; and in the UK context, Lord Steyn, 'Dynamic Interpretation amidst an Orgy of Statutes' (2004) 3 *European Human Rights Law Review* 245.

39 [2000] 2 AC 115, 131–2.

40 Ibid 131.

41 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329.

statutes to be construed conformably with the protected rights.[42] But in New Zealand and the UK at least, one only applies the rights interpretation provision after ordinary — that is, common law — interpretive principles have been applied.[43] And significantly, at least two members of the New Zealand Supreme Court in *R v Hansen* considered their bill of rights interpretation provision to embody the common law principle of legality.[44] In a similar vein, Chief Justice French of the High Court of Australia made the following observation in *Momcilovic v The Queen*:

> The human rights and freedoms set out in the *Charter* in significant measure incorporate or enhance rights and freedoms at common law. 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.[45]

This suggests that the content and scope of the principle remains a live issue even in those jurisdictions with interpretation provisions in statutory bills of rights.

III THE CONTENT AND SCOPE OF THE PRINCIPLE OF LEGALITY

A *What Rights Are Fundamental at Common Law and How Do They Become So?*

Australian courts have applied the principle of legality to protect a variety of fundamental rights at common law.[46] They include the rights to private property,[47] personal liberty,[48] freedom of expression,[49] freedom of movement,[50] natural justice[51] and access to the courts.[52] Moreover, in his 2008 McPherson Lectures on statutory interpretation and human rights, Chief Justice Spigelman identified from Australian case law a catalogue of rebuttable interpretive presumptions that taken together constitute a 'common law bill of rights'.[53]

42 See Sales, above n 14, 611.

43 In the New Zealand context, see *R v Hansen* [2007] 3 NZLR 1, 45–6 (Tipping J), 62 (McGrath J), 89 (Anderson J); Geiringer, 'The Principle of Legality', above n 14, 68, 83–6. In the UK context, see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) 51–2.

44 See *R v Hansen* [2007] 3 NZLR 1, 12 (Elias CJ), 80 (McGrath J). Interestingly, in the New Zealand context, Claudia Geiringer argues that to equate the s 6 interpretation provision of the *Human Rights Act 1993* (NZ) with the principle of legality makes the former redundant 'as the common law principle of legality ought to have been factored into the initial "ordinary meaning" inquiry': Geiringer, 'The Principle of Legality', above n 14, 83–6.

45 (2011) 280 ALR 221, 245.

46 See generally Chief Justice James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) vol 3, 27–9.

47 *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 (French CJ).

48 *Re Bolton* (1987) 162 CLR 514, 523 (Brennan J).

49 *Evans v New South Wales* (2008) 168 FCR 576, 595–6 (French, Branson and Stone JJ).

50 *Melbourne Corporation v Barry* (1922) 31 CLR 174, 199–201 (Isaacs J).

51 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 271 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

52 See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

53 Spigelman, *Statutory Interpretation and Human Rights*, above n 46, 29.

These are the common law rights and freedoms that Australian courts have the capacity to protect through the application of the principle of legality. However, the process by which the courts came to recognise these rights as fundamental is never really explained by his Honour, save for the observation that '[w]hat is to be regarded as a "fundamental right, freedom or immunity" is informed by the history of the common law.'[54] Relevantly, Brennan J began his judgment in *Re Bolton* as follows:

> Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force.[55]

This important observation would suggest that statutes can be the source of fundamental common law rights.[56] For example, the common law of habeas corpus and the *Habeas Corpus Act 1679*[57] were in this category according to Brennan J.[58] In this way, the origins of the common law rights to liberty, habeas corpus, property, a fair trial and due process might be traced to *Magna Carta*[59] and the later *Petition of Right 1628*.[60] This process — where the common law adopts as fundamental those rights and freedoms enshrined in landmark and *enduring* statutes — is perfectly legitimate and consistent with the essentially reactive nature of common law reasoning and methodology.[61]

The notion that common law rights are derived from long-established and continuing (often statutory) legal sources is supported, for example, by the recent litigation in the Federal Court and High Court regarding curial spousal privilege. In *Stoddart v Boulton*,[62] the Full Court of the Federal Court held that there is a common law right not to incriminate one's spouse that 'is separate and distinct from the privilege against self-incrimination and of greater antiquity in origin.'[63] It did so by tracing the origins of the spousal privilege to 19th century UK

54 Ibid 26. In the American bill of rights context, see David Crump, 'How Do the Courts *Really* Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy' (1996) 19 *Harvard Journal of Law and Public Policy* 795.

55 (1987) 162 CLR 514, 520–1.

56 See also *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 418–19 (Lord Rodger).

57 31 Car 2, c 2.

58 *Re Bolton* (1987) 162 CLR 514, 521.

59 See generally J C Holt, *Magna Carta* (Cambridge University Press, 2nd ed, 1992).

60 See Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 17–20. The author notes that '[r]emarkably, although only in form a petition, this instrument was treated and printed as a statute': at 20.

61 See Sir Owen Dixon, 'Concerning Judicial Method' in Severin Woinarski (ed), *Jesting Pilate: And Other Papers and Addresses* (William S Hein & Co, 1965) 152; Justice Michael McHugh, 'The Law-Making Function of the Judicial Process — Part I' (1988) 62 *Australian Law Journal* 15; Justice Michael McHugh, 'The Law-Making Function of the Judicial Process — Part II' (1988) 62 *Australian Law Journal* 116.

62 (2010) 185 FCR 409.

63 Ibid 444–5 (Logan J), citing David Lusty, 'Is There a Common Law Privilege against Spouse-Incrimination?' (2004) 27 *University of New South Wales Law Journal* 1.

common law and statutory sources that, presumably, formed part of the common law received into Australia.[64] On appeal, however, the High Court took a different view.[65] Importantly, and in order to do so, the Court had to determine 'whether … recognition [of spousal privilege was] evident from the historical record.'[66] That is, the Court had to undertake its own historical inquiry into the common law and statutory sources said by the Federal Court to form the basis of the common law right to spousal privilege.[67] In the result, a majority of the High Court concluded 'that the cases and historical materials do not provide a sufficient basis for a conclusion that the claimed privilege exists.'[68]

In any event, maybe the longevity and durability of a legal right or freedom applied by the courts (whatever its original or continuing legal source) is what is decisive at common law. This proposition is certainly consistent with the observations of Chief Justice Spigelman and Brennan J and the judicial approach in the above cases. But even if so, what ultimately determines the fundamental status of a right at common law is still never really made clear by the courts.[69]

However, in a recent extra-curial paper Sir Philip Sales of the UK High Court of Justice offered this persuasive account of when and why rights ought to be recognised as fundamental at common law:

> it is submitted that the principle of legality operates within narrow parameters, for powerful constitutional reasons. Since the effect of the application of the principle is to change what appears to be the natural meaning of a legislative provision, it is only when there is an established, well-recognised and fundamental principle or right which can be clearly identified as being applicable at the time the legislation is passed, that it can be said that Parliament cannot be taken to have intended to infringe that principle or right by the use of general language in a statutory provision … But if Parliament cannot be taken to have been squarely on notice of the existence of such a principle or right, then the process of 'reading down' or modifying the natural meaning of the words used would undermine rather than promote Parliament's intention as expressed in the legislation.[70]

This account reminds us that the principal (often statutory) interpretive rule, even in those jurisdictions where bills of rights operate, is that judges *must* prefer a construction that furthers the intention, purpose or object of *Parliament's*

64 *Stoddart v Boulton* (2010) 185 FCR 409, 412 (Spender J), 434–7 (Greenwood J), 444–5 (Logan J). See also *S v Boulton* (2006) 151 FCR 364, 378–81 (Jacobson J), 389 (Greenwood J).

65 *Australian Crime Commission v Stoddart* [2011] HCA 47 (30 November 2011).

66 Ibid [183] (Crennan, Kiefel and Bell JJ). See also at [29]–[41] (French CJ and Gummow J).

67 Ibid [19]–[41] (French CJ and Gummow J), [69]–[152] (Heydon J dissenting), [178]–[191] (Crennan, Kiefel and Bell JJ).

68 Ibid [191] (Crennan, Kiefel and Bell JJ). See also at [41] (French CJ and Gummow JJ).

69 Indeed, Heydon J in dissent made the following cryptic observation (ibid [166]):

> The appellant denied that spousal privilege was a fundamental right. It submitted that whether it was fundamental depended on whether it had 'entrenched and consistent recognition in the decided cases *as* a fundamental right' (emphasis in original). 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.

70 Sales, above n 14, 605.

legislation.[71] At any rate, Sir Philip Sales tells us *when* the recognition of fundamental rights may legitimately occur and *why*, as a consequence, the principle of legality must operate 'within narrow parameters'.[72] But his account still leaves at issue precisely *how* judges do this. It is not sufficient to simply cite 'the history of the common law'[73] or 'ancient statutes which are so much part of the accepted constitutional framework'[74] as though they provide a clear account of judicial methodology in this regard. For while these are perfectly legitimate sources of common law rights, such assertions say nothing as to how judges ultimately determine which rights are to be recognised as *fundamental* and therefore protected by the application of the principle. In other words, what guides judges in determining when 'rights or principles are so well-established that Parliament must be taken to have legislated with them in mind'?[75]

It is clear enough that there is considerably more going on with the principle of legality than the courts simply giving their judicial imprimatur to a series of rights and freedoms that the Parliament has already stamped some time earlier as fundamental. As David Dyzenhaus, Murray Hunt and Michael Taggart have noted, the principle of legality 'is controversial, at least in so far as it requires judges to construct common law values, and in respect of the material they can legitimately use in this building exercise'.[76]

In this regard, then, what rights and freedoms are recognised as fundamental at common law is ultimately a matter of judicial choice. In one respect this is unremarkable, for the judicial development of the common law can only ever occur when judges *choose* to expand (or indeed tighten) the content and scope of legal principle.[77] But the reason why these particular choices are controversial is that the assumption made by the courts — that certain rights and freedoms are so deep-lying in our legal order that '[i]t is in the last degree improbable that the legislature would overthrow [them] … without expressing its intention with irresistible clearness'[78] — is so interpretively significant: for the application of the principle of legality, based on this assumption, may limit the otherwise clear meaning and scope of parliamentary legislation.[79] There is after all no requirement of legislative ambiguity before the principle can come into play.[80]

71 See, eg, *Legislation Act 2001* (ACT) s 139; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Interpretation Act 1999* (NZ) s 5.

72 Sales, above n 14, 605.

73 Spigelman, *Statutory Interpretation and Human Rights*, above n 46, 26.

74 *Re Bolton* (1987) 162 CLR 514, 520 (Brennan J).

75 Sales, above n 14, 606.

76 David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5, 6.

77 See Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications, 1964) 209–11, 235–41.

78 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J), quoting Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) 122.

79 See Sales, above n 14, 605.

80 See, eg, *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 552–3 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See

B *The Current Scope of the Principle of Legality*

In order to ascertain the current scope of the principle of legality in Australian law we must consider *how* the courts are applying it. In other words, what is the principle's interpretive methodology? Relevantly, Jacobson J of the Federal Court provided in *S v Boulton* the following instructive account of how the principle currently operates:

> First, a statute is not to be construed as abrogating important common law rights and privileges except by clear words or necessary implication …
>
> Second, an intention to exclude a common law privilege may be gleaned from a statute even though express words of exclusion are not used …
>
> Third, the question of whether the statute impliedly abrogates a privilege is to be determined upon the proper construction of the statute, considered as a whole, and from its character and purpose …
>
> Fourth, important common law privileges are not to be lightly abrogated and the oft cited phrase 'necessary implication' requires that there be a high degree of certainty as to the intention of the legislature; the intention must be manifested by unmistakable and unambiguous language …
>
> Fifth, what is required is that there be a manifestation or indication that the legislature has directed its intention to the question of abrogation and has consciously determined that the privilege is to be excluded …
>
> Sixth, general words will not be sufficient to disclose the requisite intention unless it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification …
>
> Seventh, the presumption that the legislature does not intend to abrogate entrenched common law rights may be displaced by implication if it is necessary to prevent the statute from being rendered inoperative or meaningless or from frustrating the evident statutory purpose …[81]

On this account, the judicial application of the principle involves identifying, as the critical threshold issue, whether or not the relevant legislation may abrogate a common law right. And importantly, this methodology suggests that the principle's application is an all-or-nothing proposition in terms of protecting common law rights: if the principle can be applied then the full content of the right (ie what it requires or protects in the relevant context) is enjoyed by its holder; if not, the right is abrogated.

In *S v Boulton*, as noted, the Court identified the privilege against spousal incrimination as the common law right in play, having rejected an argument that this right also extended to de facto spouses.[82] However, it was held that the relevant provisions expressly *abrogated* the privilege against self-incrimination and, due to the 'character and purpose of the legislation', did likewise for the spousal privilege, as 'the obligation to answer was not subject to any qualifica-

also Dennis Rose, 'The High Court Decisions in *Al-Kateb* and *Al Khafaji* — A Different Perspective' (2005) 8 *Constitutional Law and Policy Review* 58, 59–60.

81 (2006) 151 FCR 364, 383–4 (citations omitted).

82 Ibid 375 (Black CJ), 383 (Jacobson J), 390 (Greenwood J).

tion.'[83] In other words, once it was determined that the principle of legality could *not* be applied (as Parliament's legislative intent was unmistakable) the Court held that the common law right was completely excluded.

The binary (all-or-nothing) nature of the principle of legality was evident also in *R & R Fazzolari v Parramatta City Council*.[84] However, in this case, French CJ was able to apply the principle to the relevant legislation and provide the appellant with the *full enjoyment* of their relevant common law right, a vested property interest in land:

> Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretive approaches where statutes are said to affect such rights. …
>
> The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights. …
>
> The terminology of 'presumption' is linked to that of 'legislative intention'. As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights. That approach resembles and may even be seen as an aspect of the general principle that statutes are construed, where constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law.[85]

It is, however, the High Court's recent decision in *Saeed v Minister for Immigration and Citizenship* ('*Saeed*')[86] that maybe best illustrates both the strength of the principle of legality and its binary (all-or-nothing) nature. The common law right in issue was the natural justice hearing rule.[87] The relevant provisions in the *Migration Act 1958* (Cth) were 'an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with'[88] (which the Court said were onshore visa applicants). The common law right was abrogated for these visa applicants as the Minister for Immigration was not expressly required to give them an opportunity to deal with relevant adverse information, though he could, in his discretion, invite them to do so.[89]

The appellant, however, was an offshore visa applicant. And though there was ample extrinsic material to suggest that the provisions *were* intended to cover all visa applicants, French CJ, Gummow, Hayne, Crennan and Kiefel JJ made clear that these materials were not determinative of legislative meaning:

83 Ibid 388 (Jacobson J, Greenwood J agreeing on this point). See also at 375–6 (Black CJ).
84 (2009) 237 CLR 603.
85 Ibid 618–19 (citations omitted).
86 (2010) 241 CLR 252.
87 Specifically, 'that, in the ordinary case, an opportunity should be given to a person affected by a decision to deal with any adverse information that is "credible, relevant and significant"': ibid 261 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), citing *Kioa v West* (1985) 159 CLR 550, 629 (Brennan J).
88 *Migration Act 1958* (Cth) s 51A(1).
89 Ibid s 56.

> Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.[90]

Consequently, they interpreted the relevant provisions as follows:

> Assuming, for present purposes, that s 51A as it applies to s 57, is valid and effective to exclude the natural justice hearing rule, it is excluded only so far as concerns onshore visa applicants. … The position of offshore visas is not addressed … The provision of particulars of information to them for comment is not a 'matter' 'dealt with' by s 57 or the subdivision. …
>
> It follows that [upon the application of the principle of legality] the implication of the natural justice hearing rule with respect to offshore visa applicants was maintained. The Minister was obliged to provide the appellant with an opportunity to answer adverse material.[91]

Once again, upon the identification of the relevant common law right — and in the absence of clear parliamentary intent to the contrary — the application of the principle ensured that the content (and so full benefit) of the natural justice hearing rule was enjoyed by the appellant. However, as noted, once the Court realised that the principle could not be applied to the legislation in relation to onshore visa applicants, the natural justice hearing rule was, necessarily, abrogated in this context.

These recent cases, where the principle of legality has been considered and (sometimes) applied, disclose the following methodological points. The rights considered fundamental at common law provide the backdrop for the judicial interpretation of legislation. And those rights will be protected unless Parliament makes crystal clear its intention to abrogate them. In this way the principle operates to insulate, and so protect in full, the common law right from the operation of the relevant legislation. The upshot is that it provides to the right holder the full enjoyment of the freedom or claim in the relevant context.

Significantly, then, the cases suggest that the principle of legality is applied in the form of a legal rule without any balancing or weighing of other rights and interests in the relevant legislative context. This interpretive approach is sound if the content of a common law right (ie what it requires in the relevant factual and legislative context) can be non-controversially determined and applied by the courts. The common law right not to incriminate one's self is, arguably, of this kind. But isn't the content and scope of most common law rights (eg natural justice, freedom of speech, property and even liberty) highly contextual and also subject to reasonable disagreement?[92] Interestingly in this regard, the High Court made the following point in the course of construing the relevant migration provisions in *Saeed*:

> Section 57(1) and (2) invite comparison with what might ordinarily be required by the hearing rule. It is necessary to bear in mind, in that regard, that what is

[90] *Saeed* (2010) 241 CLR 252, 264–5.
[91] Ibid 271.
[92] My thanks are due to both referees for this point.

> required to provide procedural fairness according to the rule will vary. Natural justice is flexible and adaptable to the circumstances of the particular case.[93]

So the contextual nature of this common law right was expressly acknowledged. But what it required in that context could and would be determined by the court. That interpretive proposition — upon which the application of the principle of legality effectively turns — is not without controversy, especially with regard to the more aspirational, contested and essentially indeterminate rights such as freedom of speech.[94] As noted, however, the content and scope of even the more well-established common law rights (such as to property and personal liberty) can also be highly contextual and contested. For example, do natural resource management restrictions infringe common law rights to property or simply regulate the manner in which they are exercised?[95] Moreover, it is the case that in a range of circumstances legislative restrictions and limitations on (common law) rights are reasonable and necessary.[96]

However, as the above cases demonstrate, the principle of legality is applied in the form of a legal rule that does not balance or weigh other rights and interests in the relevant legislative context. *It operates to insulate (and so protect in full) the judicial conception of the common law right from the operation of the relevant legislation*. So in the context of the principle's methodology, the important issues just noted either are presumptively determined by the courts (ie what the common law right requires in a particular context) or simply do not arise (ie whether legislation places a reasonable limitation on a common law right). This explains and underlines the binary nature of the principle of legality and why common law rights are either protected in full (if applied) or abrogated (if clear parliamentary intent precludes the principle of legality's application).

This methodology and, as a consequence, the proper scope of the principle of legality is, again, not often made clear in the cases. In this regard, Paul Rishworth provides the following interesting account as to why, traditionally, the scope of common law rights does not often require detailed specification:

> It was not uncommon to have recourse to rights in legal argument, but they functioned more as broad aspirations. A case in which, say, freedom of expression was advanced in order to influence a statutory meaning would probably not ascend to the level of sophistication (assessment of objective, rationality,

93 (2010) 241 CLR 252, 260 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (citations omitted).

94 See below Part V(A).

95 This issue was raised in a constitutional (and statutory) context in *Spencer v Commonwealth* (2010) 241 CLR 118 where the plaintiff argued that a collection of intergovernmental agreements between the Commonwealth and New South Wales resulted in him being prevented by legislation from clearing vegetation on his property without consent. The High Court held that the Federal Court wrongly dismissed his action on the grounds that it had no reasonable prospect of success but did not consider whether the restrictions amounted to a compulsory acquisition of property by the Commonwealth on other than just terms: at 134–5 (French CJ and Gummow J), 138 (Hayne, Crennan, Kiefel and Bell JJ). See further Stephen Lloyd, 'Compulsory Acquisition and Informal Agreements: *Spencer v Commonwealth*' (2011) 33 *Sydney Law Review* 137.

96 For example, the common law right to liberty is (reasonably and necessarily) limited by legislation that provides for the denial of bail when a person is accused of a very serious crime and/or poses a serious flight risk: see *Bail Act 1977* (Vic) s 4(2).

> proportionality, and so on) as is common in North American constitutional adjudication. Common law rights were conceptions of generally desirable outcomes, not a tool for defining a baseline of acceptable law and conduct for government.[97]

C *Provisional Conclusion*

In this Part, I have considered recent Australian cases where the principle of legality has been considered and its importance reasserted. This was done in order to ascertain how the courts apply the principle of legality and therefore its current scope in Australian law. The analysis undertaken demonstrates that, whilst the extant catalogue of common law rights protected by the principle of legality is reasonably clear, there are important methodological issues for which there is little meaningful judicial exegesis.

Relevantly, the cases are not clear as to how and when a right or freedom becomes fundamental at common law and thereby subject to protection by the principle's application. And whilst the binary nature of the principle in terms of protecting common law rights can be deduced from the cases, the courts do not explain or justify why the principle is applied in the form of a rule without balancing or weighing competing rights and interests in the relevant legislative context.

However, with the judicial reassertion of the principle of legality in the age of rights, the time has now come for this methodological opacity to be addressed. This is especially important and urgent if international human rights norms increasingly become the rights touchstone for the principle. As will be explored below, some judges and commentators suggest this is both likely and desirable.[98] If so, the appropriateness and legitimacy of the current rule-like/no-balancing methodology of the principle of legality must be reassessed.

IV METHODOLOGICAL ISSUES FOR THE PRINCIPLE OF LEGALITY IN THE AGE OF RIGHTS

A *Using International Human Rights Norms as the Rights Touchstone for the Principle of Legality*

Dyzenhaus, Hunt and Taggart have made a strong argument that it is legitimate and consistent with the common law's own methodology for it to draw on international human rights norms to update the 'set of values' that it protects by applying the principle of legality.[99] They argue that

> [i]nternational norms are a good steer as to what those values are. In the same way that reference to history and tradition assists in combating eclecticism or subjectivity in the identification of fundamental rights, human rights treaties are

[97] Paul Rishworth, 'Common Law Rights and Navigation Lights: Judicial Review and the New Zealand *Bill of Rights*' (2004) 15 *Public Law Review* 103, 106.

[98] See below nn 99–107 and accompanying text.

[99] Dyzenhaus, Hunt and Taggart, above n 76, 32–3.

> an 'ostensibly objective source', expressing the opinions, formed often over a considerable period of time, of many countries.[100]

There is considerable merit in this approach in terms of promoting transparency and clarity in judicial method. It would also provide Parliaments with clear notice of those rights which the courts consider 'are so well-established that [Parliaments] must be taken to have legislated with them in mind'.[101] And importantly, the methodological issue that arose from the analysis undertaken in Part III(A) — how and when rights become fundamental at common law — is then explained and resolved.

On this approach the application of most international human rights norms — and so, then, the principle of legality — would involve a process of balancing undertaken through the lens of proportionality.[102] In the context of the common law of judicial review, Dyzenhaus, Hunt and Taggart favour this approach, as it would promote 'a process of public, legally structured justification'[103] when government infringes rights and 'point towards adoption of a "constitutional rights" methodology'[104] that (in Canada, New Zealand and the UK) may unify constitutional and administrative law 'in name and approach under the banner of public law.'[105]

The adoption of international human rights norms as the rights touchstone for the principle of legality has not to date been endorsed by the High Court, or any other senior appellate court in Australia. But it is an approach with some important judicial supporters. Chief Justice Spigelman has noted extra-curially the considerable overlap between the 'common law bill of rights' and the list of human rights specified in international human rights instruments given legislative force in some jurisdictions:

> That development will have an influence upon the degree of emphasis to be given to these presumptions. It will also influence the articulation of new presumptions. For example, the legislative proscription of discrimination on the internationally-recognised list of grounds — gender, race, religion, etc — could well lead to a presumption that Parliament did not intend to legislate with such an effect.[106]

And along similar lines, Chief Justice French made the following observation in a 2009 extra-curial paper:

> It does not take a great stretch of the imagination to visualise intersections between these fundamental rights and freedoms, long recognised by the common law, and the fundamental rights and freedoms which are the subject of the *Uni-*

100 Ibid 33 (citations omitted).
101 Sales, above n 14, 606.
102 See Dyzenhaus, Hunt and Taggart, above n 76, 30.
103 Ibid.
104 Ibid 31.
105 Ibid.
106 Spigelman, *Statutory Interpretation and Human Rights*, above n 46, 29.

> *versal Declaration of Human Rights* and subsequent international Conventions to which Australia is a party.[107]

However, if Australian courts choose to adopt international human rights norms as the rights touchstone for the principle of legality, then they must, necessarily, consider whether to also incorporate these norms' concomitant methodology — proportionality — into its interpretive framework. But as the analysis undertaken in Part III(B) demonstrated, the application of the principle of legality does not presently involve any form of balancing process or proportionality-style analysis. This methodological issue will be considered shortly. Before doing so, however, the adoption of international human rights norms in this way also raises the related issue of what role (if any) the common law presumption of consistency would play in the Australian human rights context. It is to that important issue that I now briefly turn.

B *What Is the Relationship between the Principle of Legality and the Presumption of Consistency in the Age of Rights?*

The presumption that legislation should be read consistently with the established rules of international law is a well-established part of the common law of Australia.[108] That being so, hasn't the common law *already* adopted international human rights norms as the rights touchstone, but for the presumption of consistency rather than the principle of legality? If so, then it would seem logical and good sense for Australian courts to do the same for the principle of legality as Dyzenhaus, Hunt and Taggart and Chief Justices French and Spigelman have proposed.[109] Significantly, this would represent a convergence of approach between the principle of legality and presumption of consistency, at least insofar as the judicial protection of human rights is concerned.

This convergence of approach has already occurred in New Zealand. In *Zaoui v Attorney-General [No 2]* ('*Zaoui*'), the New Zealand Supreme Court applied the presumption of consistency to an open-ended discretionary power of deportation.[110] The New Zealand government sought the deportation of the appellant on national security grounds. In the result, the Court held that the deportation power could not be lawfully exercised in this context, as there was a real risk that the appellant would be tortured or arbitrarily deprived of his life if returned to his homeland:

> As directed by s 6 of the *Bill of Rights*, s 72 [(the deportation power)] is to be given a meaning, if it can be, consistent with the rights and freedoms contained

[107] Chief Justice R S French, 'Oil and Water? International Law and Domestic Law in Australia' (Speech delivered at the Brennan Lecture, Bond University, 26 June 2009) 21 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26June09.pdf>.

[108] It was first noted in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J). See also *Polites v Commonwealth* (1945) 70 CLR 60, 68 (Latham CJ), 74 (Rich J), 77 (Dixon J), 79 (McTiernan J), 80–1 (Williams J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 386 (Gummow and Hayne JJ).

[109] See above Part IV(A).

[110] [2006] 1 NZLR 289.

> in it, including the right not to be arbitrarily deprived of life and not to be subjected to torture. *Those rights in turn are to be interpreted and the powers conferred by s 72 are to be exercised, if the wording will permit, so as to be in accordance with international law, both customary and treaty-based*. …
>
> Because the power can be so interpreted and applied, those provisions, *as a matter of law*, prevent removal if their terms are satisfied even if the threat to national security is made out in terms of s 72 …[111]

Importantly, the Court did *not* consider ambiguity on the face of the statute to be a necessary precondition for the principle's application.[112] Indeed, Claudia Geiringer says the interpretive approach in *Zaoui* 'invites the conclusion that … if the underlying international obligation is sufficiently compelling, nothing less tha[n] express statutory language may suffice to overcome it.'[113] If the application of the presumption requires no ambiguity on the face of the relevant statute then this represents a convergence of approach with the principle of legality.[114]

In Australia, there has been some important — though not widespread — judicial support for the proposition that the application of the presumption of consistency does not require ambiguity in a statute.[115] However, the orthodox position is that ambiguity *is* a necessary precondition for the principle's application.[116] Moreover, and in contrast to New Zealand, it remains the case that in Australia there has not yet been a strengthening of the importance of the presumption of consistency that parallels the strengthening of the principle of legality. Indeed, one recent member of the High Court, McHugh J, questioned the relevance and legitimacy of the presumption in contemporary Australian law.[117] And even such a strong supporter of the principle of legality as Gleeson CJ did not view the role and status of the presumption of consistency in Australian law in equivalent terms.[118] Maybe the most interesting comments in this regard were made (extra-curially) by Chief Justice French:

> One area which awaits further exploration is the interface between human rights norms in Conventions to which Australia is a party or in customary international law and the presumption against statutory displacement of fundamental rights and freedoms of the common law. If the former can inform the latter

111 Ibid 321 [91], 321 [93] (Keith J for Elias CJ, Gault, Keith, Blanchard and Eichelbaum JJ) (emphasis added).

112 Ibid 321 [91]–[93].

113 Claudia Geiringer, 'International Law through the Lens of *Zaoui*: Where Is New Zealand at?' (2006) 17 *Public Law Review* 300, 317.

114 Ibid 317–18. See also Philip Joseph and Thomas Joseph, 'Human Rights in the New Zealand Courts' (2011) 18 *Australian Journal of Administrative Law* 80, 98.

115 See, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22, 39 (Maxwell P).

116 See *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 386 (Gummow and Hayne JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ).

117 *Al-Kateb v Godwin* (2004) 219 CLR 562, 590–1.

118 See *Coleman v Power* (2004) 220 CLR 1, 27, where Gleeson CJ stated that 'the formulation of a general principle of statutory interpretation by reference to international obligations requires some care.'

> through developmental processes of the kind mentioned in *Mabo* then the content of the so-called principle of legality may be deepened.[119]

This makes clear that, at least so far as Chief Justice French is concerned, there is certainly no aversion per se to the application of international law norms to domestic Australian law through statutory interpretation. On the contrary, he positively invites the possibility (and maybe the inevitability) that the common law will be developed further in this regard.[120] But the interpretive vehicle to be used in the application of these norms to Australian law is the principle of legality *not* the presumption of consistency.

The suggested approach of Chief Justice French may well reflect a conscious decision to use and develop the principle of legality as the exclusive interpretive means by which the judicial protection of rights will be facilitated. Or it may be impliedly suggesting that, at least so far as human rights are concerned, a convergence of approach between the principle of legality and presumption of consistency is inevitable in Australian law. In any event, what it does highlight is that as Australian courts continue to reassert the importance and strength of the principle of legality, they need to clarify the nature and role (if any) the presumption of consistency is to play in the age of rights.

I now turn to consider the other important issue that arises if Australian courts choose to adopt international human rights norms as the rights touchstone for the principle: the likely impact of incorporating its concomitant methodology — proportionality — into the framework of the principle of legality.

C *The Role of Proportionality*

The first point worth noting is that if Australian judges develop the principle of legality in the manner which Dyzenhaus, Hunt and Taggart suggest[121] they would be creating a common law bill of rights that, at least in terms of the interpretive role of the courts, is largely indistinguishable from the kind of statutory bill of rights recommended by the *Brennan Report* and rejected by the Australian government.[122] The same catalogue of rights would be protected and the principle of legality would perform the same interpretive work as an interpretation and limitation provisions in a bill of rights.

There would, however, still be important distinctions between this sort of common law model and a statutory bill of rights. The power to issue declarations that statutory provisions are incompatible with rights is an important part of the judicial function under the latter but not necessarily the former.[123] It is also

119 French, 'Oil and Water?', above n 107, 20.

120 Ibid 21. See further Chief Justice Robert French, 'Protecting Human Rights without a Bill of Rights' (Speech delivered at the John Marshall Law School, Chicago, 26 January 2010) 25–36 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26jan10.pdf>.

121 Dyzenhaus, Hunt and Taggart, above n 76, 30–3.

122 See above nn 2–12 and accompanying text.

123 For an argument that the common law ought to develop this power, see David Jenkins, 'Common Law Declarations of Unconstitutionality' (2009) 7 *International Journal of Constitutional Law* 183. And though the *New Zealand Bill of Rights Act 1990* (NZ) has no formal declaration power,

unlawful, under some statutory bills of rights, for a public authority to act in a way that is incompatible with a human right or fails to give proper consideration to a relevant human right.[124] Courts, then, have the important role of constraining and remedying (if necessary and possible) these forms of public authority illegality.[125] And whilst it would certainly be understandable if judges were to apply a statutory interpretive principle more vigorously than a common law presumption, this may not necessarily occur, if the recent bill of rights jurisprudence in New Zealand and the ACT is anything to go by.[126]

In any event, for reasons of democratic legitimacy Australian courts may decline to develop the principle of legality in this way if to do so would in effect secure a reform which the Australian elected branches of government have so recently rejected. Indeed, it is worth noting that the Dyzenhaus, Hunt and Taggart argument is made in relation to jurisdictions (Canada, the UK and New Zealand) where courts already routinely undertake proportionality analysis in order to discharge their judicial role under a bill of rights.[127] In this regard, the quantum leap in judicial method — which the incorporation of proportionality clearly is[128] — has already been made, but at the instigation of Parliament, not by the courts themselves.[129] This might also explain why the Australian High Court has chosen not to follow the lead of its British, Canadian and (to a lesser extent) New Zealand counterparts and adopt proportionality as a new ground for the judicial review of administrative action.[130]

The second, arguably more important, point is that incorporating proportionality into the principle of legality framework would require judges to answer questions that are more political and philosophical than legal. As Chief Justice Gleeson has noted:

> Whether the question is characterised in terms of standard of scrutiny, or proportionality, or a judgment about what is, or could be considered to be, appro-

there is some judicial and academic support for the proposition that the courts, nevertheless, have an implied jurisdiction to do so: *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 17 [20] (Tipping J for Elias CJ, Richardson P, Keith, Blanchard and Tipping JJ). See also Andrew S Butler, 'Judicial Indications of Inconsistency — A New Weapon in the Bill of Rights Armoury?' [2000] *New Zealand Law Review* 43. For a convincing argument that the New Zealand courts are unlikely to develop a formal declaratory jurisdiction, see Claudia Geiringer, 'On a Road to Nowhere: Implied Declarations of Inconsistency and the *New Zealand Bill of Rights Act*' (2009) 40 *Victoria University Wellington Law Review* 613.

124 See, eg, *Human Rights Act 2004* (ACT) s 40B; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.

125 See, eg, *Human Rights Act 2004* (ACT) s 40C; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39. See generally Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) ch 4.

126 See, eg, *R v Hansen* [2007] 3 NZLR 1; *R v Fearnside* (2009) 165 ACTR 22.

127 See *R v Oakes* [1986] 1 SCR 103; *R v A [No 2]* [2002] 1 AC 45; *R v Hansen* [2007] 3 NZLR 1.

128 See Thomas Poole, 'The Reformation of English Administrative Law' (2009) 68 *Cambridge Law Journal* 142; Michael Taggart, 'Proportionality, Deference, *Wednesbury*' [2008] *New Zealand Law Review* 423.

129 See Lord Justice Sedley 'The Last 10 Years' Development of English Public Law' (2004) 12 *Australian Journal of Administrative Law* 9, 15–17.

130 See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2009) 379–82.

> priate and adapted, (all expressions that carry their own baggage and need to be applied with discrimination), in the end it comes down to one about the relations between the legislative and judicial arms of government. In a liberal democracy, such a question is fundamentally political.[131]

The difficulty with proportionality is that judges must not only determine whether legislation infringes rights but also assess whether that infringement is justified in light of its other legitimate policy aims. The essence of the latter inquiry is an assessment as to whether the rights infringement is no more than is necessary to achieve the policy aim(s) of the legislation.[132] In other words, if a court considers that there are 'alternative practicable means available to achieve the same end which are less restrictive of the protected interest'[133] then the law disproportionately and unjustifiably infringes rights. In this way the core proportionality inquiry requires courts to review (indeed, second-guess) the difficult balance that must be struck in legislation between the full range of competing rights and interests that inevitably arise in complex issues of social policy. However, courts will often lack the institutional resources and expertise to properly undertake this sort of polycentric decision-making. They have neither the procedures for meaningful collective deliberation available to Parliaments nor the capacity of Parliaments (both in terms of time and resources) to conduct inquiries on rights issues and produce accompanying reports.[134]

The third point is that the application of the proportionality test is very much in the eye of the judicial beholder. Whilst it certainly 'provides an efficient framework for judging restrictions and specifying objections',[135] the 'test itself does not give any guidance as to, and consequently does not place any restriction on, how judges assign weight to the competing interests.'[136] As Tom Poole has recently noted, the upshot is that 'proportionality is plastic and can in principle be applied almost infinitely forcefully or infinitely cautiously, producing an area of discretionary judgement that can be massively broad or incredibly narrow — and anything else in between.'[137]

So for at least three reasons Australian courts should carefully consider the significant methodological issues that would necessarily attend the incorporation of proportionality into the framework of the principle of legality. The final Part of the article will explore these issues further in the context of the rights to

131 Gleeson, above n 25, 36.

132 See Kavanagh, above n 43, 233–7.

133 Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 7.

134 See Tom Campbell, 'Human Rights Strategies: An Australian Alternative' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights* (Ashgate, 2006) 319; Janet L Hiebert, 'Parliament and Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 231; Jeremy Waldron, 'Legislating with Integrity' (2003) 72 *Fordham Law Review* 373.

135 Kirk, above n 133, 63.

136 Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 686.

137 Poole, above n 128, 146.

freedom of speech and non-discrimination. The former is now recognised as a fundamental right at common law, and Chief Justice Spigelman recently mooted for the latter to be similarly recognised.

V THE PRINCIPLE OF LEGALITY AND PROPORTIONALITY APPLIED

A *The Common Law Right to Freedom of Speech*

The analysis undertaken in Part III(B) demonstrated that the principle of legality is presently applied in the form of a legal rule without the balancing of competing rights and interests. It operates to insulate (and so protect in full) the judicial conception of the relevant common law right from the operation of the legislation. And even though the contextual nature of common law rights is judicially acknowledged, the cases make clear that what is required in that context will be determined by the court.[138] As noted, this interpretive proposition is controversial for all common law rights but especially those with an essentially indeterminate content such as freedom of speech.[139]

In any event, this methodology requires the prior determination of the content of the relevant common law right (ie what it requires in a particular context) in order for the principle to be applied. In this regard it *may* be that it is suitable and legitimate for the content of some common law rights (eg those relating to property, liberty and fair trial) to be determined by judges due to their professional expertise and institutional experience. But this interpretive proposition — even regarding long-established common law rights — assumes that judges can make such determinations without controversy: that is, that judges can determine their content without recourse to contested political or moral conceptions of what these rights entail. So it is important that if the courts continue to apply the principle of legality in the form of a legal rule, they should clearly articulate (and justify) the content of the common law rights that they are insulating from the ordinary operation of legislation.

However, the common law right to freedom of speech is of a different kind. It arises more in the nature of a claim in political or moral philosophy.[140] For example, in the context of the *ECHR*, Adam Tomkins characterises freedom of expression — rightly in my view — as a qualified political claim that has been elevated to the status of a substantive right:

> The problem is that, politically, most of us do not want to claim that everyone has the right to say whatever they want. Politically, we are nervous about some forms of speech, about certain subject matters, and about the consequences of actually quite a lot of speech. Where and how to draw the lines between accept-

[138] See, eg, *S v Boulton* (2006) 151 FCR 364; *R & R Fazzolari v Parramatta City Council* (2009) 237 CLR 603; *Saeed* (2010) 241 CLR 252.

[139] See above n 94 and accompanying text.

[140] See Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 *University of Toronto Law Journal* 1, 4–7.

> able and unacceptable expression is quintessentially a political question, which, under a political constitution, ought to be addressed and resolved politically.[141]

The point is not to deny the essential nature of the right to a tolerant and vibrant democracy. On the contrary, it is hard to deny the importance and virtue of the values that underpin the right to freedom of speech and the ideals and aspirations which it embodies.[142] But the content of the right is hotly contested and largely indeterminate.[143] In this regard, the right to free speech does not have a core content that judges can reasonably and non-controversially determine and so protect through the application of the principle of legality. It does not function well as a legal rule, since, as noted, it is essentially a political or moral claim that must be mediated through a process of internal qualification before the 'right' to be protected in any given circumstance can be identified. And proportionality is, increasingly, the method used by judges to undertake that process in the age of rights. But as noted in Part IV(C), this approach or inquiry raises political questions for which courts will often lack the institutional resources and expertise to answer properly.

On the other hand and by way of contrast, as we saw above in *Saeed*,[144] the content of the natural justice hearing rule at common law ordinarily requires that an opportunity be given to a person affected by a government decision to deal with any adverse information that is credible, relevant and significant. As French CJ has noted, '[p]rocedural fairness or natural justice lies at the heart of the judicial function.'[145] Arguably, this makes it suitable and legitimate that judges determine the content of the right in this context.

Interestingly, the recognition of the right to free speech as fundamental at common law is a relatively recent development in Australia. In 2000, for example, Sir Gerard Brennan wrote the following in a foreword to a leading treatise of freedom of speech in Australian law:

> There is no common law right to free speech which trumps other legal rights but there is a general freedom of speech because of the common law principle that 'everybody is free to do anything, subject only to the provisions of the law'.[146]

But it appears that in Australia — indeed throughout the common law world — the right to free speech is now considered fundamental.[147] Most

141 Ibid 5.

142 For an excellent account of the values that underpin and justify the right to freedom of speech see Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 6–38.

143 Tom Campbell, 'Human Rights: A Culture of Controversy' (1999) 26 *Journal of Law and Society* 6, 13–18; Tom Campbell, 'Incorporation through Interpretation' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001) 79, 88.

144 (2010) 241 CLR 252, 271 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See above nn 86–91 and accompanying text.

145 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354.

146 Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000) vii (citations omitted). See also Bingham, above n 60, 78–9.

147 *Simms* [2000] 2 AC 115, 125–6 (Lord Steyn).

relevantly, in 2008 the Full Court of the Federal Court in *Evans v New South Wales* ('*Evans*') — which concerned World Youth Day — unequivocally confirmed the fundamental nature of freedom of speech, though interestingly as an incident of personal liberty.[148]

The reasoning in *Evans* itself highlights the problematic consequences of the right to freedom of speech falling within the purview of the principle of legality as it currently operates. The case involved the application of the principle to a regulation-making statutory power in order to protect the free speech rights of the applicants.[149] The applicants were protesters who opposed Catholic Church doctrine on abortion, contraception and sexuality and who wished to directly communicate these concerns to the World Youth Day participants.[150] The Court stated that '[n]o doubt conduct could validly be regulated which involves disruption of, or interference with, the free expression of religious beliefs by participants in [World Youth Day] events.'[151] And then, interestingly, in the process of invalidating a regulation that provided that 'an authorised person may direct a person within a World Youth Day declared area to cease engaging in conduct that … causes annoyance … to participants in a World Youth Day event'[152] the Court appeared to engage in a very cursory form of balancing.[153] It stated:

> In our opinion the conduct regulated by cl 7(1)(b) so far as it relates to 'annoyance' may extend to expressions of opinion which neither disrupt nor interfere with the freedom of others, nor are objectively offensive in the sense traditionally used in State criminal statutes.[154]

This might be a perfectly reasonable conclusion when viewed from the perspective of the free speech rights of the applicants;. though as the Court itself acknowledged, other important policy values and interests were also in play when the regulation regarding public safety and interference with the rights of the World Youth Day participants was framed.[155] But isn't it also possible that a legislative choice was made that, as World Youth Day was a once-off global event involving hundreds of thousands of religious pilgrims from Australia and across the globe, it was more important *in this context* that the participants be

148 (2008) 168 FCR 576, 594 (French, Branson and Stone JJ).
149 Ibid 592–7.
150 Ibid 578–9.
151 Ibid 596.
152 *World Youth Day Regulation 2008* (NSW) reg 7(1)(b).
153 I note here that proportionality has been used to test whether delegated legislation is ultra vires with respect to the regulation-making power in the primary legislation. See *Shrestha v Minister for Immigration and Multicultural Affairs* (2001) 64 ALD 669, 675 (Madgwick J); *House v Forestry Tasmania* (1995) 5 Tas R 169, 176 (Green CJ), 180–1 (Crawford J). This approach (which assesses whether a regulation is 'reasonably proportional' to fulfilling the *purpose(s)* of the empowering provision) is consistent with the constitutional characterisation of purposive legislative powers: *Leask v Commonwealth* (1996) 187 CLR 579, 605–6 (Dawson J). In *Evans*, the Federal Court made clear that it was the principle of legality that was applied to invalidate the regulation, not proportionality in this (delegated legislation) characterisation context: (2008) 168 FCR 576, 592–7 (French, Branson and Stone JJ).
154 *Evans* (2008) 168 FCR 576, 597 (French, Branson and Stone JJ).
155 Ibid 579.

able to freely, peacefully and without annoyance or inconvenience exercise their religious *and speech* rights in the designated event areas? Isn't it possible that a conscious legislative choice was made to limit the speech rights of protesters *within* designated event areas but left open any form of protest outside those boundaries, through the electronic and print media? And wasn't it reasonable to strike this particular balance between the rights of the participants and protesters, knowing that World Youth Day comprised only one week of events with one month being the longest any relevant law or regulation could operate? The problem, as noted, is what the right to freedom of speech in the World Youth Day context required or guaranteed. This was hotly contested and largely indeterminate. So a proper analysis in this regard — to identify the 'right' to free speech to be protected by the application of the principle of legality — surely required the consideration and weighing of the full range of interests of the kind I have just outlined.

Coleman v Power[156] provides another example of the problem with recognising free speech as a common law right for purposes of the principle of legality as it currently operates. There, Gummow and Hayne JJ and Kirby J applied the principle to protect the free speech rights of a person who used (non-provocative) insulting and abusive language in a public place to protest against alleged local police corruption.[157] They did so based on a conception of public and political discourse as robust, emotive and sometimes intemperate and without taking serious account of the rights of others who may seek to use and enjoy the public place.[158] On the other hand, the dissenting judges (Gleeson CJ, Callinan J and Heydon J) emphasised the benefit of civility in public and political discourse.[159] In this regard, Gleeson CJ made the following pertinent observations:

> Why should the family's right to the quiet enjoyment of a public place necessarily be regarded as subordinate to the abusers' right to free expression of what might be generously be described as a political opinion? *The answer necessarily involves striking a balance between competing interests, both of which may properly be described as rights or freedoms*.[160]

But this of course is the essence of proportionality — which Gleeson CJ acknowledged[161] — and leads courts, inevitably, into contested issues of social policy which they are no better placed to address than legislators.

However, it seems most unlikely that Australian courts (and those throughout the common law world) would now renounce freedom of speech as a fundamental right at common law. It is therefore important that they address the methodological issues that attend its recognition as a common law right. In this regard there appear to be at least two choices available. The first is to continue to apply

156 (2004) 220 CLR 1.
157 Ibid 75, 77 (Gummow and Hayne JJ), 97–8 (Kirby J).
158 Ibid 78 (Gummow and Hayne JJ), 99–100 (Kirby J).
159 Ibid 32 (Gleeson CJ), 113–14 (Callinan J), 124–6 (Heydon J).
160 Ibid 32 (emphasis added).
161 Ibid 31–2.

the principle of legality in the form of a legal rule that does not involve any balancing of competing rights or interests. If this occurs, the courts ought to recognise that as the content of the right to free speech in any given context is largely indeterminate, the principle should not be applied strictly and inflexibly when interpreting legislation. The upshot would be that courts would not be too quick to read down statutory words and subvert the otherwise plain meaning of legislation in order to protect the common law right to freedom of speech of an aggrieved litigant.

Or, in the alternative, the courts could choose to incorporate proportionality into the principle of legality framework when free speech is the common law right in issue. This would ensure that the application of the principle will include a balancing of all competing rights and interests in the relevant legislative context. This is the kind of analysis that was not undertaken when the principle was applied in *Evans* or *Coleman v Power*. But to adopt this course would of course require judges to carefully consider the significant issues and challenges (outlined in Part IV(C)) that would arise if the principle of legality's methodology were to be reformed in this way.

B *Non-Discrimination as a Common Law Right*

The final point I wish to make concerns the observation of Chief Justice Spigelman that the common law may soon recognise a presumption that Parliament does not intend to legislate in a manner that discriminates with respect to gender, race, religion and other internationally-recognised grounds.[162] Before taking such a step, the courts need to carefully consider the methodological consequences for the principle of legality.

On the one hand, Australian courts have for some time applied non-discrimination rules in a variety of statutory and constitutional settings.[163] And though determining what non-discrimination rules require in any given context is a notoriously complex task,[164] judges do possess considerable methodological experience in this regard.[165] In the statutory context, those rules are expressed in some detail and try to 'stipulate with reasonabl[e] clarity the circumstances in which it is impermissible for an attribute possessed by a person, such as his or her race or sex, to influence a decision which is made about that person.'[166] According to Neil Rees, Katherine Lindsay and Simon Rice, that aim has only been met with 'limited success'.[167] Indeed, they are critical of the following general conception of discrimination, articulated in the constitutional context by

[162] Spigelman, *Statutory Interpretation and Human Rights*, above n 46, 29.

[163] See Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2008) ch 4.

[164] See generally *Quilter v A-G* [1998] 1 NZLR 523, 556 (Keith J). My thanks are due to one of the referees for drawing this judgment to my attention.

[165] For example, Australian judges interpret and apply non-discrimination rules in the following statutory contexts: *Racial Discrimination Act 1975* (Cth) s 9; *Sex Discrimination Act 1984* (Cth) ss 5–7D; *Disability Discrimination Act 1992* (Cth) ss 5–6.

[166] Rees, Lindsay and Rice, above n 163, 73.

[167] Ibid.

the High Court[168] but used also in the application of statutory non-discrimination rules that lack particularity and detail and so require judicial exegesis:

> The essence of the notion of discrimination is said to lie in the unequal treatment of equals or the equal treatment of those who are not equals, where the differential treatment and unequal outcome is not the product of a distinction *which is appropriate and adapted to the attainment of a proper objective*.[169]

In the view of Rees, Lindsay and Rice this conception of impermissible discrimination 'could never provide the degree of certainty which is necessary if a general anti-discrimination statute is to operate with a reasonable level of success.'[170] Indeed, this principle — which Amelia Simpson has called the '"universal" conception of discrimination'[171] — appears to 'regard a certain kind of indeterminacy as an inherent feature of non-discrimination rules.'[172] As the High Court has stated:

> Discrimination is a concept that arises for consideration in a variety of constitutional and legislative contexts. It involves a comparison, and, where a certain kind of differential treatment is put forward as the basis of a claim of discrimination, it may require an examination of the relevance, appropriateness, or permissibility of some distinction by reference to which such treatment occurs, or by reference to which it is sought to be explained or justified. In the selection of comparable cases, and in forming a view as to the relevance, appropriateness, or permissibility of a distinction, a judgment may be influenced strongly by the particular context in which the issue arises. Questions of degree may be involved.[173]

Indeed, when it is understood that the 'appropriate and adapted' test — which the High Court considers a synonym for proportionality[174] — is the mechanism used to apply this non-discrimination rule, then the test's indeterminacy becomes manifest. Not surprising, then, is Simpson's critical observation of the High Court's universal conception of non-discrimination:

> Having accepted the essential indeterminacy of these rules, and thus the need for assessments of reasonableness and value judgments, the Court has created principles that cannot be self-executing. Instead, the universal conception of discrimination invites — indeed requires — the exercise of significant judicial discretion on sensitive and controversial issues. Yet the Court's practice over recent years, when invoking the universal conception, has been to avoid a full

168 Ibid.

169 *Austin v Commonwealth* (2003) 215 CLR 185, 247 (Gaudron, Gummow and Hayne JJ) (emphasis added).

170 Rees, Lindsay and Rice, above n 163, 73.

171 Amelia Simpson, 'The High Court's Conception of Discrimination: Origins, Applications, and Implications' (2007) 29 *Sydney Law Review* 263, 264.

172 Ibid 277.

173 *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595, 629–30 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ), quoted in Simpson, above n 171, 272 (citations omitted).

174 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520, 562, 567 n 272 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 197 (Gleeson CJ), 266–7 (Kirby J).

> and candid airing of reasons for preferring one position over other alternatives. Countervailing pressures — likely the standard concerns about judicial legitimacy and institutional competence — appear to have won out.[175]

In any event, the important point is that if the right to non-discrimination is recognised as fundamental at common law then the courts will likely (maybe inevitably) turn to the universal conception to provide its content. The upshot is that, again, the courts will need to undertake a proportionality inquiry, with its attendant methodological challenges, to identify the 'right' to be protected through the application of the principle of legality. But as noted, Australian courts already use proportionality to apply a variety of constitutional and statutory non-discrimination rules. To do so in the context of a common law non-discrimination rule would not, then, involve a new form of judicial reasoning.[176] It would, however, require the courts to recognise that the existing methodology of the principle of legality is no longer appropriate or legitimate, as that methodology fails to take account of the competing rights and interests that inevitably arise in most non-discrimination cases.

Indeed, if non-discrimination were recognised as a common law right this methodological reformation of the principle may be inevitable — for it is difficult to see how the principle could be applied meaningfully in its current form as a legal rule (ie without balancing) when the content of the right to non-discrimination is entirely contextual and indeterminate.[177]

VI CONCLUSION

Chief Justice French recently stated that the common law principle of legality 'has a significant role to play in the protection of rights and freedoms in contemporary society, while operating in a way that is entirely consistent with the principle of parliamentary supremacy.'[178] Indeed, his Honour went so far as to say that 'the interpretive rule can be regarded as "constitutional" in character even if the rights and freedoms which it protects are not.'[179] But notwithstanding its contemporary (and constitutional) significance to statutory construction and rights protection at both common law and under bills of rights, it remains a principle for which there is little meaningful judicial exegesis. This article has sought to fill at least part of the resulting analytical gap.

It did so by first providing a brief history of the principle of legality, including its contemporary reassertion by Australian courts as the chief interpretive tool to facilitate rights protection. Then an analysis of Australian case law was undertaken in order to ascertain the content of the principle and how the courts currently apply it. This revealed the principle's current methodology but also raised a number of important issues which the courts are yet to address. These

175 Simpson, above n 171, 288 (citations omitted).
176 My thanks are due to one of the referees for this point.
177 See generally Peter Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537.
178 French, 'Protecting Human Rights without a Bill of Rights', above n 120, 34.
179 Ibid 30.

methodological issues were outlined then considered in the context of the rights to freedom of speech and non-discrimination. This analysis suggested that a reassessment of its current methodology may be required if the principle of legality is to be applied and developed in the age of rights in a constitutionally appropriate manner.