

# **THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES**

## **A PRACTICAL INTRODUCTION**

Talk delivered by Pamela Tate S.C., Solicitor-General, to the Continuing Legal Education program of the Victorian Bar  
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1. In this talk today I wish to give you a practical introduction to the *Charter* and to describe briefly its manner of operation. As this is to be no more than an introduction to the *Charter*, I thought it best not to presume any prior knowledge of the human rights laws in other jurisdictions nor presume any prior knowledge of international conventions.
2. I wish to say a few words first of all about what the aim of the *Charter* is, and its general scheme. I then wish to consider each of the five Parts of the *Charter* in some detail. This will involve talking briefly about some of the rights catalogued under Part 2, including the international background against which the *Charter* was enacted, and the gradual introduction of comparable legislation at a domestic level in many countries.
3. I then want to consider in some detail the key obligations the *Charter* imposes under Part 3. It is my view that the only way to understand how the *Charter* is intended to operate is to understand what duties it imposes and upon whom it imposes those duties. This should also provide the key to its operation.
4. In looking at each of the five Parts of the *Charter*, and in particular, Parts 2 and 3, I'll make reference to some of the leading authorities drawn from other jurisdictions (particularly, the United Kingdom, New Zealand and Canada) and give you some concrete examples of how comparable human rights laws apply elsewhere.
5. I have prepared a handout with some lists of further materials to assist you.

6. When the United Kingdom Parliament enacted its *Human Rights Act* in 1998, it delayed commencement by 2 years.<sup>1</sup> Those 2 years were spent training the profession and the judiciary. By October 2000, Lord Bingham stated that:

The implementation of the Human Rights Act 1998 ha[d] assumed something of the character of a religious event: an event eagerly-sought and long-awaited but arousing feelings of apprehension as well as expectation, the uncertainty that accompanies any new and testing experience.<sup>2</sup>

7. The conception of the commencement of human rights legislation as a religious or quasi-religious event is, in my view, something best avoided. It is avoided by the leading writers in this area. In the authoritative text on the U.K. experience, written by two English barristers, Richard Clayton Q.C. and Hugh Tomlinson Q.C., the authors state that they:

hope that [their] book will serve to temper the evangelism of those who see the implementation of the Human Rights Act as a religious event.<sup>3</sup>

8. While the social and cultural significance of human rights legislation is not to be underestimated, the U.K. experience tells us that what is required for the successful implementation of human rights legislation is not evangelism but disciplined analysis and research. In his Foreword to Clayton and Tomlinson's text, *The Law of Human Rights*, Lord Bingham comments that:

[I]t is thought and careful research which will, in particular, be needed if the British courts are to be guided towards sound and sensible decisions, recognising the important values which infuse the Act but recognizing also

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<sup>1</sup> There were a small number of sections that came into force upon enactment. The commencement section in the United Kingdom (s 22) provided that on the passing of the Act certain sections came into force: s 18 (Appointments of United Kingdom Judges to the European Court of Human Rights), s 20 (Orders made by Ministers of the Crown); and s 21(5) (any liability to suffer death for an offence under the *Army Act 1955*, the *Air Force Act 1955* or the *Naval Discipline Act 1957* being replaced by a liability to imprisonment for life or other less punishment authorized by those Acts). The commencement of most of the provisions of the Act was a matter for the Secretary of State, who could bring them into force by making an order nominating a particular day: s 22(3). The Secretary of State, Mr Jack Straw, chose to bring into force on 24 November 1998 the requirement under s 19 for compatibility statements to be made before the second-reading speech of a Bill by a Minister of the Crown in charge of the Bill in either House of Parliament. The Human Rights Act 1998 (Commencement) Order 1998, Statutory Instrument 1998/2882 brought s 19 into force. This was 15 days after the *Human Rights Act* was passed and two years before the remaining provisions came into force. A compatibility statement is a written statement to the effect either that in the Minister's view the provisions of the Bill are compatible with "the Convention rights" (defined in s 1 of the Act), or that although he is unable to make such a statement, the government nevertheless wishes the House to proceed with the Bill. The remaining provisions of the Act came into force on 2 October 2000 (by Order dated 12 July 2000, SI 2000/1851). In this way, the staggered commencement of the U.K. *Human Rights Act* is similar to the staggered commencement of the *Charter*.

<sup>2</sup> Foreword to Clayton & Tomlinson, *The Law of Human Rights* (O.U.P., 2000), v.

<sup>3</sup> *Ibid* ix.

the strengths of our own native traditions, idiosyncratic though some of them doubtless are.<sup>4</sup>

9. Let me turn then to the aim of the *Charter* and the general scheme of the legislation, with an eye to the need for thought and careful research, and the obtaining of sound and sensible decisions.

#### **A. THE AIM AND SCHEME OF THE CHARTER**

##### **WHAT DOES THE *CHARTER* AIM TO DO?**

10. The aim of the *Charter* is to protect and promote human rights where those rights are modelled on those recognized under international law.
11. There are 3 central questions at the heart of the *Charter*. Who does the *Charter* benefit? Who does the *Charter* bind? (By “bind” I mean impose obligations or duties upon). Which human rights are protected and promoted?
12. The answer to the first question, “Who does the *Charter* benefit?”, is natural persons, that is, human beings.<sup>5</sup> The beneficiaries of the rights under the *Charter* are natural persons alone and not legal persons such as corporations.
13. The answer to the second question, “Who does the *Charter* bind?”, is that the *Charter* binds, or imposes duties or obligations on, the three branches of government: the Legislature, the Judiciary and the Executive.
14. However, importantly, the *Charter* binds each of those three branches of government in different ways. It binds the Legislature by imposing upon it an obligation to prepare and table compatibility statements for each Bill introduced into Parliament.<sup>6</sup> Compatibility statements under the *Charter* are statements by a Member of Parliament expressing the opinion, in relation to a Bill he or she has introduced into Parliament, that the Bill is compatible with human rights, and explaining how it is compatible. Alternatively, if he or she considers the Bill to be incompatible with the *Charter*, the statement must indicate the nature and extent of any incompatibility. Members of the Bar

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<sup>4</sup> Ibid v.

<sup>5</sup> See the definition of “person” in s 3.

<sup>6</sup> Section 28.

may be briefed to assess the compatibility of a draft Bill with the human rights under the *Charter* or to settle compatibility statements to be tabled in Parliament as barristers have done in the A.C.T.<sup>7</sup>

15. The *Charter* binds the Judiciary by imposing upon it an obligation to interpret all Victorian statutory provisions compatibly with human rights, so far as it is possible to do so, and consistently with the purpose of the legislation.<sup>8</sup> This interpretive obligation can have a significant impact in litigation and I'll give some examples of that later. Knowledge of the manner in which the interpretive obligation can operate will be an important skill for barristers to have.
16. The *Charter* binds the Executive Government – referred to in the *Charter* as “public authorities” – by imposing an obligation to act compatibly with human rights and to take into account human rights in decision making.<sup>9</sup> It does this by means of a prohibition upon incompatible conduct and upon failures to take account of human rights in decision making. Conduct by public authorities in breach of this general obligation of compliance will be able to be relied upon in some legal proceedings.
17. The definition of “public authorities” is extensive in order to capture not only Ministers and public servants but also statutory bodies, local councils, and Victoria Police. Importantly, the definition extends to those bodies that discharge functions of a public nature. This functional definition of a public authority allows the reach of the *Charter* to cover those bodies engaged by the Executive Government when it “contracts out” its functions. It means that bodies, such as private corporations, when they are exercising public functions on behalf of the State, are prohibited from acting incompatibly with human rights or failing to take account of human rights in their decisions.
18. The answer to the third question, “Which human rights are protected and promoted?”, is that the rights protected and promoted under the *Charter* are liberal democratic rights modelled on those accepted by the international

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<sup>7</sup> See Kate Eastman, ‘Memorandum of Advice: Terrorism (Extraordinary Temporary Powers) Bill 2006’, an advice supporting the compatibility of the Terrorism (Extraordinary Temporary Powers) Bill 2006 with the *Human Rights Act 2004* (A.C.T.).

<sup>8</sup> Section 32.

<sup>9</sup> Section 38.

community in an international convention, the International Convention on Civil and Political Rights (the ICCPR).

19. The overall aim of the *Charter* is thus to provide a restraint on the exercise of public power by imposing duties on the Legislature, the Judiciary and the Executive for the benefit of natural persons, those duties being to recognize and respect the human rights of natural persons.
20. The *Charter* is thus aimed at ensuring that public powers and functions are exercised in a principled way and that public power is not misused or abused. The *Charter* thus sits beside other legislation designed to regulate the relationship between the individual and the State, including the *Freedom of Information Act 1982 (Vic)*; the *Administrative Law Act 1978 (Vic)*; the *Whistleblower Protection Act 2001 (Vic)*; the *Ombudsman Act 1973 (Vic)*; the *Police Regulation Act 1958 (Vic)* and the *Public Administration Act 2004 (Vic)*.

#### **THE SCHEME OF THE *CHARTER***

21. As I've mentioned, the *Charter* is divided into five Parts.
22. Part 1 contains the preliminary provisions including the definition sections and an important application section, which is designed to indicate who the *Charter* binds and how it binds them.
23. Part 2 enumerates or catalogues the particular rights which the *Charter* seeks to protect and promote, such as the right not to be subjected to medical treatment without one's consent, the right to freedom of expression and the presumption of innocence.
24. Part 3 is headed "Application of Human Rights in Victoria" and it is this Part which describes in detail the series of obligations imposed upon the three branches of Government within Victoria: the Legislature, the Judiciary and the Executive.
25. Part 4 relates to the functions to be performed by the Victorian Equal Opportunity and Human Rights Commission.

26. Part 5 makes provision for review of the *Charter* in 2011 and in 2015, and empowers the Governor in Council to make regulations. No regulations have yet been made. Part 5 also contains important transitional provisions and brings into effect a Schedule of amendments, including amendments which effect a change of name for the Equal Opportunity Commission to the Victorian Equal Opportunity and Human Rights Commission.
27. Let me turn to a detailed examination of the five Parts of the *Charter*.

**B. AN EXAMINATION OF THE FIVE PARTS OF THE CHARTER**

**PART 1**

28. While Part 1 is headed “Preliminary”, it includes a number of significant sections. Unusually for Victoria, it contains a citation clause which enables the *Charter* to be referred to as “the *Charter* of Human Rights and Responsibilities”<sup>10</sup> rather than “the *Charter Act*”. It permits the *Charter* to be referred to in all contexts, including in the cross-references within the *Charter* itself, as “the *Charter*”.
29. Part 1 contains a definition section in s 3 and the most important definition is that given to the term “public authority” which I mentioned briefly before. The definition of “public authority” is set out separately in s 4 and it contains a nominated list of core public authorities including Ministers;<sup>11</sup> public officials within the meaning of the *Public Administration Act 2004* (Vic);<sup>12</sup> entities established by statute that have functions of a public nature;<sup>13</sup> and public organizations, such as Local Councils<sup>14</sup> and Victoria Police.<sup>15</sup> Regulations may also prescribe who is<sup>16</sup> and who is not<sup>17</sup> a public authority.
30. In addition to the nominated list, there is the general functional definition for a “public authority” (under s 4(1)(c)) that includes any entity (whether

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<sup>10</sup> Section 1(1).  
<sup>11</sup> Section 4(1)(f).  
<sup>12</sup> Section 4(1)(a).  
<sup>13</sup> Section 4(1)(b).  
<sup>14</sup> Section 4(1)(e).  
<sup>15</sup> Section 4(1)(d).  
<sup>16</sup> Section 4(1)(h).  
<sup>17</sup> Section 4(1)(k).

otherwise a public or private entity) “whose functions are or include functions of a public nature” but only when “it is exercising those functions” and only when it is doing so “on behalf of the State or [another] public authority”.

31. This would mean, for example, that if a private transport corporation is contracted to provide public transport on behalf of the State, the corporation will be bound by the *Charter* when it is exercising those functions but not when it is carrying out its private services. Ditto for private companies that undertake responsibility for the control and management of prisons.
32. Furthermore, if, for example, a private transport corporation subcontracts the provision of public transport on behalf of the State, the subcontractor will also be bound as performing public functions on behalf of the contracted private transport corporation, the first public authority in the chain.
33. The relationship between the State and the public authority need not be by contract – it could be, for example, through the provision of public funding by the State to an entity for it to perform public functions on behalf of the State.<sup>18</sup> Nor is it the case that there is a need for an agency relationship to exist before a public authority can be held to be acting on behalf of the State.<sup>19</sup>
34. What is clear is that the *Charter* does not bind purely private organizations carrying out private functions.<sup>20</sup>
35. The U.K. *Human Rights Act* also prohibits “public authorities” from acting in a way incompatible with human rights.<sup>21</sup> It includes within its definition of “public authorities”, “any person certain of whose functions are functions of a public nature”.<sup>22</sup> Those entities that satisfy the functional definition only are often referred to as “hybrid public authorities”.<sup>23</sup>

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<sup>18</sup> However, the provision of public funding does not necessarily mean that it is exercising that function on behalf of the State: s 4(5).

<sup>19</sup> Section 4(4).

<sup>20</sup> See support for the same proposition in the context of the New Zealand Bill of Rights Act, *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 [64].

<sup>21</sup> Section 6(1).

<sup>22</sup> Section 6(3)(b).

<sup>23</sup> See, for example, the judgment of Lord Nicholls at [16] in *Aston Cantlow PCC v Wallbank* [2004] 1 AC 546.

36. The *Charter* itself sets out a range of factors that may be taken into account when determining if an entity, such as a corporation, is a public authority. These considerations (under s 4(2)) include: whether the function is conferred by or under a statutory provision; whether the function is connected to or generally identified with functions of government; whether the function is of a regulatory nature; whether the entity is publicly funded to perform the function and whether the entity that performs the function is a company all of the shares in which are held by or on behalf of the State.
37. This range of factors is not exhaustive<sup>24</sup> nor does the presence of any one of them inevitably result in the function being of a public nature.<sup>25</sup> They are factors which have been given prominence in the U.K. and New Zealand.
38. Let me give you an example from the U.K. in the recent case from the England & Wales' Court of Appeal, *Johnson v London Borough of Havering*,<sup>26</sup> handed down on 30 January 2007. Mrs Johnson was a resident of a "care home" maintained by the London Borough of Havering and she sought to prevent the Borough from transferring ownership of the care home to private sector control. She argued that the transfer itself would constitute a breach of Article 8 of the European Convention (the right to respect for private and family life). The Borough denied the breach but said that, in any event, nothing would be lost by the residents because the new private owners of the homes would themselves be public authorities under the Act. The proceeding<sup>27</sup> was principally concerned with a preliminary point, viz. whether an institution that provided private residential accommodation to elderly people, who were placed there by local authorities to discharge their statutory obligations of care, exercised a public function for the purposes of the *Human Rights Act*.
39. The Court of Appeal had to grapple with one of its previous decisions, *R (Heather) v Leonard Cheshire Foundation*,<sup>28</sup> which would have answered the preliminary question by saying that care homes were not public authorities.

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<sup>24</sup> Section 4(3)(a).

<sup>25</sup> Section 4(3)(b).

<sup>26</sup> [2007] EWCA Civ 26.

<sup>27</sup> This was heard with a second proceeding, *YL v Birmingham City Council*.

<sup>28</sup> [2002] 2 All ER 936.

In *Leonard Cheshire*, the Court of Appeal had placed much emphasis on the fact that the residential care home at issue was not “enmeshed” in the activities of government.<sup>29</sup> It considered primarily the status of the body, the nature of its relationship with the state, and the degree to which it was controlled by the State. On the other hand, in *Johnson* it was argued that *Leonard Cheshire* could not stand with the subsequent decision of the House of Lords, *Aston Cantlow v Wallbank*,<sup>30</sup> which had emphasized the need to consider the particular activities or functions performed by a body and not its institutional relationships.

40. In *Aston Cantlow* the House of Lords held that a Parochial Church Council did not perform public functions, and was therefore not a “hybrid” public authority, when it sought to recover funds for repairs of a local church from the lay rectors to whom liability attached under the *Chancel Repairs Act 1932* (U.K.).<sup>31</sup> The activity was the enforcement of a civil debt arising as a matter of private law. As Lord Hope said: “The function which it is performing has nothing to do with the responsibilities which are owed to the public by the State.” No mention was made of *Leonard Cheshire* in the judgments.
41. In *Johnson* the Court of Appeal considered itself obliged to follow *Leonard Cheshire* and held that the relevant care homes were not exercising public functions and thus were not public authorities under the functional definition.<sup>32</sup> It held that *Leonard Cheshire* had not been implicitly overruled by *Aston Cantlow*.<sup>33</sup>
42. However, Lord Justice Buxton proceeded to consider the matter, unaided by authority, in which he indicated that there was much to be said for the view that the functions of care homes, when performed to discharge the

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<sup>29</sup> See the leading judgment of Lord Woolf CJ quoted in *Johnson*, above n 26, [35] and his judgment in *Polar Housing and Regeneration Community Association v Donoghue* [2002] QB 48 quoted in *Johnson*, above n 26, [31].

<sup>30</sup> [2004] 1 AC 546. See *Johnson*, above n 26, [27].

<sup>31</sup> The lay rectors were resisting the claim for payment on the ground that it was an infringement of their right to peaceful enjoyment of their possessions guaranteed by article 1 of the First Protocol to the Convention and unlawful discrimination as between landowners contrary to article 14.

<sup>32</sup> *Johnson*, above n 26, [66].

<sup>33</sup> *Ibid.*, [63], [64].

responsibility of the State, should be considered functions of a public nature.<sup>34</sup> The Court granted leave to appeal to the House of Lords.<sup>35</sup> We can thus look forward to having the benefit of a further House of Lords decision on these issues at some point in the future.

43. I also wish to alert you to a recent New Zealand first instance decision which gives a summary account of New Zealand, Canadian and United Kingdom authorities on the meaning of “public function, power or duty”:<sup>36</sup> *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 at [49] – [70].
44. With respect to the remaining definition sections, you will need to consult the *Equal Opportunity Act 1995* (Vic) for the meaning of “discrimination”, s 38 of the *Interpretation of Legislation Act 1984* (Vic) for the meaning of “Act” (which is used in the definition of “statutory provision”) and “entity” (which is used in the definition of “public authority”), and the *Public Administration Act 2004* (Vic) for the meaning of “public official”.
45. The final point to be made about Part 1 is to refer you to s 6, the Application provision, which does three things. First, it provides in sub-section (1) that only “persons” have human rights. “Person” is defined as a human being (in s 3) with the consequence, which I’ve mentioned before, that other legal persons such as corporations are not right-holders. This differs from the situation in New Zealand<sup>37</sup> where all legal persons have the benefit of human rights (at least so far as is practicable) and differs also from the U.K.<sup>38</sup> and Canada.<sup>39</sup>

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<sup>34</sup> Ibid [72].

<sup>35</sup> Ibid [84].

<sup>36</sup> This is relevant to s 3 of the *NZ Bill of Rights Act 1990*, the Application section, whereby the Act applies only to acts done: “(a) By the legislative, executive, or judicial branches of the government of New Zealand; or (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.”

<sup>37</sup> Section 29: “The provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.”

<sup>38</sup> This is because the Convention rights under the *Human Rights Act 1998* (s 1(1) and Schedule 1) are formulated wholly generally, for example, “Everyone has the right to freedom of expression” (Article 10 of the European Convention) and it has long been recognized under Convention case law that a ‘person’ can be a natural or artificial person. See, for example, *R v Broadcasting Standards Commission ex p BBC* [2001] QB 885, in which the U.K. Court of Appeal held that a company could have privacy rights.

<sup>39</sup> Peter Hogg, *Constitutional Law of Canada* (4th ed) (Carslaw, 1997) at [34.1(b)] says that “Sections 2, 7, 8, 9, 10, 12, and 17 of the [Canadian] Charter open with the phrase “Everyone has the right”. In ss 11 and 19 “any person” replaces “Everyone”; s 20 uses “any member of

46. The second thing the application provision does is to state (again in sub-section (1)) that all persons have the human rights set out in Part 2. The expression “human rights” is also defined (in s 3) to mean “the civil and political rights set out in Part 2”. So, importantly, the *Charter* operates only in relation to those particular human rights. However, it does not abrogate any other rights a person may have (e.g. the right under s 80 of the Commonwealth Constitution to trial by jury when charged with an indictable offence against the Commonwealth). This is made plain by s 5 of the *Charter*.
47. The third and significant thing that the application provision does is to identify the manner in which each of the three branches of government are bound by the *Charter*, and it does this by sub-section 2 of s 6.
48. Before considering the duties imposed by the *Charter*, I want to say something about the rights in Part 2 and the international and comparative background to the *Charter*’s enactment. This is useful not just for an understanding of legal history but because an understanding of the scope of the rights under the *Charter* can and should be informed by the interpretation given to them in other jurisdictions. This requires some sensitivity on behalf of practitioners to the different international conventions which the laws of different jurisdictions have sought to give effect to.

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the public” and s 24 uses “Everyone”. It seems likely that these various terms are synonymous and that each is apt to include a corporation as well as an individual.” See also *McDonald v Canada* [1995] 3 SCR 199, where the Canadian Supreme Court held that as corporations enjoyed human rights, including the right to freedom of expression, tobacco laws governing advertising and health warnings were invalid as inconsistent with that right. The South African Bill of Rights also extends to corporations as all “juristic persons” are entitled to the rights “to the extent required by the nature of the rights and the nature of that juristic person” (s 8(4)).

## PART 2

### *THE INTERNATIONAL AND COMPARATIVE BACKGROUND*

49. In June 1945 the United Nations was established by a Charter. References to respecting human rights were included amongst the purposes of the United Nations, despite early opposition. The UN established a Commission on Human Rights, chaired by Eleanor Roosevelt, which met for two years and the end result of which was the Universal Declaration of Human Rights. This was adopted by the Third General Assembly of the United Nations on 10 December 1948, which has been celebrated ever since as Human Rights Day.
50. The Universal Declaration is not itself a treaty or convention and it took another 18 years before two International Conventions were adopted by the United Nations: the International Covenant on Civil and Political Rights (the ICCPR) and the International Covenant on Economic, Social and Cultural Rights in 1966.<sup>40</sup> These three documents, the Universal Declaration of Human Rights, the ICCPR and the ICESCR are sometimes referred to as the International Bill of Rights.<sup>41</sup>
51. The rights contained in the ICCPR are those traditionally associated with liberal or democratic humanism; the right to liberty and security of the person;<sup>42</sup> the right to freedom of movement;<sup>43</sup> the right to a fair trial including the right to be presumed innocent until proved guilty according to

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<sup>40</sup> The ICCPR and ICESCR were both adopted by the UN General Assembly on 16 December 1966.

<sup>41</sup> See Francesca Klug, *Values for a Godless Age: the history of the Human Rights Act and its political and legal consequences* (Penguin, 2000) 95. Australia is a party to both conventions, having ratified the ICCPR on 13 August 1980 (See *Dietrich v The Queen* (1992) 177 CLR 292 at 359 (Toohey J.)) and the ICESCR in 1975. However, international covenants are not binding in Australia unless they have been incorporated into Australia law by legislation. There has also been a limited common law presumption that, at least in the event of ambiguity, statutes are to be interpreted so as not to be inconsistent with established rules of international law: see *Coleman v Power* (2004) 220 CLR 1, 27 [17]–[19] (Gleeson CJ). See also Spigelman AC, “Blackstone, Burke, Bentham and the Human Rights Act 2004” (2005) 26 *Australian Bar Review* 1, 7.

<sup>42</sup> ICCPR, article 9.

<sup>43</sup> ICCPR, article 12.

law and the right to be tried without undue delay;<sup>44</sup> the right to privacy;<sup>45</sup> the right to freedom of thought, conscience and religion;<sup>46</sup> the right to political liberty including the right to freedom of expression<sup>47</sup> and peaceful assembly<sup>48</sup> and association<sup>49</sup> and the right to political participation including the right to vote and to stand for office at genuine periodic elections held by universal and equal suffrage.<sup>50</sup>

52. It is these rights under the ICCPR which, by and large, have provided the model for the substantive rights enumerated in Part 2.
53. The rights within the Universal Declaration have also formed the basis for the Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights)<sup>51</sup> which was ratified by the United Kingdom in 1951.<sup>52</sup> The European Convention largely consists of liberal democratic rights but also includes in the First Protocol to the Convention the right to education and the right of parents to ensure education is in conformity with their own religious and philosophical convictions.
54. Domestic human rights legislation took some more time to develop. In 1982 Canada enacted its constitutionally entrenched *Canadian Charter of Rights and Freedoms*<sup>53</sup> and many of the rights are of the same liberal humanist kind as those to which I've referred.

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44 ICCPR, article 14.

45 ICCPR, article 17.

46 ICCPR, article 18.

47 ICCPR, article 19

48 ICCPR, article 21.

49 ICCPR, article 22.

50 ICCPR, article 25.

51 Klug, above n 41, 96. See also Francesca Klug, 'The United Kingdom Experience' in Christine Debono and Tania Colwell (eds), *Comparative Perspectives on Human Rights* (National Institute of Social Science and Law, 2004).

52 Indeed, the United Kingdom played a part in the drafting of the European Convention and was the first country to ratify it: U.K., *Parliamentary Debates*, House of Commons, 16 February 1998, 307 769 (Jack Straw, Secretary of State for the Home Department), reprinted in Jonathan Cooper and Adrian Marshall-Williams, *Legislating for Human Rights: the Parliamentary Debates on the Human Rights Bill* (Hart, 2000), 3.

53 Part 1 of the *Constitution Act 1982*: see s 34 for its citation. This was introduced after the *Canadian Bill of Rights Act 1960* about which Hogg, above n 39, at [32.1] says: "[T]he failure to entrench the Bill of Rights by constitutional amendment meant that it could be amended or repealed at any time by the federal parliament, and raised the question whether it could be effective at all. The failure to extend the Bill of Rights to the provinces (which would have required an amendment) meant that provincial violations of Civil Rights were not

55. In 1990 the New Zealand Parliament enacted the *New Zealand Bill of Rights Act*, which expressly sought to give effect to New Zealand's commitment to the ICCPR.<sup>54</sup> In 1991 Hong Kong acquired a constitutionally entrenched *Bill of Rights* based on the ICCPR.<sup>55</sup>
56. In the aftermath of apartheid in South Africa a new Constitution was forged including an extensive Bill of Rights as Chapter 2 of the Constitution of the Republic of South Africa 1996, built upon the recognition of human dignity and the inclusion of a wide-ranging set of socio-economic rights as well as liberal democratic rights. A new Constitutional Court was also established.
57. As I've mentioned, in 1998 the United Kingdom Parliament enacted the *Human Rights Act* which brought into effect in the United Kingdom the rights contained in the European Convention (the Convention rights appear in Schedule 1 to the U.K. Act). The U.K. government was already bound by the judgments of the European Court of Human Rights in Strasbourg, to which individual complainants could go for relief, and it was ultimately considered fairer, quicker and cheaper for complainants to raise these matters in domestic courts by way of what was described at the time as "Bringing Rights Home".<sup>56</sup>
58. In 2003 the Irish Parliament enacted its own human rights legislation, somewhat curiously titled, the *European Convention on Human Rights Act 2003*, and in 2004 the Australian Capital Territory enacted its *Human Rights Act 2004* taking the rights under the ICCPR as its model.

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covered at all. The Canadian Bill of rights lost most of its importance in 1982 with the adoption of the *Charter of Rights*." At [33.1], Hogg adds: "Indeed, the inadequacies of the Canadian Bill of Rights were often offered as reasons for the adoption of a more effective Bill."

<sup>54</sup> Although it doesn't include all the rights guaranteed by the ICCPR, for example, the right to the protection of the family and children's rights (ICCPR, art 23 & 24) nor is there a general right to privacy (ICCPR, art 17). It also contains no right to property (which right is not guaranteed by the ICCPR but is guaranteed by the Irish Constitution, arts 40.3 and 43; the Constitution of the United States of America, 5<sup>th</sup> and 14<sup>th</sup> amendments; German Basic Law, art 14, Constitution of the Republic of South Africa 1996, s 25). See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act; A Commentary* (Lexis Nexis. 2005) [1.3.2].

<sup>55</sup> *The Bill of Rights Ordinance 1991*.

<sup>56</sup> The U.K. Labour Party brought out a consultation paper, *Bringing Rights Home*, in November 1996. In October 1997, when the Human Rights Bill was published, the Home Office released a consultation paper, *Rights Brought Home*, which explained how the rights were to be incorporated into U.K. Law. See Klug, "the United Kingdom Experience", above n 51, 2, and Cooper and Marshall-Williams, above n 52, ix.

59. With respect to legal research, it is worth noting that under the ICCPR,<sup>57</sup> the United Nations has established an international Human Rights Committee, which publishes a series of “General Comments” that indicate the scope of particular rights protected under the ICCPR.<sup>58</sup> The European Court of Human Rights in Strasbourg delivers judgments on the rights under the European Convention which are available on-line. Decisions of the recently established New Zealand Supreme Court, the Canadian Supreme Court and the South African Constitutional Court may also be useful on relevant rights.

### *THE CATALOGUE OF RIGHTS*

60. Let me consider briefly the scope of just some of the rights under the *Charter* and then I’ll examine how the duties imposed by Part 3 engage with these particular rights.
61. **Section 10(c)** is the right of a person not to be subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent. This means, for example, that patients who are competent to give consent must be allowed to refuse medical treatment or refuse to participate in a medical experiment. Section 10(c) is modelled on article 7 of the ICCPR. The *Charter* goes further than the ICCPR in recognizing not only a right to refuse to be subjected to medical experimentation but also a right to refuse medical treatment<sup>59</sup> and requiring that the consent be “full, free and informed”. This means that not only must the consent be voluntary but the person concerned must have been given sufficient information for an informed decision to be made. This might include information such as the nature of the person’s condition and the treatment options available, including explanations of possible risks, side-effects and benefits of the treatment.

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<sup>57</sup> Part IV of the ICCPR provides for the establishment of the Human Rights Committee consisting of 18 members of “high moral character and recognized competence in the field of human rights”.

<sup>58</sup> Note that the U.N. Human Rights Committee is a Committee established under the ICCPR (art. 28) and the Committee does not deal with economic, cultural and social rights.

<sup>59</sup> The right to refuse medical treatment is also recognised under s 11 of the *New Zealand Bill of Rights Act* and s 10 of the A.C.T. *Human Rights Act*.

62. **Section 15** identifies two rights: the right to *hold* an opinion without interference by the State and the right to freedom of expression – that is, the right to seek, receive and impart information in various mediums.<sup>60</sup> The right to freedom of expression applies in relation to the manifestation or communication of an opinion, for instance, in speech, writing or action. The right to freedom of expression includes a right to engage in political protest or criticism.<sup>61</sup>
63. However, it was clear to the international community that an unrestricted right to freedom of expression could lead to abuse and for that reason it was acknowledged that the enjoyment of the right to freedom of expression must carry with it special duties and responsibilities to respect the rights and reputations of other persons. This understanding led to article 19 of the ICCPR, upon which s 15 of the *Charter* is based, including express reference to the types of permissible restrictions that could be placed on the right, including restrictions that are reasonably necessary to respect the rights and reputations of other persons or to protect national security, public order, public health or public morality. These internal restrictions in turn confine the scope of the right to freedom of expression. They are mirrored in s 15(3) of the *Charter*.
64. With respect to the rights which apply to those charged with criminal offences, some of the most significant of these are: s **25(1)**, the right of a person charged with a criminal offence to be presumed innocent until proved guilty according to law;<sup>62</sup> s **25(2)(c)**, the right to be tried without unreasonable delay;<sup>63</sup> and s **25(2)(k)**, the right not to be compelled to testify against oneself or to confess guilt.<sup>64</sup> These are rights familiar to us through the common law. However, it is the *consequences* of including these rights in the *Charter* which is important – for their inclusion means that the duties imposed under Part 3 are duties owed in respect of those rights. Again, it is

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<sup>60</sup> These mediums include written and oral communications; television programs; commercial advertising; broadcasting, film and video; pictures; sign language; dress and images.

<sup>61</sup> *Hopkinson v Police* [2004] 3 NZLR 704.

<sup>62</sup> This is modelled on Article 14(2) of the ICCPR.

<sup>63</sup> This is modelled on Article 14(3)(c) of the ICCPR. It serves to protect, inter alia, the interest of an accused in having evidence tested while it remains fresh.

<sup>64</sup> This is modelled on Article 14(3)(g) of the ICCPR.

the duties under the *Charter* which are critical to its operation, in particular the duty owed in the interpretation of statutory offences.

65. I should mention that some of the rights under the *Charter* are modifications or modernizations of the rights under the ICCPR and I draw your attention particularly to s 8 – the right to equality before the law. Sub-section (4) of s 8 allows for the introduction of measures to improve the status of people who have been disadvantaged because of discrimination in the past – these forms of special or affirmative action measures are not recognized under the relevant articles of the ICCPR (articles 2 and 26) but they are recognized in Canada (s 15(2) of the *Canadian Charter*) and in s 19(2) of the *New Zealand Bill of Rights Act*.

#### ***PROPORTIONALITY***

66. Before I leave Part 2, there is another critically important section included within it. This is s 7(2) and it provides that all of the rights enumerated in Part 2 may be subject to reasonable limitations that can be demonstrably justified in a democratic society. What this section reflects is that the *Charter* tolerates interferences with, or intrusions or limitations upon, *any* of the rights in Part 2 providing that those interferences have an objective which is sufficiently important to warrant limiting or interfering with a right and providing that the degree of interference is proportional to, or has a rational connection with, the permitted objective sought to be achieved. Those interferences with, or limitations upon, rights can occur through legislation or by means of the particular conduct or particular decisions of the Executive. Providing that any interference with a right is such as to be reasonably justified in a democratic society, there is no incompatibility with the *Charter* or the human rights it protects.
67. It is worth noting that, under the *Charter*, none of the rights under Part 2 are absolute. In other words, all of the rights may be subject to the reasonable limitations test under s 7(2). However, most of the rights are modelled on those recognized under the ICCPR, and some of these are treated as absolute under article 4.2 (for example, the prohibition on torture or on cruel, inhuman

or degrading treatment or punishment). The status of a right at international law, as absolute or not, will be a relevant consideration in determining whether the limitation upon the right (the extent to which there is an interference with, or an intrusion upon, a right) is reasonable.

68. This notion of “proportionality” is a key principle embraced by the Charter and it reflects the jurisprudence developed under international law. It is a foundational principle of all the domestic human rights legislation to which I’ve referred. The general principle endorsed by s 7(2) (viz. that the rights may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society) is to be found in the same terms in s 5 of the *New Zealand Bill of Rights Act*; s 1 of the *Canadian Charter of Rights and Freedoms*; and s 28 of the *A.C.T. Human Rights Act*.

69. The general principle does not appear explicitly in the U.K. *Human Rights Act* but the principle is applied there as part of the incorporation of the European Convention into domestic law. It is a complex principle but the nub of proportionality is that, as the New Zealand Court of Appeal said in *Moonen v Film and Literature Board of Review* when applying principles from the leading Canadian Supreme Court decision of *R v Oakes*<sup>65</sup>:

A sledgehammer should not be used to crack a nut.<sup>66</sup>

70. The general principle under s 7(2) of the *Charter* also appears in s 36 of the South African Bill of Rights and that section goes on to spell out the range of factors to be considered when determining whether a particular law, or particular conduct, although it prima facie interferes with a right, does so only in a manner that is rational and proportionate to the objective to be achieved. Those five factors are: (1) identifying the nature of the right; (2) the importance and purpose of the limitation [or interference with the right]; (3) the nature and extent of the limitation [or interference with the right]; (4) the relationship between the limitation and its purpose; and (5) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

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<sup>65</sup> [1986] 1 SCR 103.

<sup>66</sup> *Moonen v Film and Literature Board of Review (Moonen (No 1))* [2000] 2 NZLR 9, [18] (Tipping J.).

71. Section 7(2) of the *Charter* goes on to reflect precisely those factors set out in s 36 of the South African Bill of Rights. This was done on the recommendation of New Zealand practitioners who reported that policy and legislative officers within the New Zealand Government often resorted to the test under the South African Bill of Rights when advising on the proportionality of any legislative or policy intrusion upon a human right. To my knowledge the words “proportionate” and “proportionality” do not appear in any human rights legislation but the principle has been described in those terms authoritatively by the Canadian Supreme Court,<sup>67</sup> the Constitutional Court of South Africa,<sup>68</sup> the New Zealand Court of Appeal<sup>69</sup> and the House of Lords.<sup>70</sup>

### PART 3

#### *THE KEY OBLIGATIONS UNDER THE CHARTER*

72. Turning to Part 3, it is this Part which imposes the key obligations on the three branches of government: the Legislature, the Judiciary and the Executive. Those obligations are dealt with in different Divisions of Part 3. I'll mention the nature of the obligations and then provide you with some examples of each.
73. The principal obligation on the Legislature is imposed by s 28 of the *Charter* – the obligation on each Member of Parliament,<sup>71</sup> who introduces a Bill into a House of Parliament, to prepare and table a compatibility statement for that Bill. Section 28 appears in Division 1 of Part 3.
74. The principal obligation on the Judiciary is imposed by s 32 of the *Charter*, the obligation to interpret all statutory provisions in a way that is compatible with human rights, consistently with the purpose of those provisions. Section 32 appears in Division 3 of Part 3.

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<sup>67</sup> *R v Oakes* [1986] 1 SCR 103.

<sup>68</sup> *S v Makwanyane* 1995 (3) SA 391 [104].

<sup>69</sup> *Moonen v Film and Literature Board of Review (Moonen (No 1))* [2000] 2 NZLR 9

<sup>70</sup> *R v Home Secretary; ex parte Daly* [2001] 2 AC 532.

<sup>71</sup> This contrasts with the obligation under the U.K. *Human Rights Act* (s 19), the *New Zealand Bill of Rights Act* (s 7) and the A.C.T. *Human Rights Act* (s 37), which all require the Attorney-General to make the compatibility statement.

75. The principal obligation on the Executive and those who discharge the functions of the Executive is imposed by s 38 of the *Charter*. The obligation is to comply with human rights in the way they act and give proper consideration to human rights in the making of decisions. Section 38 appears in Division 4 of Part 3.

**SECTION 28: COMPATIBILITY STATEMENTS**

76. A useful example of a compatibility statement is the one prepared in the A.C.T. when legislation was introduced into Parliament to permit the involuntary administration of electroconvulsive therapy, or ECT.<sup>72</sup>
77. In 2005 the A.C.T. Government introduced the Mental Health (Treatment and Care) Amendment Bill 2005 (A.C.T.). The compatibility statement, which was tabled in Parliament, first identified what relevant rights this Bill might interfere with, or limit, or restrict. The principal relevant right was identified as the right to refuse medical treatment, the equivalent of s 10(c) under the *Charter*. The compatibility statement went on to consider whether the involuntary administration of ECT would be an unreasonable interference with that right. It considered first the status of that right under international law and noted that the right is not considered to be absolute under international law.<sup>73</sup> The value underlying the right is personal autonomy and there are circumstances where the right may need to be compromised to achieve some other lawful and proper purpose.
78. The purpose of the Bill was to ensure that emergency ECT treatment was not unduly delayed where it was necessary to save a person's life. The therapy could be administered only where the person was incapable of giving consent and an order had been obtained from the Mental Health Tribunal in response to an urgent application. Safeguards included the need for the Tribunal to be satisfied that all other reasonable forms of treatment available had been tried

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<sup>72</sup> Compatibility Statement, Mental Health (Treatment and Care) Amendment Bill 2005 (accessible at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)).

<sup>73</sup> Note that the right to refuse to be subjected to medical *experimentation* is an absolute right under the ICCPR. Article 4.2 of the ICCPR provides that a number of the rights cannot be derogated from, including art 7, which provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

without success or that ECT was the most appropriate treatment reasonably available. The order had to specify the number of occasions ECT could be given to a maximum of three and would be superseded by any further order of the Tribunal after a full hearing. No less restrictive means would have been reasonably available to achieve the purpose of the Bill, or it was at least within the range of reasonable solutions to the problem faced.<sup>74</sup>

79. The compatibility statement concluded, first, that the measure was directed at an important and relevant matter of pressing and substantial social concern, and second, that there was a rational and proportionate relationship between permitting ECT to be administered without consent, where the person was incapable of giving consent and delay would place the person's life at risk.
80. The measure had been carefully designed to achieve its purpose and was not arbitrary, unfair or based on irrational considerations.<sup>75</sup> The Attorney-General expressed the view that the Bill was consistent with the A.C.T. *Human Rights Act*.<sup>76 77</sup>

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<sup>74</sup> It is not necessary to show that Parliament has adopted the least restrictive means of achieving its end – it is sufficient for compatibility with human rights for the interference to be within the range of reasonable solutions to the problem faced. *R v Sharpe* [2001] 1 SCR 45, 101-102. See *R v Oakes* [1986] 1 SCR 103, 139.

<sup>75</sup> This was one of only 2 reasoned compatibility statements tabled in the A.C.T. to date.

<sup>76</sup> Victoria differs from the A.C.T. in that all compatibility statements must be reasoned. Under the A.C.T. *Human Rights Act*, there is only a requirement that the compatibility statement state *whether*, in the opinion of the Attorney-General, the Bill is consistent with human rights – not *how* it is consistent. This requirement was complied with in the first year of operation of the A.C.T.'s *Human Rights Act* largely by one-line statements indicating that the Attorney-General held the relevant opinion. Victoria has learned from this experience in the A.C.T. and the Human Rights Consultation Committee recommended, and included in its draft Bill, a requirement, in effect, that the compatibility statement provide reasons. As a result, under s 28 of the *Charter* a statement of compatibility must state not only *whether*, in the opinion of the member of Parliament who introduced the Bill, the Bill is compatible with human rights but also, if it is compatible, *how* it is compatible. In the U.K. the compatibility statements are only required to be made “in writing and to be published in such manner as the Minister making it considers appropriate” (s 19(2)). These are sometimes one-liners, but there are also reasoned and articulate statements such as those expressed in relation to the Offender Management Bill 2006, which conferred new powers of search and amended existing powers of detention (Explanatory Notes, Offender Management Bill 2006 (U.K.) [159]-[160]). This was introduced into the House of Commons on 22 November 2006.

<sup>77</sup> Section 28(3)(b) of the *Charter* allows for the member of Parliament to express the opinion that the Bill is incompatible with human rights. This is also allowed for in the A.C.T. (under s 37(3)(b) of the *Human Rights Act*, whereupon the statement must state *how* the Bill is not consistent with human rights) and in the U.K. (under s 19(1)(b) of the *Human Rights Act*). In all these jurisdictions, the statements are nevertheless described as compatibility statements.

81. In Victoria compatibility statements are now available through a link on the website of the Office of Chief Parliamentary Counsel.

***SECTION 32: THE INTERPRETIVE OBLIGATION***

82. The second key obligation is the interpretive obligation under s 32 which is imposed on the Judiciary. Section 32 provides:

so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

This is a powerful measure and it is likely to have a significant impact in litigation. Interpretive obligations under comparable human rights legislation have been used to qualify the construction of the mens rea element of statutory criminal offences and have had a major impact, especially in the United Kingdom, upon the construction of so-called reverse-onus offences.

83. A simple example of the former is the New Zealand case of *Hopkinson v Police*<sup>78</sup> in which the offence of damaging the flag with the intention of dishonouring it<sup>79</sup> was construed, in the light of the right to freedom of expression, as an offence which required an element of contemptuous intent, equivalent to “defiling”, imputing an active and lively sense of shaming or a deliberate act of callousness, rather than merely an exhibition of intentional disrespect. The greater mental threshold resulted in the setting aside of a conviction for an accused who had burnt the New Zealand flag in an act of purely political protest and with no expression of contempt.
84. A more complex example is to be found in the history of the interpretation of reverse-onus offences. This area is also instructive in relation to the application of the reasonable limits test.
85. In the decision of the Canadian Supreme Court in *R v Oakes*, which is relied upon in all jurisdictions for its analysis of the reasonable limits test and proportionality, the statutory offence to be interpreted was s 8 of the *Narcotic*

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<sup>78</sup> [2004] 3 NZLR 704.

<sup>79</sup> Under s 11(1)(b) of the *Flags, Emblems and Names Protection Act 1981* (N.Z.).

*Control Act*.<sup>80</sup> This provided, in summary, that if “the Court finds the accused in possession of a narcotic, he is presumed to be in possession for the purpose of trafficking. Unless the accused can establish the contrary, he must be convicted of trafficking.”<sup>81</sup> The presumption applied however small the amount of the prohibited drug found in the possession of the accused. The Court held that s 8 should be interpreted as imposing a legal burden on an accused of proving that he or she was not in possession of the narcotic for the purpose of trafficking.

86. The Court held that the imposition of this reverse onus was contrary to the presumption of innocence because it could not be justified as a reasonable limit. It imposed “two requirements which must be satisfied under the justification head: a sufficiently important objective, and proportionality of the means chosen to achieve the objective”.<sup>82</sup> The essence of the Court’s methodology is captured in a famous passage from the Chief Justice:

To establish that a limit is reasonably and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom” ... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum that an objective relates to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking...[the reasonable limits test] must show that the means chosen are reasonable and demonstrably justified. This involves a form of “proportionality test” ... There are ... three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question ... Third, there

<sup>80</sup> *Narcotic Control Act*, R.S.C. 1970, c. N-1.

<sup>81</sup> *R v Oakes* [1986] 1 S.C.R. 103, 108. Section 8 (extracted at 115) relevantly read: “...if the court finds that the accused was in possession of the narcotic ... he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking ... if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged ...”.

<sup>82</sup> *Hansen v The Queen* [2007] NZSC 7, [121] (Tipping J).

must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of “sufficient importance”.<sup>83</sup>

87. The Court held that Parliament’s concern that drug trafficking be decreased was substantial and pressing but that the means chosen by Parliament did not satisfy the rational connection test, the first element of proportionality. As the Court said: “possession of a small or negligible quantity of narcotics does not support the inference of trafficking. ... the presumption required ... is over inclusive and could lead to results in certain cases which defy both rationality and fairness.”<sup>84</sup> One could say, as the New Zealand Court of Appeal later said, a sledgehammer had been used to crack a nut.
88. Against this background the House of Lords came to interpret a similar reverse-onus offence in the case of *R v Lambert*.<sup>85</sup> There the statutory offence was that of possessing a controlled drug of class A with intent to supply.<sup>86</sup> The statute provided that an accused “shall be acquitted ... if he *proves* that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug.”<sup>87</sup> The question for the Court was whether that statutory provision violated the presumption of innocence protected by article 6(2) of the European Convention (within Schedule 1 to the U.K. *Human Rights Act*) because it required an accused to disprove an important element of the offence<sup>88</sup> where the offence was one punishable by life imprisonment.<sup>89</sup> The Court held that the presumption of innocence was violated because an accused could be convicted while a reasonable doubt existed<sup>90</sup> and thus the transfer of the legal burden would be a

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<sup>83</sup> [1986] 1 SCR 103, 138-139 (Dickson CJ).

<sup>84</sup> [1986] 1 SCR 103, 142. As the right to the presumption of innocence is constitutionally entrenched in Canada, this led to the Court declaring that s 8 of the *Narcotic Control Act* was of no force or effect.

<sup>85</sup> [2002] 2 A.C. 545.

<sup>86</sup> Section 5(3) of the *Misuse of Drugs Act 1971* (U.K.) (see *ibid* 564).

<sup>87</sup> Section 28(3) of the *Misuse of Drugs Act 1971* (U.K.) (see *ibid*).

<sup>88</sup> It was accepted that knowledge of the existence and control of the contents of the container was the gravamen of the offence: see *ibid* 570.

<sup>89</sup> *Ibid* 572.

<sup>90</sup> *Ibid* 571.

“disproportionate reaction to perceived difficulties facing the prosecution in drugs cases”.<sup>91</sup>

89. However, the Court considered that if the statutory offence was interpreted as imposing not a legal burden of proof but merely an evidential burden on the accused, there would be no violation of the relevant right.
90. As the Court said, an evidential burden has the effect that “the matter must be taken as proved against the accused unless there is sufficient evidence to raise an issue on the matter but, if there is sufficient evidence, then the prosecution have the burden of satisfying the jury as to the matter beyond reasonable doubt in the ordinary way”.<sup>92</sup> Accordingly, the House of Lords construed the relevant statutory offence as imposing no more on the accused than an evidential burden. They did this by way of discharging their obligation under s 3 of the U.K. *Human Rights Act*, which provides that “so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with the Convention rights”. This is similar but not identical to s 32 under the *Charter* and *R v Lambert* provides a dramatic way in which the interpretive obligation can have an impact upon matters which are central to legal proceedings.
91. However, the last word does not rest with the House of Lords. The Supreme Court of New Zealand has recently refused to accept that the words “unless the contrary is proven” can be read, as the House of Lords read it, as imposing an evidential burden only. In the important case of *R v Hansen* [2007] NZSC 7, handed down on 20 February 2007, the New Zealand Supreme Court considered that a reverse-onus offence under the *Misuse of Drugs Act 1975*, in its application to the possession of cannabis of 28 grams, was a disproportionate intrusion upon the right to a presumption of innocence. It supported its conclusion partly on the ground that “the Australian State of Victoria in its comparable legislation has imposed only an evidential onus on an accused in circumstances akin to those in this case”;<sup>93</sup>

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<sup>91</sup> Ibid 574.

<sup>92</sup> [2002] 2 AC 545, 572.

<sup>93</sup> [2007] NZSC 7, [223].

that is, s 73(2) of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). Justice McGrath continued by saying:

I think it is instructive that it has not been thought necessary in a jurisdiction of its size to impose a legal burden of proof on an accused charged with an offence of the present kind in order adequately to address the problems associated with detection and prosecution of illicit drug dealing in Victoria.<sup>94</sup>

92. Ultimately, the Court found that the interpretive obligation under s 3 of the *New Zealand Bill of Rights Act* was not sufficient to direct the reinterpreting of a statutory provision, which purported to impose a legal burden as imposing no more than an evidentiary burden. It held that imposing a legal burden was a disproportionate interference with the right to a presumption of innocence. The Court indicated in its reasons (though not within its formal orders) that the particular statutory offence at issue was incompatible with the *New Zealand Bill of Rights Act*. The Supreme Court of Victoria has conferred upon it under s 36 of the *Charter* an express power to issue declarations of inconsistent interpretations. The New Zealand Supreme Court does not have this power expressly<sup>95</sup> whereas the United Kingdom courts do.<sup>96</sup> An example in the U.K. courts is the declaration made in *A v Secretary of State of the Home Department*<sup>97</sup> in relation to terrorism legislation passed in 2001 providing for detention of non-nationals believed to be a risk to national security.
93. It is important to note that the interpretive obligation under the *Charter* (s 32) requires that a human rights-consistent interpretation be adopted but the interpretation adopted must also be consistent with the purpose of the legislation. This is likely to mean that where there is a range of interpretations to be adopted, all of which are equally consistent with the purpose of the legislation, the interpretation which is least restrictive of

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<sup>94</sup> Ibid.

<sup>95</sup> While there is no express provision within the *New Zealand Bill of Rights Act*, it is the view of the authors of *The New Zealand Bill of Rights Act: A Commentary* that the courts do have the power to make a declaration of inconsistency. This is because such a declaration would not be inconsistent with the language of the *New Zealand Bill of Rights Act* and would be consistent with the *Human Rights Amendment Act 2001*, which gave the courts the task of devising and granting remedies for acts inconsistent with the *New Zealand Bill of Rights Act*: see Butler and Butler, above n 54, 1019-1027.

<sup>96</sup> See section 4(2) of the *Human Rights Act* (U.K.).

<sup>97</sup> [2005] 2 A.C. 68.

human rights should be adopted and assessed for compatibility.<sup>98</sup> The obligation extends only to the interpretation of Acts passed by the Victorian Parliament and statutory instruments made thereunder.<sup>99</sup>

94. The interpretive obligation under s 32 does not come into effect until 1 January 2008 nor does the obligation upon public authorities to comply, to which I will now briefly turn.

**SECTION 38: THE OBLIGATION OF COMPLIANCE ON PUBLIC AUTHORITIES**

95. Section 38 renders unlawful acts of public authorities that are incompatible with a human right or decisions that fail to give proper consideration to a human right.

96. Let me make some brief comments about s 38 and about s 39 (which governs reliance upon a breach of s 38 in legal proceedings):

- (1) the effect of s 38 is to create a new legal norm, contravention of which generates new forms of unlawfulness; that is, certain types of conduct or decision-making which would not have been unlawful before the *Charter* are now rendered unlawful;
- (2) a breach of s 38 does not in itself found a novel cause of action which sounds in damages – there is no sui generis *Charter* or human rights action which is based on a contravention of s 38 – this contrasts with the New Zealand recognition of a cause of action under the *New Zealand Bill of Rights Act* in the case of *Simpson v Attorney-General* [1994] 3 NZLR 667 (*Baigent’s Case*);

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<sup>98</sup> This is not to indicate any particular staged sequence for interpreting legislation in the light of s 32; many alternative sequences have been proposed and debated in relation to the interpretive obligation under comparable human rights legislation. This is a topic which would require detailed examination on its own account. Indeed, in *Hansen*, above n 93, Tipping J articulates a 6-staged test (at [92]) for the interpretive exercise and points out that the “rather differently arranged and constructed sequence” of the 5-staged test adopted by the Court of Appeal in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 had not been intended to be mandatory.

<sup>99</sup> See the *Charter*, s 3, which defines “statutory provision” to mean “an Act (including this *Charter*) or a subordinate instrument or a provision of an Act (including this *Charter*) or of a subordinate instrument”. Section 38 of the *Interpretation of Legislation Act* defines “Act” to mean “an Act passed by the Parliament of Victoria”.

- (3) where it is possible to fit the unlawfulness of the conduct of a public authority into an existing cause of action or otherwise rely upon it for some form of relief or remedy, then a contravention of s 38 might supply that necessary element (subject to a precondition identified in sub-section (1) of s 39);
- (4) an example where a breach of s 38 might be relied upon is where a public authority (say, the police) has obtained evidence in a manner that interfered with or restricted a right beyond reasonable limits. By reason of the *Charter*, that evidence has now been obtained illegally because it has been obtained in contravention of s 38. In a court proceeding it would thus be possible to apply to have that evidence ruled inadmissible as an exercise of the standard *Bunning v Cross* discretion;
- (5) a further example would be an application for a permanent Stay of a criminal prosecution on the ground that the right to a trial without unreasonable delay had been interfered with beyond reasonable limits by the conduct of a public authority (say, the prosecutor). In the proceeding it would be possible to rely upon the unlawful conduct of the prosecutor (the contravention of the norm under s 38) to enliven the Court's discretionary power to grant a Stay;
- (6) an example in a civil proceeding would be an application for judicial review on the ground that a public authority, when arriving at a relevant decision had failed to take into account a relevant human right, or, in the particular circumstances in which s 38 had been contravened, had acted unreasonably;<sup>100</sup>

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<sup>100</sup> Failure to give proper consideration to a relevant human right might be accommodated within the existing ground of failing to take into account relevant considerations as s 38 requires that the decision-maker take into account *as a relevant consideration* the need to give proper consideration to human rights. In an application for judicial review of the conduct of a public authority (or of a decision made by the public authority) on the ground of unreasonableness, the fact that the conduct of the public authority involved a breach of s 38 would be relevant to an assessment of the reasonableness of the conduct in an application of the *Wednesbury* test. The test would remain whether the conduct of the public authority in contravening s 38 was so unreasonable that no reasonable public authority in the same position would have acted in the same manner. Section 38 will provide part of the legislative context in which the public authority acted but all of the circumstances of the case would need to be considered (including the nature of the right at issue, whether the conduct involved a disproportionate interference

- (7) what is important to recognize is that the court in which proceedings are brought must already have jurisdiction to entertain applications of the type sought to be relied upon (for example, judicial review) and the existing requirements governing those forms of applications must be met (for example, time limits). The intention is thus to incorporate *Charter* breaches into the existing law;
- (8) the permission extended by s 39(1) for reliance to be placed on a breach of s 38 in a proceeding is dependent upon the precondition that the person is able to “seek” the same relevant relief or remedy as that to which the *Charter* breach is relevant, in respect of the decision or conduct of the public authority, on a ground independent of the *Charter*. This does not mean that he or she must be able successfully to impugn the decision or conduct of the public authority on that independent ground but one would expect that the independent non-*Charter* ground must be such as to survive a strike-out application. In other words, “a person can only seek redress if [he or she has] a pre-existing relief or remedy in respect

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with the right, and the overall factual circumstances of the alleged contravention). By contrast, in the United Kingdom, in relation to judicial review cases brought in respect of breaches by public authorities of the obligation to comply with the U.K. *Human Rights Act*, the courts apply proportionality as the relevant standard of judicial review without reliance upon the ground of unreasonableness and without reliance upon the *Wednesbury* test. *R v Secretary of State for the Home Department; ex parte Daly* [2001] 2 AC 532 is an example of a proceeding for judicial review where a blanket policy by prison officers of inspecting prisoners’ legal correspondence always in the absence of the prisoners was held to infringe a prisoner’s right to respect for his correspondence under article 8(1) of the European Convention to a greater extent than was necessary for the prevention of disorder and crime. The House of Lords held that the policy was void and that, in that instance, the same result would have been reached on the traditional grounds of review (the policy being ultra vires the statutory authorization under s 47(1) of the *Prison Act 1952*). The statutory power to make rules for the regulation and control of prisoners had to be construed in accordance with the common law presumption that the right to communicate confidentially with a legal adviser under the cloak of legal professional privilege was not to be interfered with absent express language or necessary implication to the contrary. Section 47(1) did not authorize the excessive intrusion prescribed by the policy and thus “the Home Secretary accordingly had no power to lay down or implement the policy in its present form” (Lord Bingham, at [21]). However, see *R v Lord Saville of Newdigate; ex parte A* [1999] 4 All ER 860 at [37] where a contravention of human rights was considered to be capable of constituting unreasonableness (in the *Wednesbury* sense) at common law in the absence of countervailing considerations. This approach might reflect that intended for Victoria.

of the act of the public authority, in which case that relief or remedy may also be granted for *Charter* unlawfulness”.<sup>101</sup>

97. The upshot of this is that a breach of s 38 can only be relied upon in litigation which has an independent non-*Charter* basis and the breach of s 38 will not itself sound in damages (although the non-*Charter* cause of action may, of course, do so<sup>102</sup>). This may have a narrowing effect on the possible use of the *Charter* in litigation but it should also assist the gradual development of case law under the *Charter*, which might proceed in something close to an orthodox fashion.

#### PART 4

98. Part 4 confers a range of functions on the Victorian Equal Opportunity and Human Rights Commission including providing an annual report to the Attorney-General on all declarations of inconsistent interpretation made by the Supreme Court during the year,<sup>103</sup> and reviewing public authority’s programs and practices to assess compatibility when requested to do so by the authority.<sup>104</sup> The Commission is also given a right of intervention in any proceeding in which a question of law arises that relates to an application of the *Charter* or in which a question arises with respect to the interpretation of a statutory provision in accordance with the *Charter*.<sup>105</sup> This is similar to the right the Attorney-General has to intervene under s 34 (in Part 3). Parties to proceedings where such questions arise must ensure that notice of those proceedings are given to both the Commission and the Attorney-General.<sup>106</sup>

#### PART 5

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<sup>101</sup> Dr Julie Debeljak, ‘The Charter Mechanisms’ (Speech delivered at the Judicial College of Victoria: Introduction to Human Rights Seminar, 19 February 2007), 31.

<sup>102</sup> See s 39(4).

<sup>103</sup> Section 41(a)(ii).

<sup>104</sup> Section 41(c).

<sup>105</sup> Section 40.

<sup>106</sup> Section 35.

99. Part 5 makes provision for reviews of the *Charter* after 4 and 8 years respectively. Those reviews are to include consideration of whether additional rights should be protected under the *Charter*, for example, those under the ICESCR, and whether further provision should be made in relation to the remedies to be afforded by reason of the breach by public authorities of their obligation of compliance.

### C. CONCLUSION

100. In conclusion, might I say that in *Hansen* the Justices of the New Zealand Supreme Court were in dispute as to the proper relationship between certain sections of the *New Zealand Bill of Rights Act* and the proper tests to apply on interpretation. This is after 17 years of familiarity and practice with human rights legislation.
101. We can infer from that experience that while this is an exciting time in Victoria with respect to the changes that will occur in the legal relationship between the individual and the State, we have embarked upon a process which, as the House of Lords described it in *Ghaidan*, is one of “cautiously feeling [one’s] way forward as experience in the application [of human rights laws] gradually accumulates”.<sup>107</sup>

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<sup>107</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [27] (Lord Nicholls).