

## Human Rights – What is left unsaid.

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### Introduction

- 1 The Victorian Charter of Human Rights and Responsibilities Act 2006 (“the Charter”) introduces what is largely an alien concept – the concept of human rights - into a jurisdiction largely shaped around the law of obligations. In so doing, and by reason of the specific content and form of the legislation, it introduces a body of international case law into substantive dispute resolution, the lawful scope of administrative action, and into the science (or art?) of statutory interpretation. The purpose of the Charter is to protect and promote human rights (as set out in section 1) and the implementation of that aim will be entrusted to Parliament, public authorities, and to the courts. In particular as regards the latter, the Charter will further develop the role of the court as watchdog, and will inevitably heighten the tension between the courts, the legislature, and the executive. This is particularly so given that, in section 32(1) the courts are required “*so far as it is possible to do so consistently with their purpose*” to interpret statutory provisions in a way that is compatible with human rights,<sup>1</sup> and section 38 creates new categories of unlawfulness by public authorities. In this way, as in the UK and other jurisdictions, the Charter will realign boundaries, and further mould the approach of the courts to the scrutiny of administrative action which impacts upon the interests of the populace.<sup>2</sup>

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<sup>1</sup> In *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 the House of Lords considered the equivalent provision in the Human Rights Act 1998 (UK) and Lord Nicholls said, at 571: “*the interpretive obligation decreed by section 3 is of an unusual and far reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question.*” – referred to with apparent approval by the ACT SC CA in *Kingsley’s Chicken Pty Ltd v. Queensland Investment Corporation* [2006] ACTCA 9. Another example of the interpretative obligation in the UK is *R(Hammond) v. SSHD* [2005] UKHL 69: a no oral hearing provision was interpreted as “no oral hearing except where required in the interests of justice to comply with article 6”. See also *O v. Crown Court at Harrow* [2006] UKLH 42 applied recently in the ACT in *R v Rao SCC No 164* (unreported, Justice Gray) (11 August 2006).

<sup>2</sup> The Review of the Implementation of the Human Rights Act published by the Department of Constitutional Affairs in July 2006 concluded, however, that the Act had not significantly altered the

- 2 Central to any public law dispute, and pivotal in human rights cases, is the tension between the separation of powers and adherence to the rule of law. As Lord Templeman put it in *M v. Home Office* [1994] AC 377,

*“the proposition that the executive obey the law as a matter of grace, and not as a matter of necessity [is] a proposition that would reverse the result of the civil war”*

The precise approach to the operation of the rule of law in the era of human rights is, however, a matter of some complexity, focussing upon the relationship between public interests and private rights.

- 3 Reflecting the structure of the English Human Rights Act 1998, but equally relevant to the Charter, Lord Hoffman has explained that:

*“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. 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”* (*R(Simms) v. Home Secretary* [2000] 2 AC 115, 132).

- 4 The Charter is a detailed and carefully drafted legal instrument which in critical respects contains detailed characterisations of the issues to address. I have in mind, in particular, section 4(2) which sets out in detail factors to which regard can be had in determining whether or not a function is of a public nature so as to constitute an entity a public authority for some purposes, and section 7 which provides a non-

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constitutional balance between Parliament, the Executive and the Judiciary. It also found that the Act had had a significant, but beneficial effect, upon the development of policy by central Government.

exclusive checklist of factors to balance in determining whether or not an interference is demonstrably justified.

- 5 However, the implementation will also give rise to considerable argument as to the scope and proper interpretation both of the Charter, and of the rights which it seeks to protect. This uncertainty stems from three factors:
  - a. the Charter inevitably draws upon a range of jurisprudential principles which have previously not been reflected in Victorian jurisprudence. Of these, unquestionably the most significant is the concept of proportionality.
  - b. section 32(2) provides that “*International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision*” and the Charter thereby incorporates a body of caselaw with which Victorian courts will not necessarily be familiar; and
  - c. as regards sections 32, 38 and 39, there is potentially considerable uncertainty as to the appropriate interpretation to be given to these provisions, and the practical effect of them in different legal contexts.
- 6 We should all probably also be mindful of the exhortation of the English Master of the Rolls in 2000, shortly before the Human Rights Act 1998 (UK) came into force, that “*if the Court was not going to be taken down blind alleys it was essential that counsel, and those who instructed counsel, took a responsible attitude as to when it was right to raise a Human Rights Act point*” (see *Daniels v. Walker*, The Times, (2000) May 17).
- 7 In this paper I focus upon some of the hidden intricacies of human rights law and discuss these in the context of the Charter. In particular, I focus upon the practical effect of human rights legislation upon decision-making, both at administrative and judicial levels, and upon so-called implied rights. Both are capable of leading human rights conceptually beyond substantive recognition of the articulated “rights”

themselves, and are essential to a meaningful understanding of the ways in which the Charter can, and should, be reflected within Victorian jurisprudence.

### **The role of the courts in implementing the Charter**

- 8 Whilst in the past it may have been thought that a Sovereign Parliament and the force of public opinion may have been sufficient properly to protect the rights of minorities, the enactment of the Charter reflects widespread experience and appreciation that this is not in fact so. However, whilst remedies as against Parliament as provided for in the Charter are largely political, the courts are, under the Charter, given a pivotal role in the protection of individual human rights. The English courts have, however, recently emphasised that there is nothing undemocratic about this process.

#### *Section 32*

- 9 Section 32 of the Charter requires that “*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*”. It is this provision which gives rise to the most obvious impact upon administrative law. First, those statutes that provide statutory powers or impose statutory duties may well be interpreted differently after the implementation of the Charter. By reason of this, an act which was *intra vires* previously, may well become *ultra vires* when the relevant statute is interpreted having regard to section 32. Fundamental questions may arise, for example, whether or not it can have been Parliament’s intention to authorise action which is necessarily contrary to an individual’s human rights. Equally, considerations which may not have been relevant to decision-making, or processes that may not have been required, prior to the implementation of the Charter may become relevant or necessary in the light of the Charter.
- 10 Second, there may be issues as to whether or not section 32 applies only to legislation relating to public authorities (as defined in the Charter) or whether or not it applies as regards all legislation which is capable of limiting the exercise of an individual’s

human rights. On its face, section 32 covers all legislation which would otherwise be incompatible with human rights, and there is therefore a strong argument that it should apply even if there is no possible claim against a public authority in the circumstances. This is particularly so given that the concept of incompatibility focuses upon the individual's right under the Charter, not upon the character of identity of the potential actor limiting that right.

- 11 Third, there is an issue as to the scope of the interpretative obligation in section 32(1). It requires that legislation should be interpreted in such a way as to be compatible with human rights. Strictly construed, therefore, it has no application unless legislation cannot be implemented in a way which would be compatible with human rights. Incompatibility only arises where the legislation *necessarily* requires action with unjustifiably limits human rights, since all other legislation enables compatibility, and it may be presumed that those implementing it will act lawfully in compliance with their obligations under the Convention. However, it is possible that different issues may arise as regards compatibility where the legislation confers powers or duties upon non-public authorities, in which case there may not be a presumption that they will act consistently with human rights, given that they are not bound to do so by the Charter.
  
- 12 Fourth, the interpretative obligation is limited by the proviso that legislation should be so interpreted "*so far as it is possible to do so consistently with their purpose*". This immediately raises issues as to how the ambit of the Statutory purpose (not legislative intention) should be interpreted when considering whether or not there is a human rights compatible interpretation open to the court. An example of the effect of such provision is the decision of the House of Lords in *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 where the phrase persons living with the original tenant "as his or her wife or husband", was interpreted to include a homosexual partner. The Government in that case had submitted that the purpose of the legislation (which provided for succession rights in relation to tenancies) was to protect traditional family relationships which should therefore not include homosexual relationships. In that case Lord Nicholls observed that there is ambiguity as regards the equivalent

interpretative obligation in the English legislation by reason of the word “possible”. There are two available interpretations:

- a. Possible may mean if the words are ambiguous a human rights compliant interpretation should be chosen; or
- b. It may mean that even if the unambiguous meaning of the legislation is clear, nonetheless the courts should strive to reach a human rights compliant interpretation. As Lord Nicholls noted, this is the interpretation which has found favour in England and gives the interpretative obligation far reaching effect.

13 This then gives rise to the further difficulty of how far courts can or should go in seeking to replace the Parliamentary intention otherwise clear, in order to achieve a human rights compliant interpretation. According to Lord Nicholls, the interpretation to be possible must not be inconsistent with a fundamental feature of the legislation, or go against the grain of the legislation.

14 Fifth, and somewhat curiously, it is only as regards section 32 that the express statutory permission to consider international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right, is provided. However, given that all cases arising under the Charter will involve interpretation of the Charter itself, section 32(2) is likely to be found to be of general application in cases arising under the Charter.

15 Finally, it is inevitable that the process of adaptation to the language and content of the Charter will not happen overnight. Six years after the enactment of the Human Rights Act 1998 Lord Nicholls in the House of Lords still maintained that the Law Lords were “still cautiously feeling their way forwards” in relation to section 3 of the English legislation (in *Ghaidan v. Godin-Mendoza* [2004] UKHL 30).

### *Section 38*

16 The second potentially wide ranging point of impact for administrative law is section 38 of the Charter which provides that “*Subject to this section, it is unlawful for a*

*public authority to act in a way that is incompatible with a human right, or in making a decision, to fail to give proper consideration to a relevant human right*". By virtue of section 38(2), this provision does not apply if "*as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision*". This exception to section 38(1) is broader than the equivalent provision in the UK, where unlawfulness is only precluded where by reason of primary legislation the public authority could not have acted differently. Section 38(2) is likely to give rise to considerable dispute as to:

- a. Whether or not the individual was acting "as a result" of a provision;
- b. Whether or not that provision was made under an Act of the Commonwealth;
- c. What is meant by "under law the public authority could not reasonably have acted differently ...". Would it, for example, cover a contract of employment requiring an individual to act in a particular way?; and
- d. The ambit of reasonableness.

17 These issues are particularly stark given that they will only arise *after* it has been determined that there has been an unjustifiable limitation upon a human right.

18 Section 38(1) is, moreover, of uncertain impact upon administrative law.

19 The first issue is the scope of unlawfulness under section 38(1). is unclear whether or not section 38(1) involves two different mechanisms of unlawfulness, or merely seeks to encapsulate both "acts" (defined to include failures to act and proposals to act) and "decisions". Thus, section 38(1) may make two separate things unlawful, i.e. acting incompatibly with a human right, and failing to give proper consideration to a human right irrespective of whether or not the resultant decision was compatible with the human right. If the latter is correct, section 38(1) effectively codifies in the human rights field the "relevant considerations" ground of challenge, i.e. that a

decision may be flawed for failing to take into account relevant considerations even if the outcome of the decision could not in any way be challenged.

- 20 The spectre of a manifestly compatible act or decision being found to be unlawful because there was no proper consideration given to the human right is one which is unlikely to fill many courts with enthusiasm. However, given the focus of Australian public law upon ensuring that the processes of administrative decision-making and action are lawful, such a claim would be entirely consistent with Australian administrative law generally.
- 21 A further question is what amounts to “proper consideration” to a human right. Would every decision which was, in outcome, an unjustified limitation on a human right amount to a failure to give “proper consideration” to a human right (this may not matter given that the decision would probably amount to an act, which would in any event be unlawful as being incompatible with a human right).
- 22 The second issue is how section 38(1) will be reflected in public law claims. Interpreted without reference to section 39 (which will be considered below) section 38(1) may be prayed in aid of a public law claim in a number of possible ways:
  - a. The most simple application is by virtue of the requirement that relevant considerations be taken into account by decision-makers. A decision which failed to give proper consideration to a relevant human right could be flawed by jurisdictional error given that Parliament has required that all public authorities shall give such consideration to human rights in the exercise of their powers and duties (provided they fall within the Charter). The characterisation of the error as jurisdictional error would, of course, depend upon construction of the relevant legislation together with the Charter. However, a court may find it unattractive to find that something which the Charter described as “unlawful” did not amount to a jurisdictional error.
  - b. The relevant considerations argument could apply to two different situations. If a human right was not taken into account at all, then it could lead to a jurisdictional

error. Second, if the human right was taken into account, there could nonetheless be jurisdictional error if it was not *properly* considered. The obvious dichotomy here is between permitting lipservice to be given to human rights, and maintaining an appropriate boundary between review and reconsideration of the merits of the decision. It would appear, however, that in considering whether or not a decision is unlawful on the basis of failure to give proper consideration to a human right is going to require an analysis of whether or not the right was unjustifiably interfered with, which is going to involve a blurring of the distinction between reviews of the process and merits of the decision.

- c. The third possible application stems from the unlawfulness in acting incompatibly with a human right. On one view, this could automatically lead to a jurisdictional error in that an exercise of power with an unlawful consequence cannot be within the lawful power of public authorities. Executive powers should not be permitted to be exercised in order to unlawfully interfere with the rights of people. However, the contrary view is that legal error does not necessarily amount to jurisdictional error.
- d. A fourth means of incorporating section 38 into Victorian public law is by incorporation into *Wednesbury* unreasonableness – namely an unlawful act or decision is *Wednesbury* unreasonable. However, in the UK it is generally accepted that the *Wednesbury* standard of review is insufficiently stringent to encapsulate human rights violations. Accordingly, it would be difficult to maintain that all acts or decisions made unlawful under section 38 could fall within *Wednesbury* unreasonableness. If that is right, it is difficult to conceive of a logical or principled means of distinguishing between those human rights violations which were, or which were not, *Wednesbury* unreasonable.
- e. Further possibilities include claims for injunctive relief to prevent continuing or future unlawfulness, or a claim for declaratory relief seeking clarification of the law as it applies in a particular situation. Whether or not habeas corpus could also be sought is a further issue.

*Section 39*

- 23 The analysis set out above as regards the potential relevance of section 38 of the Charter to public law claims is subject to the proper interpretation of section 39.
- 24 Section 39 provides that: *“If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter”*.
- 25 There are three possible interpretations of section 39.
- 26 First, unlawfulness under the Charter can only ever be relied upon where an individual could in any event have been granted relief upon another legal basis. So interpreted, section 39 would add nothing of substance to existing law, but would nonetheless have political significance in that a court would be declaring the decision or action of a public authority (including a so called hybrid public authority) to be unlawful.
- 27 Second, unlawfulness under the Charter could be relied upon as a ground of unlawfulness entitling an individual to be granted relief provided that that ground of unlawfulness was relied upon in support of a cause of action which is already (or otherwise) known to the law. Thus, for example, if otherwise than by reason of the charter unlawfulness was a basis upon which an injunction could be granted. Then unlawfulness under the Charter can be relied upon in order to seek an injunction irrespective of whether or not an injunction could be sought on any other ground. So interpreted, section 39 would be facilitative rather than restrictive, save that it would make it clear that the Charter does not itself create a new form of action, it merely gives rise to a new form of unlawfulness which can be relied upon in causes of action which are founded upon unlawfulness.
- 28 Third, and somewhere between the two other interpretations, section 39 could be interpreted so as to provide that unlawfulness under the Charter can be relied upon provide a cause of action could in any event have been brought, relying upon some

other ground of unlawfulness. In order to ensure that section 39, so interpreted, could not be undermined by simply naming two grounds of unlawfulness, one under the Charter and one not, there would need to be some threshold requirement for the non-Charter ground of unlawfulness, but it would not be necessary that both grounds could succeed. In this way, the availability of a claim under the Charter would depend upon some fortuitous other ground of unlawfulness which was properly arguable in the circumstances and/or not liable to be struck out<sup>3</sup>.

- 29 In the context of public law claims a number of significant issues arise from the drafting of section 39
- a. The starting point is that if the Charter is being relied upon in support of an argument that a particular act or decision was flawed by jurisdictional error either because of the proper interpretation of the relevant legislation, or because a relevant consideration was not taken into account, then that is relief that is being sought at common law relying upon principles of public law but supporting such grounds by reference to unlawfulness arising under section 38 of the Charter. The individual is seeking relief on the basis that the act or decision was beyond jurisdiction, however, in establishing such claim the individual may well need to rely upon section 38 of the Charter. It is not clear how section 39, on any of the interpretations set out above, would apply in the circumstances.
  - b. The language of section 39(2) to some extent supports the construction that the limitation under section 39(1) relates only to rights to seek relief, that is, that it does not limit an existing right to seek relief based upon public law grounds of jurisdictional error even if the submissions in support of that ground for seeking relief rely upon or refer to the Charter. It is perhaps less clear how that relates to injunctions and declarations where the unlawfulness sought to be restrained or determined is under section 38.

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<sup>3</sup> This is the review of the Solicitor-General for Victoria as set out in her recent lecture to the Continuing Legal Education program of the Victorian Bar at para 96(8).

30 The interpretation of section 39 and its application to public law claims gives rise to fundamental questions as to the scope of the protection afforded in real terms by the Charter. Consideration of the parliamentary material provides no clear answer as to Parliament’s intention and the language of the Charter certainly permits all of the interpretations set out above. There is, thus, likely to be considerable scope for gradual judicial feeling of the way in implementation of the Charter in the field of administrative law.

31 What is, however, clear is that whether or not claims are free-standing, or ancillary to other claims, in assessing whether or not public authorities have acted compatibly with human rights under the Charter courts will have to grapple with review of the substance, and not merely the process, of the decision.

### **Interference or limitation upon human rights**

32 Perhaps the most pervasive effect of human rights legislation is on the processes of decision-making and the structure required of administrative decisions.<sup>4</sup> In large measure, the Charter, as with human rights legislation elsewhere, requires a two stage decision-making approach in any case where human rights are, or may be, implicated (which will in all probability involve most areas of public administration) – first asking whether or not a human right has been limited, and second, whether or not such limitation is justified under section 7 in the particular circumstances of the case.

33 Whilst at first blush the question whether or not there has been an interference with or limitation upon a human right may seem a straightforward enquiry, the qualified nature of human rights make this a far more opaque question. This threshold question thus itself involves matters of balancing and degree. It is essential, therefore, that all human rights analysis begins with an examination of the proper scope of the “right”

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<sup>4</sup> Courts, defined as the Supreme Court, any County Court, the Magistrates’ Court or the Children’s Court (section 3(1)) are expressly excluded from the definition of public authority in section 4 except where acting in an administrative capacity, but are expressly made subject to the Charter for limited purposes by virtue of section 6 – although section 38 which makes it unlawful to act in a way that is incompatible with a human right only covers public authorities, i.e. not courts.

in question and a careful comparison between this and the impact of the particular measure in the case at hand.

- 34 The following examples from European jurisprudence may help to illustrate the potential complexity:
- a. in *Bensaid v UK* [2001] 33 EHRR 205 the European Court of Human Rights held that whilst mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity, and the preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life (para 47), removal from the UK and the prospect of deterioration in psychiatric condition did not in the circumstances establish that Mr Bensaid's moral integrity would be substantially affected to a degree falling within the scope of the right to privacy (the evidence in that case was that service in Algeria would be scant and would require extensive travel and there was expert evidence suggestive of a likely deterioration in Mr Bensaid's mental health).
  - b. In *R(Buxton) v. Parole Board* [2004] EWHC 1930 (Admin) at paragraph 50, the court held that where Article 8 rights are necessarily curtailed by virtue of detention (which is itself lawful under Article 5), then it is not necessary for the Parole Board to consider separate questions under Article 8. Thus, the Parole Board does not need to consider proportionality as between the infringement of Article 8(1) rights, and the protection of the public interests involved. This decision is of obvious significance as the balancing exercise required by Article 8 would involve a shift in the "assessment of risk" function habitually carried out by the Parole Board. The difficulty is readily apparent from the example considered during argument in Buxton, i.e. that of two prisoners on licence who carry out identical offences, one of which is a single mother with sole custody of a young baby. The question was whether the Parole Board was entitled to take that into account, other than as regards its effect upon the risk which she posed.

- c. The European Commission on Human Rights in *X v United Kingdom* (1975) 2 DR 105, a case about conjugal rights in prison, concluded in relation to Article 12 (right to found a family)

*“Although the right to found a family is an absolute right in the sense that no restrictions similar to those in para. (2) of Art. 8 of the Convention are expressly provided for, it does not mean that a person must at all times be given the actual possibility to procreate his descendants. It would seem that the situation of a lawfully convicted person detained in prison in which the applicant finds himself falls under his own responsibility, and that his right to found a family has not otherwise been infringed. This complaint therefore, is also manifestly ill-founded.”*

- d. The English High Court in *R v. SSHD ex parte Mellor* [2001] EWHC Admin 472, a claim about access to fertility treatment in prison held (at para 26) in relation to the right to found a family, that curtailment of this right was the prisoner’s own responsibility.<sup>5</sup>
- e. In *Spinks v. SSHD* [2005] EWCA Civ 275 the English Court of Appeal held that the question of whether or not there has been inhuman and degrading treatment in detaining a prisoner with a life threatening condition (i.e. whether there has been any prima facie limit on the right) may depend upon the degree of danger posed by the prisoner.
- f. In *Neilsen v. Denmark* [1988] EHRR 175 and *HM v. Switzerland* (26 February 2002, application no 39187/98) the European Court has held that the purpose of any measures of restriction may be a relevant consideration in determining whether or not there has been a deprivation of liberty. If the measures are taken principally in the interests of the individual who is being restricted, they may well be regarded as not amounting to a deprivation of liberty and so no breach of Article 5(1) would arise.
- g. The House of Lords in *R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High*

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<sup>5</sup> Now one must also have regard to the *Dickson v. UK* case where the ECtHR held by a majority of 4 to 3 that a failure to provide IVF to a prisoner to enable him to have children did not breach Article 8.

*School (Appellants)* [2006] UKHL 15: held that “*What constitutes interference depends on all the circumstance of the case, including the extent to which in the circumstances an individual can reasonably expect to be at liberty to manifest his beliefs in practice.*” Their Lordships emphasised that freedom of religion does not carry with it the freedom to manifest religious beliefs in the place and precise manner of choosing. Thus, it was held that there was no breach of the freedom of religion in a restriction in place at a school upon a particular form of religious dress associated with extreme views.

35 Thus, in any given case, the question of whether or not there is a *prima facie* limitation upon a right will depend upon a value judgment as to the circumstances and expectations as to the exercise of the right.

### **Proportionality, and its legislative implementation in section 7**

36 Section 7 of the Charter largely implements what is generally referred to as the concept of “proportionality”, namely, the requirement for any interference with a human right to be justified in order for that interference to be lawful. The question of proportionality, or compliance with section 7, does not arise unless and until it is established that there has been an interference with, or a limit upon, a human right (and whilst proportionality is, itself, a concept rooted in human rights jurisprudence in England Lord Slynn has stated that the time has come to recognise proportionality as part of administrative law more generally – *R(Alconbury) v. Secretary of State for the Environment* [2001] 2 WLR 1389, para 53 – a comment perhaps indicative of the jurisprudential trend in English public law).

37 In broad terms what is required at this second stage of the enquiry is that the infringement must be proportionate to, or demonstrably justified by, the end to be served. There is otherwise a breach of the individual victim’s human rights. The proper means of testing this, an apparently simple question, has vexed judges and academics, and is likely to emerge as a significant jurisprudential challenge in Victoria. The real difficulties lie in determining:

- a. by whom,
- b. in what way, and
- c. against what yardstick,

should the question of proportionality, or justification, be determined.

38 In summary, the complexities include:

- a. Determining the degree of deference to be given to the primary decision-maker, either as regards factual questions upon which the question of proportionality or justification depends, or as regards the significance of the interest to be served by the infringement, or as regards the balance to be struck between competing interests?
- b. Determining whether or not the question of proportionality is one solely for the court, or whether the role of the court is to assess whether or not the primary decision-maker erred in his approach to proportionality, and if so, what amounts to a reviewable error?
- c. How proportionality is to be tested where questions of policy for the decisionmaker are involved?
- d. How proportionality is to be tested where policy judgments have been made either by Parliament or by the executive?
- e. By what principle is proportionality to be tested.

39 The European jurisprudence is, to some extent, confusing in this regard since it is predicated in part upon a margin of appreciation being given to contracting states, a concept which is conceptually distinct from that of proportionality. Also, English jurisprudence is conceptually distinct as it lacks the precision of the non-exhaustive list of factors in section 7 of the Charter, but it also includes, in most cases, an exhaustive list of the public interests which can be relied upon to justify infringement

in any given case. Moreover, the English and European jurisprudence also relies upon a supervening requirement that any interference must be in accordance with law – which in itself incorporates a requirement that a principled basis of interference be ascertainable.

40 The first point to make is that human rights jurisprudence, whilst remaining a jurisdiction of review and not primary decision-making, retains its focus upon whether or not human rights have been violated, and not upon whether or not there are defects in the decision-making process leading to the relevant decision. This was recently reiterated in England by the House of Lords in the case of *R(Begum)* referred to above. Lord Bingham, at paragraph 29, commented that:

*“The unlawfulness proscribed by section 6(1) [the equivalent of the first limb of section 38 of the Charter] is acting in a way which is incompatible with a Convention right, not relying on a defective process of reasoning, and action may be brought under section 7(1)[which has no direct equivalent in the Charter] only by a person who is a victim of an unlawful act.”*

41 At paragraph 30, Lord Bingham reiterated that the courts role remained one of review and not of determination of the merits, but he continued:

*“The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time (Wilson v First County Trust Ltd (No 2) [2003] UKHL 40, [2004] 1 AC 816, paras 62-67). Proportionality must be judged objectively, by the court (Williamson, above, para 51). As Davies observed in his article cited above, “The retreat to procedure is of course a way of avoiding difficult questions”.”*

42 In his characteristically succinct way, at paragraph 31 Lord Bingham captured the true issue in saying that:

*“What matters in any case is the practical outcome, not the quality of the decision-making process that led to it”.*

43 It is this focus upon outcome and not process, and its associated tension between review and merits, which leads to much of the confusion surrounding the legal analysis of the justification for limitations upon human rights, particularly its application in a judicial review framework.

44 The second point to make is that human rights jurisprudence focuses upon balance and not absolutes. The essence of the proportionality/justification question can best

be encapsulated by the following quotation from the European Court of Human Rights in the case of *Soering v United Kingdom* (1989) 11 EHRR 4399, at paragraph 89:

*"inherent in the whole of the Convention is a search for fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's human rights"*

45 This was initially reflected in two decisions of the House of Lords as imposing a highly specific test. Thus, for example, in *R v Shayler* [2003] 1 AC 247 Lord Hope adopted a passage from an article by Professor Jeffrey Jowell QC, *Beyond the Rule of Law: Towards Constitutional Judicial Review* [2000] PL 671, 679:

*"[Proportionality] starts by asking whether the breach is justifiable in terms of aims it seeks. Some Convention rights can only be violated for specific purpose such as national security and therefore other aims would not be legitimate, whatever their rationale. It then proceeds to consider whether in reality those aims are capable of being achieved. Spurious or impractical aims will not suffice. It then goes on to consider whether less restrictive means could have been employed. The breach must be the minimum necessary. Finally it asks whether the breach is necessary (not merely desirable or reasonable) in the interests of democracy. Only a 'pressing social need' can justify the breach of a fundamental right."*

46 Further, in the leading consideration of the doctrine of proportionality in English Human Rights law, in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 53 (a case concerned with official policy as to the searching of prison cells, and the impact of the policy on prisoners' rights to confidential communication with their lawyers) Lord Steyn stated (at pp.547-8)

*"The contours of the principle of proportionality are familiar. In de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an Act, rule or decision) is arbitrary or excessive the court should ask itself: "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective." Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases?"*

Lord Steyn then referred to some academic work and observed,

*"The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various Convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in R v Ministry of Defence ex parte Smith [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights".*

*"In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued. The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in Mahmood [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in Mahmood, at p 847, para 18 "that the intensity of review in a public law case will depend on the subject matter in hand." That is so even in cases involving Convention rights. In law context is everything."*

- 47 The third, and related, question is whether or not there is any requirement that any limitation upon human rights be to the minimum extent possible. Section 7(2)(e) suggests not, as it places as one relevant factor to take into account, and not a determinative consideration, "*any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve*". In an early consideration of the way in which English courts should approach the question of justification of *prima facie* infringements of human rights, Dyson LJ in the English Court of Appeal held in *Samaroo v. SSHD* [2002] INLR 55 at paragraphs 25 & 35, that the task of the court was to decide whether the Secretary of State had struck the balance fairly between the conflicting interests, and that in reaching its decision, the court must

recognise and allow to the Secretary of State a discretionary area of judgment (at paragraph 35). Also, at paragraph 39, Dyson LJ stated that what is required is that the Secretary of State justifies a derogation from a Convention right, and that the justification be convincingly established, bearing in mind that the Secretary of State is entitled to a significant margin of discretion. The court should scrutinise the weight given by the Secretary of State to various factors and should interfere if, despite being given an appropriate margin of discretion, it concludes that the weight accorded was unfair and unreasonable.

48 However, in terms of the detailed application of such principles, Dyson LJ stated (paras 19-20):

*"in deciding what proportionality requires in any particular case, the issue will usually have to be considered in two distinct stages. At the first stage, the question is: can the objective of the measure be achieved by means which are less interfering of an individual's rights ? ... The essential purpose of this stage of the enquiry is to see whether the legitimate aim can be achieved by means that do not interfere, or interfere so much, with a person's right under the Convention.*

*At the second stage, it is assumed that the means employed to achieve the legitimate aim are necessary in the sense that they are the least intrusive of Convention Rights that can be devised in order to achieve the aim. The question at this stage of the consideration is: does the measure have an excessive or disproportionate effect on the interests of affected persons ?"*

49 This has more recently been rejected as a straightjacket into which decision-making must fit, and the requirement to show that a legitimate aim cannot be achieved by a less restrictive means has not been universally applied (see eg *R(Lough) v. First Secretary of State* [2004] 1 WLR 2557. In *R(Clay Lane Housing Co-operative v. Housing Corporation* [2004] EWCA Civ 1658 it was held that the test in *Daly* allowed "necessary", where appropriate, to mean "reasonably", rather than "strictly" or "absolutely" necessary.

50 Fourth is the issue of the compatibility of the proportionality test with the separation of powers. The English courts' answer to this is that the intensity of the scrutiny of measures depends upon the subject matter of the right, the context of the interference, and the extent to which matters of social policy for the executive are at play. This

tension was recently explained by Lord Hoffman in *R(Prolife Alliance) v. BBC* [2003] UKHL 23:

*75. My Lords, although the word "deference" is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.*

*76. This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle. It is reflected in article 6 of the Convention. On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.*

51 Whilst Lord Hoffman's analysis appears simple, there are no "bright lines" in its application. Rather, it remains a question of judgment and degree. This, and the confusion of legal principle in this area, is apparent from the speech of Lord Walker in the same case:

*132. Some of these cases speak of the national court, on judicial review, according to administrative decision-makers a margin of appreciation. But since the coming into force of the Human Rights Act it has become clear that that expression is confusing and therefore inapposite. The correct principle is that the court should in appropriate cases show some deference to the national legislature or to official decision-makers: see the observations of Lord Hope of Craighead in *R v DPP ex parte Kebilene* [2000] 2 AC 326, 380-1 and those of Lord Steyn in *Brown v Stott* [2001] 2 WLR 817, 842. Lord Hope (at p.381) favoured the expression "discretionary area of judgment" put forward by Lord Lester of Herne Hill QC and Mr Pannick in *Human Rights Law and Practice* (1999) p.74. This lead was followed*

by the Court of Appeal in *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840; Laws LJ referred (at p.855) to the need for a "principled distance" between the decision-maker's decision on the merits and the court's adjudication.

52 The analysis of Laws LJ in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] 3 WLR 344, 376-8 (expressly adopted by Lord Walker in the *Prolife Alliance* case) is also of interest:

(1) (at p 376) "greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure";

(2) (at p 377) "there is more scope for deference 'where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified' (per Lord Hope in *ex parte Kebilene*)";

(3) (at p 377) "greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts";

(4) (at p 378) "greater or less deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts".

53 A fifth issue is how courts can and should incorporate questions of policy, fact and merit into what are its uniquely reviewing functions. In the case of *Wilkinson*, for example, the Court of Appeal made an order for cross-examination in order that factual issues which it held were necessary for it to determine whether or not the actions of the defendants were compatible with human rights. The court held that it could not fulfil its function without making determinations of fact. However, in subsequent cases, the extent to which *Wilkinson* can be relied upon has been limited by reference to context and the nature of the issues involved.

54 Real practical issues arise as to how matters of policy, and fact can and should be reviewed by courts considering proportionality. Thus, for example:

- a. if it is necessary to consider whether or not a particular decision breaches an individual's right to life, or to respect for privacy, it may well be necessary for the

court to analyse what the likely effect of the measure may be. That will, in many cases, require expert evidence and cross-examination (as for example in the UK in *Wilkinson*).

- b. Whether or not the primary decision-maker's conclusions as to whether or not a particular measure will in fact endanger life, or promote the best interests of the victim, may need to be resolved by the court in order to ascertain whether or not the proposed measure is lawful under the Charter. Such enquiries are, in fact, mandated by the requirement to consider whether or not a right has or will be limited (section 7(2), and by section 7(2)(c) which requires the court, in assessing the justification for a limitation, to consider "*the nature and extent of the limitation*". This is likely to alter the conventional parameters of public law litigation.
- c. Courts will also need to assess and balance the policy objectives said to be served by a particular measure, the importance of that policy objective, and alternative means of implementing that policy. This in turn requires a potentially much expanded reference to extra-statutory materials in order to assess compatibility with the Charter. The English Courts have responded to this challenge by adopting the principles expounded by the House of Lords in the case of *Wilson v First County Trust Ltd* [2003] UKHL 40:

*"[61]... As to the objective of the statute, at one level this will be coincident with its effect.... But that it not the relevant level for convention purposes. What is relevant is the underlying social purpose sought to be achieved by the statutory provision. Frequently that purpose will be self-evident, but this will not always be so.*

*[62] The legislation must not only have a legitimate policy objective. It must also satisfy a 'proportionality' test. The court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect. This involves a 'value judgment' by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current effect and impact of the legislation which matter, not the position when the legislation came into force.*

*[63] When a court makes this value judgment the facts will often speak for themselves. But sometimes the court may need additional background*

*information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the 'proportionality' of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the 'mischief') at which the legislation is aimed. This may throw light on the rationale underlying the legislation.*

*[64] This additional background material may be found in published documents, such as a government white paper. If relative information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard for information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material the court would not be 'questioning' proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation.*

*[65] To that limited extent there may be occasion for the courts, when conducting the statutory 'compatibility' exercise, to have regard to matters stated in Parliament."*

55 Whilst *Wilson* accommodated the use of statements made in Parliament, more difficult issues arise as regards statements from the executive as to the policy objectives to be served by legislation. This remains an open question in England, and is likely to be an area of some controversy.

## **Conclusion**

56 The challenges now facing the Victorian judiciary cannot be underestimated. This is particularly so given the interpretive tensions in the Charter, and the traditional reluctance of Victorian courts to entertain any form of merits review by way of judicial review. Whilst the reality is that, if the English experience is anything to go by, the number of declarations of inconsistent interpretation, reliance upon the interpretative obligation, or successful claims relying solely or primarily upon human

rights is likely to be small, the underlying impact of the Charter upon judicial decision making, judicial culture, and public administration is likely to be significant. By way of example, there is an obvious judicial reluctance to find that conduct which is unlawful under the Charter would otherwise have been lawful. In that way the interpretation of existing legal rules, and legislation is likely to be subtly, or in some cases not so subtly, influenced by the background of human rights arguments.

57 Moreover, the re-education process implicit in considering compatibility itself leads to an increased awareness of rights rather than obligations, and of the need to ensure that intrusions upon the interests of others are fully and properly justified, and are minimised if practical and reasonable. In the UK, this effect was noted to flow from three interrelated factors: the need to prepare compatibility statements, consideration of the impact of judgments, and changes in behaviour which flow from the greater immediacy of legislation which makes breaches of human rights unlawful. It was this, rather than the relatively limited number of cases which either relied upon the interpretative obligation, or granted declarations of incompatibility, which is the true measure of the act.

58 There will be an inevitable tension in the early stages of implementation of the Charter between conventional models of decision-making according to public law precepts, and consideration of human rights. One issue which arises (and will continue to arise given that section 39 of the Charter expressly enables causes of action to include (but not exclusively to depend upon) human rights grounds) is how human rights principles can be incorporated into traditional public law analyses. One proposed resolution (though by no means an exhaustive solution) suggested by the English court of appeal is that recognition of rights should normally be regarded by decision-makers as an integral part of the decision-maker's approach to material considerations, and not in effect as a footnote (*Lough v. First Secretary of State* [2004] 1 WLR 2557 at para 48). This, and the analysis of sections 32 and 38 set out above, suggests that the Victorian experience may well reflect that of England, whereby it is not truly possible any more to separate public law from human rights

jurisprudence, and where traditional classifications of reviewable error have shifted in order to accommodate the immediacy of the human rights jurisprudence.