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THE MEANING OF THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES FOR JUDICIAL REVIEW AND ADMINISTRATIVE REVIEW

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INTRODUCTION

1. The *Charter of Human Rights and Responsibilities Act* 2006 (**the Charter**) is a human rights instrument of a kind that has been described as a "Commonwealth" or "dialogue" model. Rather than leaving the final resolution of contested questions of rights with the courts, by giving them power to strike down Acts of Parliament for violation of human rights, the Charter is intended to preserve Parliamentary sovereignty and to foster a human rights dialogue between the three arms of government – the executive, the legislature and the judiciary. It does this by various mechanisms.

2. The purpose of this paper is to outline the broad structure of the Charter and to highlight some general issues in the context of judicial and administrative review. Other speakers at today's seminar will address the interpretative obligation and the definition of public authorities in some detail and this paper will only touch briefly on those matters.

3. When it is fully in force as of 1 January 2008, the five main features of the Charter will be as follows.

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[1] Victorian Bar.

4. First, the rights themselves are set out in Part 2 of the Charter.[2] They are civil and political rights derived from the International Covenant on Civil and Political Rights (**ICCPR**), with some modifications considered to be desirable in order to adapt the rights to the Victorian context.[3] All of the rights are subject to a general limitations clause in s 7(2) of the Charter which that provides "[a] human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom" and sets out a number of factors to be taken into account in making that assessment.

5. Secondly, subs 32(1) requires all statutory provisions to be interpreted in a way that is compatible with human rights "[s]o far as it is possible to do so consistently with their purpose". This is one of the two principal means by which the Charter seeks to protect and promote human rights.

6. Thirdly, where the Supreme Court finds that a statutory provision cannot be interpreted consistently with human rights, the Court may make "a declaration to that effect".[4] The declaration will not affect the validity or enforcement of the provision in question or the outcome of the proceedings, but will set in motion procedures for an executive and possibly also a legislative response.[5]

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2 See the definition of "human rights" in s 3.

3 See the discussion in Human Rights Consultation Committee Report, *Rights, Responsibilities and Respect* (2005) (**Consultation Committee Report**) at 42-46 in relation to the modification of some of the ICCPR rights.

4 Subsection 36(2) of the Charter. It is curious that subs 32(1) uses the word "compatibly" whereas subs 36(2) uses the word "consistently". This may be a product of the drafting history of the Charter, as the original draft of the Charter in the Consultation Committee Report used the word "compatibly" in the corresponding clause (sub-cl 37(2)) and contemplated the making of "declarations of incompatibility" rather than the somewhat weaker "declarations of inconsistent interpretation". It is unlikely that anything will turn on this difference.

5 Sections 36(7) and 37.

7. Fourthly, subs 38(1) of the Charter makes it unlawful for a public authority[6] "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." This, it is submitted, establishes a new and potentially far-reaching standard against which the conduct of public authorities is to be assessed in both administrative and judicial review.

8. And fifthly, s 39 of the Charter enables individuals, in limited circumstances to be discussed below, to seek review of an act or decision that is unlawful under the Charter, but does not permit an award of damages for a breach of the Charter.

JUDICIAL REVIEW

9. It is convenient to look first at the impact of the Charter on judicial review, though many of the issues, particularly in relation to the interpretative obligation and the obligations of public authorities, are relevant also to administrative review.

Section 32: the interpretative obligation or power

10. Section 32 applies to all Victorian statutory provisions, including subordinate instruments and the Charter itself.[7] Whenever a public authority exercises a power conferred by statute, and in some way affects a person's human rights, Victorian courts and tribunals engaged in reviewing the exercise of the power must interpret the provision compatibly with the human rights in the Charter so far as it is possible to do so consistently with the purpose of the provision. As the majority of powers exercised by public authorities in Victoria are statutory powers, the interpretative obligation will potentially be a very powerful tool for the protection of human rights under the Charter because it can be used to

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6 The concept of a "public authority" is defined in s 4 of the Charter.

7 See the definition of "statutory provision" in s 3 of the Charter.

confine the scope of the statutory authority given to public authorities by reference to human rights considerations.

11. Similar provisions can be found in s 6 of the *New Zealand Bill of Rights Act* 1990 (**NZ BORA**) and s 3 of the UK *Human Rights Act* 1998 (**UK HRA**). There is a growing body of case law and academic commentary concerning the scope of these interpretative provisions in human rights instruments in other jurisdictions.[8] This paper will make only a few broad points.

12. First, as already noted, it appears that each of the human rights in Part 2 of the Charter is subject to the general limitation in subs 7(2) that "[a] human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom". This "reasonable limits" test introduces a form of proportionality test into the interpretation of legislation, which will be discussed in some detail below. For present purposes, the point to note is that a statutory provision which limits or affects a person's human rights is not necessarily incompatible with the relevant right. The limitation must be found to be disproportionate before there will be an inconsistency.

13. Second, there will be little difficulty in arriving at a rights-compatible interpretation where the statutory power is expressed in general or ambiguous terms. Provisions cast in such terms will be able to be read down in the same way that general or ambiguous statutory provisions are presently read down in accordance with the principle of interpretation that the courts will presume that Parliament did not intend to legislate to curtail

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8 For useful discussions of s 32, see H Charlesworth, "Human Rights and Statutory Interpretation" in S Corcoran and S Bottomley, *Interpreting Statutes* (Federation Press, 2005); P Tate SC S-G, 'Some Reflections on Victoria's Charter of Human Rights and Responsibilities', AIAL Forum No 52, 18 at 25-29; and S Evans and C Evans, 'Legal redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17 *Public Law Review* 264 at 268-269.

fundamental common law rights and freedoms unless it does so in clear and unambiguous terms.[9] Difficult questions about the proper operation of s 32 may arise, however, where the statutory wording is more specific and may, on its face, appear to authorise a public authority to act in a way that limits a human right.

14. Third, in the more contestable cases, the proviso contained in s 32(1) may have particular relevance. The proviso is that statutory provisions must be interpreted compatibly with human rights only so far as it is possible to do so "*consistently with their purpose*". The Explanatory Memorandum stated, in relation to this proviso, that:

> The reference to statutory purpose is to ensure that … courts do not strain the interpretation of legislation so as to displace Parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.[10]

15. It is arguable that this proviso renders s 32 no more powerful than the purposive rule in s 35(a) of the *Interpretation of Legislation Act* 1984. Much will depend on the level of abstraction at which the statutory purpose is identified.[11]

16. Fourth, s 32(1) is most closely modelled on s 3(1) of the UK HRA and it may be expected that the judgments of the UK courts concerning the limits of the interpretative obligation under that Act will provide much assistance to Victorian courts and tribunals.[12] Judicial statements about the limits of what is "possible" under s 3 of the UK HRA have included statements to

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9 For recent statements of the principle, see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30]; and *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19]; and, in a very different context (Pt 5.1C of the Corporations Act), *ASIC v GDK Financial Solutions Pty Ltd* [2006] FCA 1415 at [43]-[45]. And see P Bayne, 'The Human Rights Act (ACT) 2004 and Administrative Law: A Preliminary View', AIAL Forum No 52, 3 at 5-7.

10 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), at 23. See also the Consultation Committee Report, at 82-83.

11 See S Evans and C Evans, op cit n 8, at 268-269 for a discussion of this point.

12 Subsection 32(2) of the Charter permits courts and tribunals to consider the judgments of domestic, foreign and international courts and tribunals relevant to a human right when interpreting statutory provisions.

the effect that the courts' task is still one of interpretation – they are not permitted to legislate,[13] or to "to radically alter the effect of the legislation",[14] or to adopt an interpretation "which departs substantially from a fundamental feature of an Act of Parliament".[15] These statements, however, provide little practical guidance when taken out of the context of the particular statutory provisions being interpreted. The limits of s 32 will inevitably have to be worked out on a case by case basis.

17. When looking at UK decisions, it is important to bear in mind that the UK provision does not contain a proviso to the effect of that in s 32. However, there are indications in recent judgments in the UK that s 3 may be subject to similar overriding constraints regarding the underlying purpose of the legislation being interpreted.[16] For example, in *Ghaidan v Godin-Mendoza*, where the House of Lords read a provision of the *Rent Act* relating to the security of tenure of "a person who was living with the original tenant as his or her wife or husband" to include the surviving partner of a homosexual couple, Lord Nicholls said that "the mere fact the language under consideration is inconsistent with a [rights]-compliant meaning does not of itself make a [rights]-compliant interpretation … impossible",[17] *but the interpretation adopted must be compatible with "the underlying thrust of the legislation" and must "go with the grain of the legislation".*[18]

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13 *Poplar Housing and Regeneration Community Association Ltd v Donoghue* (***Poplar Housing***) [2001] EWCA Civ 595; [2002] 2 QB 48 at [75]-[76] per Lord Woolf CJ; and *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45 at [108] per Lord Hope, who dissented in what is generally regarded as a controversial application of s 3 of the UK HRA.

14 *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; [2002] 2 QB 48 at [75]-[76] per Lord Woolf CJ.

15 *Re S (Minors) (Care Order: Implementation of Case Plan)* [2002] UKHL 10; [2002] 2 AC 291 at [40] per Lord Nicholls; *Ghaidan v Godin-Mendoza* (***Ghaidan***) [2004] UKHL 30; [2004] 2 AC 557 at 572 [33] per Lord Nicholls.

16 See *Ghaidan* [2004] UKHL 30; [2004] 2 AC 557 at 572 [33] per Lord Nicholls.

17 *Ghaidan* [2004] UKHL 30; [2004] 2 AC 557 at 572 [32] per Lord Nicholls.

18 *Ghaidan* [2004] UKHL 30; [2004] 2 AC 557 at 572 [33] per Lord Nicholls. And see *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467 for a useful comparison.

18. The final point to make about finding the limits of what is "possible" under s 32 is that it must be read with s 36. The fact that the Supreme Court is given power by s 36 to make declarations of inconsistent interpretation requires them to recognise that there are limits to what is "possible" under s 32. The role of courts and tribunals is not to subvert the purpose of particular provisions of an Act of Parliament but to declare, where appropriate, that the provisions cannot be interpreted consistently with human rights and to set in motion the mechanism provided by the Charter to require an executive and potentially also a Parliamentary response to that inconsistency.[19] The balance that the courts strike between their exercise of these two powers will be a significant factor in determining the new constitutional balance that is brought about by the Charter.

Section 38: grounds of review under the Charter

19. Sections 38 and 39 are the key provisions of the Charter concerning the review of the conduct of public authorities on human rights grounds. In summary, s 38, in the writer's view, establishes a new ground or grounds of review, but s 39 only permits those grounds to be raised via the existing avenues of review. There will not be a new "Charter cause of action" or a new and independent procedure for human rights review under the Charter itself.

20. Subsection 38(1) prescribes a norm of conduct for public authorities and appears to have two (potentially related) limbs. The section makes it "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" (emphasis added).

21. Before considering these limbs, it should be noted that the subsection does not apply if as a result of a Victorian or Commonwealth statute, "or otherwise under law", the public authority "could not reasonably have

[19] Sections 36(7) and 37.

acted differently or made a different decision": subs 38(2). Here again is a difference from the UK Act, where the word "reasonably" does not appear. The example given in the Charter underneath subs 38(2) indicates this qualification is intended to ensure harmony with ss 32 and 36: where a statutory provision cannot be interpreted compatibly with human rights, a public authority will not contravene subs 38(1) where it acts to give effect to the provision.[20] The incompatible provision must, it is submitted, be one that does not give the public authority any scope for discretion as to the manner in which it must act. The remainder of the discussion of s 38 in this paper is subject to this qualification.

(a) The first limb of s 38 – proportionality review

22. The first limb of s 38 sets an objective standard and requires a public authority's compliance with that standard to be assessed by the application of the "reasonable limits" test in s 7(2) of the Charter. Section 7(2) sets out a non-exhaustive list of factors that may be taken into account in determining whether a limitation on a right can be justified as reasonable and therefore not incompatible with the right.[21] It is worth setting out the list of relevant factors in full, because it throws some light on the nature of the courts' task in review proceedings under the Charter. They are:

    (a) the nature of the right;

    (b) the importance and purpose of the limitation;

    (c) the nature and extent of the limitation;

    (d) the relationship between the limitation and its purpose; and

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[20] See also the Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill, at 27.

[21] The list of factors is based on those in s 36 of the South African *Bill of Rights*.

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

23. Section 7(2) introduces a form of proportionality test. That is clear from the Consultation Committee Report that preceded the Charter and the Attorney-General's Second Reading Speech[22] and from the use of the same formulation as similar provisions in human rights instruments in other jurisdictions which have been interpreted as introducing a proportionality test.[23]

24. The principle of proportionality has been described in the United Kingdom as imposing a three stage test:

(i) whether the legislative objective is sufficiently important to justify limiting a fundamental right;

(ii) whether the measures designed to meet the legislative objective are rationally connected to it; and

(iii) whether the means used to impair the right or freedom are no more than is necessary (or reasonably necessary) to accomplish the objective.[24]

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22 Consultation Committee Report, 47, which refers to the proportionality test developed in Canada in *R v Oakes* [1986] SCR 103 at 137-8 per Dixon CJ; and the Second Reading Speech for the Charter Bill, *Hansard*, Assembly, 4 May 2006, at p 1291 where the Attorney-General said that "[t]he general limitations clause embodies what is known as the 'proportionality test'."

23 Section 1 of the *Canadian Charter of Rights and Freedoms* (in Pt I of the *Constitution Act* 1982 (Canada)), s 5 of the NZ BORA and s 36 of the Bill of Rights in Part 2 of the *Constitution of the Republic of South Africa* 1996.

24 *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] AC 69 at 80 per Lord Clyde. This formulation has been adopted in a number of different decisions. See eg *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at [30] per Lord Bingham, where his Lordship said that this formulation is close to that laid down by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103 at [69]-[70]. See also *Huang v Home Secretary* [2007] UKHL 11, [2007] 2 WLR 581 at [19], the House of Lords confirmed the relevance of the fourth, overriding requirement of the *Oakes* test, which the House described as requiring a fair balance between the rights of individuals and the interests of the community that are intended to be served by the limitation in question.

25. In most cases, the real contest will arise at the third stage.

26. The significance of this is that proportionality goes further than the traditional *Wednesbury*[25] unreasonableness ground of review. A frequently quoted statement concerning the comparison between unreasonableness and proportionality is that of Lord Steyn in *R v Secretary of State for the Home Department; ex parte Daly* (***Daly***),[26] where his Lordship said:

> Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the concrete disposal of cases? … 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…

He then offered some general observations:

> 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.
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> Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations.

27. Courts in the United Kingdom have maintained that the advent of judicial review on proportionality grounds has not resulted in a shift to merits review. In a case concerning whether a school could lawfully refuse to permit a student to wear Islamic dress in contravention of the school's uniform policy,[27] Lord Bingham endorsed the remarks of Lord Steyn, quoted above, and said that "[t]here is no shift to a merits review, but the

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25 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.
26 [2001] UKHL 26; [2001] 1 AC 532 at [27].
27 *R (Begum) v Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100.

intensity of review is greater than was previously appropriate".[28] (His Lordship went on in the next sentence, however, to say that the principle of proportionality requires the court to "make a value judgment, an evaluation, by reference to the circumstances prevailing at the time".) On the other hand, in *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs*, the Court of Appeal said:[29]

> … particularly since the HRA came into force, our conception of the rule of law has been increasingly substantive rather than merely formal or procedural. Thus the rule of law requires not only that a public decision should be authorised by the words of the enabling statute, but also that it be reasonable and (generally in human rights cases) proportionate to a legitimate aim. But reasonableness and proportionality are not formal legal standards. They are substantive virtues…

28. It has been suggested that the fact that the conduct of the public authority involved a breach of s 38(1) would be relevant to an assessment of the reasonableness of the conduct in an application of the *Wednesbury* test.[30] On the other hand, when regard is had to the requirements of the principle of proportionality, and the list of relevant factors set out in s 7(2) of the Charter, it is strongly arguable that at least the first limb of s 38(1) will introduce a new and distinct statutory ground of review. If so, it represents a fundamental shift in the nature of judicial review as it has previously been understood in Victoria. Although *Wednesbury* unreasonableness has always involved a "qualitative assessment" of the decision under

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28 *R (Begum) v Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100 at [30]. See also *Daly* [2001] UKHL 26; [2001] 1 AC 532 at [28] per Lord Steyn; and *R (ProLife Alliance) v British Broadcasting Corporation* (***ProLife Alliance***) [2003] UKHL 23; [2004] 1 AC 185 at [139] per Lord Walker.

29 [2006] EWCA Civ 1279 at [146]. Some academic commentators have also taken the view that proportionality is a form of substantive review: see eg D Feldman (ed), *English Public Law* (2004), Ch 16; Lord Irvine, 'The development of Human Rights in Britain under an Incorporated Convention on Human Rights' [1998] PL 221 at 229 and 235, where the then Lord Chancellor said that a human rights Act would bring about "a shift from form to substance" in administrative law.

30 P Tate SC S-G, 'A Practical Introduction to the Charter of Human Rights and Responsibilities' 29 March 2007, para 95(6), footnote 99.

review,[31] the traditional conception of judicial review is that courts are not concerned with the merits of an administrative decision, but rather with the procedures adopted in coming to the decision.[32] But it is simply not possible to make an assessment of the relevance of criteria such as "the importance and purpose of [a] limitation" on human rights or whether there are "any less restrictive means reasonably available" to achieve the intended purpose of a limitation without to some degree assessing the merits of the act or decision in question.

(b) The variable intensity of proportionality review

29. The reach of proportionality review is, however, tempered by the fact that the level of scrutiny to which courts will subject the acts and decisions of public authorities is a variable one which will depend entirely on the subject matter and context of the decision or action. This has been variously described in the United Kingdom as a doctrine of "judicial deference" to the executive and legislature,[33] or as affording to those arms of government a "discretionary area of judgment"[34] or a domestic "margin of appreciation".[35] Whatever name it goes by, the principle essentially boils down to this:

    (a) in matters involving complex questions of a highly "political" kind, such as matters of social or economic policy or the allocation of resources, courts will apply the test of proportionality with lesser

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31 Whether one regards that as, in truth, a species of substantive review or not may be debatable: see eg Aronson, Dyer & Groves, *Judicial Review of Administrative Action* (3rd ed, 2004), at 339.

32 See, in the Victorian context, *O'Rourke v Miller* [1984] VR 277 at 284; and, more recently, *Applicant A1 v Brouwer* [2007] VSC 66 at [23] (Gillard J); and see Aronson, Dyer & Groves, op cit n 30, at 14-15 and the cases there discussed.

33 See eg *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158; [2003] QB 728 at [83] per Laws LJ; and *ProLife Alliance* [2003] UKHL 23; [2004] 1 AC 185 at [74]-[77] and [139] where Lords Hoffman and Walker disapproved of the term "deference".

34 See eg *R v DPP; ex parte Kebilene* [1999] UKHL 43; [2000] 2 AC 326 at 380-381 per Lord Hope.

35 *Secretary of State for Work and Pensions v M* [2006] UKHL 11 at [91] per Lord Walker.

intensity, thereby allowing the decision-maker a greater discretionary area of judgment; and

(b) in matters which are generally regarded being within the particular expertise of the courts, such as criminal justice and individual liberty, they will apply a more rigorous test of proportionality, thereby permitting the decision-maker a lesser discretionary area of judgment.

30. Lord Steyn offered a pithy summary of the point in *Daly* when he said: "In law context is everything."[36]

31. Examples of cases in which the courts have expressed the view that a degree of deference is due to the original decision-maker include those involving questions of national security and public safety,[37] foreign relations,[38] social housing policy,[39] planning matters,[40] immigration control,[41] child support payments,[42] and even in matters of "good taste and decency" in public broadcasting.[43]

32. This sort of deference in cases of this nature is nothing new, either in the UK or in Australia. It leads to the question – what practical difference does it make? Is proportionality, coupled with deference, nothing more than reasonableness under a new guise? Professor Keith Ewing has said of the UK HRA that, although it has allowed a wider range of questions to

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36 *Daly* [2001] UKHL 26; [2001] 1 AC 532 at [27].

37 *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153; *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68; and *R (Gillan) v Commissioner of Police for the Metropolis* [2004] EWCA Civ 1067; [2005] 1 All ER 970.

38 *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006]] EWCA Civ 1279

39 *Poplar Housing* [2001] EWCA Civ 595; [2002] QB 43.

40 *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* (***Alconbury***) [2001] UKHL 23; [2003] 2 AC 295.

41 *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606; [2002] QB 1391.

42 *Secretary of State for Work and Pensions v M* [2006] UKHL 11 at [91] per Lord Walker.

43 *ProLife Alliance* [2003] UKHL 23; [2004] 1 AC 185.

be asked, judicial deference has meant that "the answer remains the same, it simply takes more words to produce…"[44] However, examples can be found where the UK HRA and the jurisprudence it brings with it has had some impact.

33. A good example of the variable standard can be found in *A v Secretary of State for the Home Department*,[45] concerning legislation providing for the indefinite detention of foreign nationals who were certified by the Home Secretary as being suspected terrorists. In that case, the House of Lords (with the exception of Lord Hoffman, who delivered a strong dissent) extended a wide margin of appreciation to the government's assessment that the ongoing threat of international terrorism constituted a "*public emergency threatening the life of the nation*" that justified the United Kingdom derogating from the right to liberty in Article 5(1) of the European Convention on Human Rights (**ECHR**). However, the ECHR required that any measures adopted pursuant to such a derogation must be "*strictly required by the exigencies of the situation*" – in essence, a proportionality test. On behalf of the Home Secretary it was submitted that the assessment of what measures were necessary to deal with the terrorist threat was also a matter within the discretionary area of judgment of the government and Parliament and should not be subject to review by the courts. The House rejected this submission, on the basis that a question of individual liberty was involved, and held that the legislation was disproportionate essentially because it discriminated, on no rational grounds, between foreign nationals and British nationals: each posed a potential terrorist threat, but while the former were liable to indefinite detention, the latter were not.

34. Although the limitations on the derogation power under the ECHR have no parallel in the Charter, it may at least be said that a UK court, prior to the

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44 K Ewing, 'The futility of the Human Rights Act' [2004] PL 829 at 843; and see the rebuttal by A Lester [2005] PL 249.

45 [2004] UKHL 56; [2005] 2 AC 68.

coming into operation of the UK HRA, may not have gone past the first stage of the House of Lords' analysis in *A v Home Secretary*.

35. A second example concerns two cases, one in the UK[46] and the other, a recent decision of the Supreme Court of Victoria,[47] in which the relevant authorities decided to remove the applicants from their respective witness protection programs. In both cases, the decision of the authority was upheld by the reviewing court. It is impossible to make a genuine comparison of the outcome in the two cases, for the obvious reasons that statutory regimes and the circumstances of the applicants were different, but a comparison of the judgments at least demonstrates the impact that the HRA has had in the UK, and that the Charter will have here, on the language and the conceptual and doctrinal framework of administrative law in the field of human rights.

36. Lord Justice Auld, in the UK case, directly confronted the fact that the decision to remove the applicant from the program engaged the applicant's right to life; he considered the level of intensity with which the decision should be reviewed; he considered the evidential basis for the decision; and he decided, ultimately, that, the decision was well within the bounds of the decision-maker's discretionary area of judgment.

37. The Victorian decision, like the UK decision, also recognized the special competence of the Chief Commissioner of Police in such matters, but represented an orthodox examination of the nature of jurisdictional error and a number of classic procedural grounds of review. Comparatively little time was spent on what was, by comparison, the central issue in the UK case, namely the degree of risk to the applicant.

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46 *R (Bloggs 61) v Secretary of State for the Home Department* [2003] EWCA Civ 686; [2003] 1 WLR 2724.

47 Applicant A1 v Brouwer [2008] VSC 66.

38. The same result was reached in both cases, but by very different means. The comparison demonstrates the manner in which the Charter may be expected to bring about a change in the language and the concepts involved in judicial review and that change will inevitably, in some cases, also affect the outcome of the review.

(c) The second limb of s 38 – "proper consideration" of human rights

39. The second limb of s 38 makes the human rights protected by the Charter a mandatory consideration in all cases where an administrative decision engages a relevant right or rights. It is, however, more debatable whether this second limb creates a ground of review different from the traditional relevant considerations ground.

40. It has been said that courts have, for the most part, treated this ground of review as a "box-ticking" exercise, merely requiring *some* consideration of a relevant consideration, not necessarily *adequate* consideration.[48] In *Minister for Aboriginal Affairs v Peko-Wallsend*,[49] Mason J said that, subject to two qualifications, the appropriate weight to be given to a relevant consideration is a matter for the decision-maker, not the court. The first qualification concerned cases where the relevant Act provided an indication of the weight to be accorded to various considerations. Section 38 of the Charter, by providing that human rights, where relevant, must be accorded "proper" consideration, may fall within that qualification and may not, therefore, represent any variation from the traditional common law ground.

41. There will, however, inevitably be a question of what is meant by "proper" consideration. For example, if a decision-maker has given real and genuine consideration to a relevant human right but nevertheless arrived

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48 See eg Aronson, Dyer & Groves, op cit n 30, at 258ff.

49 (1986) 162 CLR 24 at 40-41.

at a decision that is incompatible with the right, has the decision-maker acted unlawfully within the meaning of s 38?

42. On one view, if Parliament had intended to render it unlawful to make a decision that was not compatible with human rights, that is what it would have said.

43. On the other hand, it is not easy to see any principled reason why public authorities should be prohibited from *acting* in a way that is compatible with human rights but be free to make *decisions* that are incompatible provided that they have given proper and genuine consideration to the relevant right or rights.

44. In practice, this question may be resolved in a way that does not give rise to any difficulty: in many, if not most, cases, a decision may not have any adverse consequences for an individual until some act is taken to carry the decision into effect and the compatibility of that act or proposed act[50] can be assessed against the first limb of s 38.

(d) Influence on common law grounds of review

45. In so far as these two tests differ from the common law grounds of judicial review, it is submitted that s 38 must be taken to have introduced new statutory grounds of review, or at least statutory modifications of the existing grounds, that are applicable only in the human rights context. The ramifications of this for judicial review in general, outside the Charter context, are limited. In the United Kingdom, despite initial suggestions that proportionality review would inevitably subsume the unreasonableness ground even in cases falling outside the human rights and European Community law context,[51] that step has not yet been

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50 See the definition of "act" in s 3 of the Charter.

51 *Alconbury* [2001] UKHL 23; [2003] 2 AC 295 at [51] per Lord Slynn.

taken.[52] However, in Victoria, unless the law in other States and Territories, or at federal level, developed in a similar way,[53] any such development of the common law grounds by analogy to the Charter may be precluded by the High Court cases holding that there is one national common law in Australia,[54]

(e) Some practical considerations

46. From a practical point of view, the proportionality principle may tilt the balance in favour of applicants for review in cases in which a human right is engaged for this reason. It has been held in other jurisdictions that an applicant need only establish that his or her human rights have been limited in some way before the onus will pass to the public authority to establish that the limitation was proportionate.[55] This is significant, as the question of whether a limitation on a human right can be justified as reasonable or proportionate will in most cases be the real issue in dispute.

47. Practitioners will also need to think about how the impact of the various factors in s 7(2) of the Charter on the case at hand may be established. In the United Kingdom, public authorities have on some occasions led evidence on such issues as the nature and purpose of a limitation on a

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52 W Wade & C Forsyth, *Administrative Law* (9th ed, 2004), at 371, have said that the *Wednesbury* doctrine "is in terminal decline, but the coup de grace has not yet fallen". And see *Association of British Civilian Internees – Far East Region v Secretary of State for Defence* [2003] EWCA Civ 473; [2003] QB 1397; 3 WLR 80 at [32]-[37] where the Court of Appeal said that, although it had difficulty seeing the justification for retaining the *Wednesbury* test, it was not for that court "to perform its burial rites".

53 The existence of the *Human Rights Act* 2004 (ACT) and the consideration now being given, or soon to be given, to similar human rights instruments in other Australian States may make this a realistic possibility in the future.

54 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563-564; *Lipohar v R* (1999) 200 CLR 485 at 500 and 505-510; *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49 at 62 and 83.

55 See M Fordham, *Judicial Review Handbook* (2001, 3rd ed), at p803 -804 [15.1.5]; and, in Canada, *RJR-MacDonald Inc v Attorney-General (Canada)* [1995] 3 SC 199 at [60]. The judicial review precedents in Bullen & Leake & Jacob's *Precedents of Pleading* (14th ed, 2001), at 883-884, provide an illustration of how this might be pleaded.

right,[56] something that would not be contemplated in proceedings for review on unreasonableness grounds in Australia. Section 7(2) might also be expected to result in expert evidence being led to establish the availability and efficacy of less restrictive means of achieving the same purpose.[57]

Section 39: avenues of review under the Charter

48. The next question to ask is how and when may a person who alleges that a public authority has acted in breach of s 38 obtain review of the act or decision complained of? Section 39 of the Charter is headed "Legal proceedings". Subsection 39(1) provides:

> 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.

49. Section 39 has no real equivalent in the human rights instruments in the United Kingdom, New Zealand or the ACT and its meaning is far from clear. Its most readily apparent consequence is that a person seeking to have the acts or decisions of a public authority reviewed on a Charter ground must do so by means of the existing avenues for obtaining the judicial review of administrative decisions in Victoria. These are the *Administrative Law Act* 1978 (**ALA**) and Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005, in relation to orders in the nature of certiorari, mandamus and prohibition; Order 57, in relation to habeas corpus; and proceedings for declaratory relief.

50. Section 39(1) appears to pick up the relevant limitations on the availability of relief by these means, such as time limits. Practitioners will therefore

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[56] K Stern, "Human Rights – The Victorian Charter – What is left unsaid", Address to the Australian Institute of Administrative Law, Victorian Chapter, 3 May 2007.

[57] *Southampton Port Health Authority v Seahawk Marine Foods Ltd* [2002] EWCA Civ 54.

need to pay close attention to the criteria for standing and so on under the existing avenues of review and consider how they interact with the Charter. But how far does this go? An applicant for relief under the ALA must establish that he or she is a "person affected by a decision of a tribunal", as those terms are defined in the ALA.[58] There may be cases where an act of a public authority does not constitute a "decision" for the purposes of the ALA or where the concept of a "public authority" under the Charter may not be co-extensive with the concept of a "tribunal" under the ALA or with the types of bodies amenable to review by the traditional remedies. Would this preclude the availability of review? These concerns may be more apparent than real.

51. One difficult question is whether, in order to seek review on a ground of unlawfulness under the Charter, an applicant must also be able to raise an arguable or even successful claim on an existing ground of review. Three possible interpretations of subs 39(1) have been suggested. In the context of judicial review proceedings, they are:

(a) a narrow view, that applicants may only seek relief under the Charter where they are able to establish a good claim for the same relief on one of the existing grounds of review;

(b) a broad view, that applicants need only establish a ground of unlawfulness under the Charter to entitle them to relief of a kind otherwise available in judicial review proceedings, regardless of whether they also raise a non-Charter ground; and

(c) a middle view, that in order to obtain relief on a ground of unlawfulness under the Charter applicants must be able to assert a claim for relief on one of the traditional grounds that need not ultimately be successful but must at least be either (i) sufficient to

[58] See ss 2 and 3 of the ALA.

survive a preliminary challenge or (ii) at the very least, not colourable.

52. The language of the section tends to support a version of the middle or narrow views, as does the Explanatory Memorandum for the Charter Bill, which stated, in relation to clause 39 of the Bill:

> Sub-clause (1) provides that if a person has a right to seek relief or a remedy otherwise than because of this Charter, founded on the unlawfulness of some conduct by a public authority, then any unlawfulness generated by this Charter (as set out in clause 38) may be *a further ground in the cause of action*. This clause does not create any new or independent right to relief or a remedy if there is nothing more than a breach of a right protected under Part 2.[59] (Emphasis added.)

53. The fact that s 39(1) speaks of a person having the ability to *seek* any relief or remedy, not of a person having a *right* or *entitlement* to any relief or remedy, suggests that the narrow view can be dismissed.[60] The narrow view would also severely limit the impact of the Charter, if not render it largely superfluous, because it would mean, in practice, that an applicant could only obtain review of an act or decision of a public authority that was incompatible with a Charter right in circumstances where the act or decision was for some other reason unlawful. The Charter would be incapable of affecting the outcome of the application.

54. If the middle view is to be adopted, it is submitted that it should not be necessary to demonstrate that the non-Charter ground is sufficiently arguable as to survive a strike out application. Rather, it should be sufficient if the non-Charter claim is not colourable; that is, that it is not

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59 Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill, at 28.

60 See P Tate SC S-G, 'The Charter of Human Rights and Responsibilities – A Practical Introduction', Seminar presented to the Victorian Bar CLE Program, at 29.

made for an improper purpose or otherwise lacking in good faith.[61] This may not be a very difficult threshold to reach.

55. However, it is submitted that there are good reasons for favouring the broad view. First, there is little to commend the middle view in terms of principle. What purpose would it serve merely to require an applicant to frame his or her application also in terms of one of the traditional grounds in order to be able to rely on the s 38 ground? Secondly, s 39(1) of the Charter, like all statutory provisions, must be interpreted in accordance with s 32.[62] It is difficult to accept that courts would adopt an interpretation that would result, in a particular case, in the position that an act or decision alleged to be unlawful solely on the basis that it is incompatible with a person's human rights was nevertheless unable to be reviewed. Such an interpretation might itself be incompatible with the person's human rights (although the scope of the right to a fair hearing in s 24 of the Charter would have to be considered carefully), requiring a more liberal reading of the section.

56. One way of circumventing these potential difficulties is simply to frame an applicant's case in a way that brings it within one of the existing grounds as well as a Charter ground. The grounds of judicial review overlap and, in most cases, the same set of facts will likely give rise to a claim or review that may be put in terms of both a traditional ground of review and a Charter ground of review.

57. Another, and potentially more significant way around this question, at least in cases involving the exercise of a statutory power, is by way of the interpretative obligation in s 32. If a statutory power, particularly one cast

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61 An analogy might be drawn the manner in which the Federal Court can exercise jurisdiction over non-federal claims: provided a federal claim is made in the proceedings and is not made colourably, the fact that the federal claim might be struck out, leaving only claims that would otherwise be non-federal, does not deprive the Federal Court of jurisdiction: see Hon J Allsop, 'Federal jurisdiction and the jurisdiction of the Federal Court of Australia in 2002' (2002) 23 Aust Bar Rev 29 at 42-45.

62 See the definition of "statutory provision" in s 3 of the Charter.

in general terms, is construed in accordance with s 32 so as not to authorise an act or decision taken by a public authority, the act or decision may be *ultra vires* in the traditional narrow sense. Arguably, the invalidity may therefore arise on the basis of an existing ground of review, rather than on a "ground of unlawfulness arising because of this Charter", and the applicant would not need to resort to s 39(1) of the Charter in order to obtain review. Section 39(2) of the Charter seems intended to enable arguments such as this.

ADMINISTRATIVE REVIEW

VCAT's statutory powers

58. As noted above, the interpretative obligation in s 32 of the Charter is relevant also to administrative review, and will be particularly important in this context because the powers of administrative review bodies are generally derived from statute. VCAT, for example, when exercising its review jurisdiction, "has all the functions of the decision-maker".[63] The word "function" is defined in s 3 to include "jurisdiction, power, duty and authority". VCAT therefore has all the powers of the original decision-maker and those powers will themselves, in most cases, be statutorily based and subject to interpretation in accordance with s 32 of the Charter.

59. Similarly, VCAT's general procedural powers,[64] and its powers to grant stays,[65] injunctions[66] and declarations[67] are all derived from the VCAT Act. VCAT's exercise of these powers will therefore be conditioned in all cases in which a human right is engaged by the interpretive obligation in s 32 of the Charter. Although these are statutory powers, the manner in which they are exercised is largely conditioned by principles of the common law

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63 *Victorian Civil and Administrative Tribunal Act* 1998 (**VCAT Act**), s 51(1)(a).
64 Section 98 of the VCAT Act.
65 Section 50 of the VCAT Act.
66 Section 123 of the VCAT Act.
67 Section 124 of the VCAT Act.

which have been developed with considerations of fundamental rights and natural justice in mind. There may, therefore, be little practical difference in most cases. It is possible, however, that the application of the interpretative power may alter the scope of these powers in some cases, as Connolly J in the ACT Supreme Court recognised in *R v Upton*[68] in relation to the statutory and common law powers to stay criminal proceedings.

Proportionality

60. VCAT will also have to apply the principle of proportionality in reviewing the acts and decisions of public authorities on human rights grounds, and because it is standing in the shoes of the original decision-maker, considerations of "deference" or "discretionary areas of judgment" may be less appropriate.

Internal review

61. In some cases, before an applicant gets to VCAT, there is a level of internal review of administrative decision-making. Questions may arise as to whether, and if so, how the right to a fair hearing before an independent and impartial tribunal in subs 24(1) of the Charter applies to internal review procedures. The right in subs 24(1) is given, in addition to a person charged with a criminal offence, to "a party to a civil proceeding". Does this include internal review procedures? In the United Kingdom, it has been held that internal review proceedings come within the ambit of the right to a fair hearing in Article 6(1) of the ECHR.[69] Article 6(1) is expressed slightly differently to subs 24(1) of the Charter, as it relates to

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68 [2005] ACTSC 52.

69 *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295; and *Begum v London Borough of Tower Hamlets* [2003] UKHL 5; [2003] 2 AC 430. See P Bayne, op cit n 9, at 10-13 for a detailed discussion of the latter case.

the determination of an individual's "civil rights and obligations", and this may be of some significance.

62. Assuming internal review is within the ambit of subs 24(1), the United Kingdom cases have gone on to hold that there will not be a breach of the right to a fair hearing by an independent tribunal provided the internal review is subject to further review by an external tribunal. The nature of the review that is necessary to satisfy the right may vary with the circumstances.

USING CASE LAW FROM OTHER JURISDICTIONS

63. The lack of a bill of rights in Australia had led at least one senior judge to the lament that Australian lawyers faced the danger of becoming isolated from the developing human rights jurisprudence of other jurisdictions.[70] The introduction of the Charter has, in a sense, reconnected Victorian courts and tribunals with that jurisprudence. A couple of observations about that fact may be made.

64. First, there is a vast amount of case law and academic literature on the various human rights instruments in the United Kingdom, New Zealand, South Africa and Canada. This might be seen as both a blessing and a curse. It places an enormous burden on courts and tribunals but also, in the first instance, on practitioners. Practitioners will need to be familiar with the case law in other jurisdictions in order properly to advise their clients and will be expected to be able to direct courts and tribunals to the relevant authorities.[71] On the other hand, the practitioner's task will be

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70 Hon JJ Spigelman AC, 'Rule of Law – Human Rights Protection' (1999) 18 Aust Bar Rev 29 at 32-33; and repeated in Hon JJ Spigelman AC, 'The truth can cost too much: the principle of a fair trial' (2004) 78 ALJ 29 at 47; and Hon JJ Spigelman AC, 'Principle of legality and the clear statement principle' (2005) 79 ALJ 769 at 782.

71 Although it is only in relation to the interpretative obligation in s 32 that courts and tribunals are expressly permitted to have regard to the jurisprudence of international and foreign domestic courts and tribunals (see subs 32(2)), it is to be expected that courts and tribunals will look to the experience of other jurisdictions in the application of the Charter generally.

assisted by the fact that many of the issues likely to arise under the Charter will already have been the subject of consideration by the highest courts in other jurisdictions and practitioners will have the benefit of this body of case law in dealing with what will, no doubt, be difficult questions of interpretation, degree and judgment.

65. Secondly, when using this body of case law, practitioners should bear in mind that each of the Acts on which the cases are different in various respects, including:

(i) the operative clauses of the various Acts (such as ss 7, 32, 38 and 39 of the Charter) are expressed differently;

(ii) there are also some differences in the wording of the underlying rights in issue, some more subtle than others, particularly in relation to those ICCPR rights that have been modified in the Charter; and

(iii) and the manner in which the same or similar points are resolved in different jurisdictions is, not surprisingly, not always the same.[72]

CONCLUSION

66. In the United Kingdom, a review conducted by the Department of Constitutional Affairs approximately five years after the UK HRA had come into operation concluded that it had not significantly altered the constitutional balance between Parliament, the executive and the judiciary in the UK.[73] How the balance is struck in Victoria under the Charter remains to be seen, but there seems little doubt that the Charter, like the UK HRA, will have a significant impact on the language and the

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72 See eg, in the field of criminal law, the different solutions in the United Kingdom and New Zealand to the question whether a law which, on its face, imposes a reverse legal burden of proof in criminal cases may be read down to impose only an evidential burden: *Sheldrake v DPP; Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264; *R v Phillips* [1991] 3 NZLR 175; and *R v Hansen* [2005] NZCA 220.

73 Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (July 2006).

conceptual and doctrinal framework of administrative law in the field of human rights and on the ultimate resolution of many cases in that field.