

# ADDRESS GIVEN AT THE HUMAN RIGHTS UNDER THE CHARTER: THE DEVELOPMENT OF HUMAN RIGHTS LAW IN VICTORIA CONFERENCE

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*“A voyage around statutory protections of human rights”*

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In 2004, Lord Cooke of Thorndon expressed confidence that the world was moving gradually to a single law of human rights.<sup>2</sup> He was writing against the background of the great success of human rights instruments following the Second World War. The Declaration of Human Rights was followed by the International Covenants on Civil and Political Rights and Economic and Social Rights and the adoption of statements of rights in the constitutions of the newly independent Commonwealth countries.

Even those countries which lacked constitutional statements of rights gradually became open to the scrutiny of international or supranational agencies. The United Kingdom became subject to the European Court of Human Rights. The accession by New Zealand and Australia to the First Optional Protocol to the International Covenant on Civil and Political Rights brought access to the Human Rights Committee for those who had exhausted their domestic remedies. The cold wind of measurement against international human rights standards took away some of the warm complacency with which we regarded common law protection.

Protection of human rights in domestic law was given impetus by the adoption in Canada of a Charter of Rights and Freedoms. The Charter overtook a rather feeble experiment with a statutory statement of rights adopted in 1960.<sup>3</sup> New Zealand and later the United Kingdom looked to the Canadian model to provide more systematic domestic measures of protection for human rights.

The solution we eventually adopted in New Zealand in 1990 was a Parliamentary Bill of Rights, respectful of Parliamentary sovereignty, instead of the constitutional measure that had first been proposed. The process of changing direction at a late stage has left some oddities in the expression of the New Zealand Bill of Rights Act which continue to cause difficulty, principally in application of the overarching test borrowed from the Canadian Charter to save incompatible legislation from invalidity. It was proposed at a time when the New Zealand Bill provided that incompatible legislation was invalid. As French CJ noted in *Momcilovic*, the proportionality test it mandated had no part to play in the interpretation of legislation to conform with the rights protected.<sup>4</sup> Nevertheless, after considerable hesitation, it is now established in New Zealand that the general provision balancing rights against the objectives of the legislation is key to the interpretation of legislation which impinges on rights.<sup>5</sup>

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<sup>1</sup> The Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand.

<sup>2</sup> Robin Cooke “The Road Ahead for the Common Law” (2004) 53 International Comparative Law Quarterly 273 at 273.

<sup>3</sup> Canadian Bill of Rights SC 1960 c 44.

<sup>4</sup> *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1 at [26]–[29].

<sup>5</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

Lord Cooke's optimism about ultimate world-wide convergence was expressed with knowledge of the legislative enactment of statements of rights in New Zealand and in the United Kingdom. He would have regarded the adoption of similar legislative responses in the Australian Capital Territory and Victoria as further evidence of the trend to convergence.

Ten years later, I am not so sure about directions. It is true that the common derivation of the domestic statements of rights in the International Covenants may be expected to promote common outcomes in the very long haul and the work of international agencies such as the United Nations Human Rights Committee is likely to provide encouragement towards commonality. So it would be rash to think that domestic legal regimes will not shift over time under such influences. But significant divergence in the methods of addressing human rights exists in all common law jurisdictions. In those circumstances, the expectation expressed in the interpretive provisions in the Victorian Charter and the ACT statute about the use of comparative law may be dangerous if not accompanied by understanding of the differences in approach in the different domestic human rights instruments and the different legal cultures in which apparently comparable provisions come to be applied.

The effort required in working with domestic expressions of human rights which draw on international instruments and their different application in comparable jurisdictions is not to be underestimated. So, far from sharing Dyson Heydon's recent Law Quarterly Review opinion that judges are avid for such cases to relieve the tedium of more humdrum (and worthwhile) work,<sup>6</sup> I am of the view that this work is hard. It calls for close attention both to judicial method and the exposition of fundamental values in the domestic legal order. *Pace* Dyson Heydon, "Gay Paree" this is not.<sup>7</sup>

### **The role of courts in human rights**

In trying to fulfil my brief to bring an international perspective, it is therefore necessary to talk about difference as much as what we have in common. I want to start by saying something about the role of courts in human rights. Whether we operate under constitutional or statutory bills of rights, I think the importance of a statement of rights may not depend on the courts.

One of the aspirations of those who promoted the New Zealand Bill of Rights Act was that it would become part of the political and social culture as well as a source of vindication through courts. It was to be a "set of navigation lights"<sup>8</sup> for legislators and a standard by which executive power, particularly in the exercise of discretion, could be measured and, if necessary, checked. It was also to be an accessible statement of shared values which would raise public consciousness about constitutional fundamentals and the level of civil discourse about such values. Sir Geoffrey Palmer, the architect of the New Zealand legislation, in 2005 expressed the view that the New Zealand Bill of Rights Act is a "Parliamentary bill of rights" which relies principally upon

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<sup>6</sup> JD Heydon "Are bills of rights necessary in common law systems?" (2014) 130 LQR 392 at 402.

<sup>7</sup> At 403.

<sup>8</sup> Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at 6.

the processes of government, rather than court decisions, to protect human rights".<sup>9</sup> There is no doubt that, in New Zealand, the success of the New Zealand Bill of Rights Act is not principally to be gauged from reading court decisions. It has permeated the processes of power, as appears from the Cabinet Manual down. There has been a revolution in what has been required of those exercising public power by way of reasons (prompted in part by other legislative measures concerning freedom of information and other checks such as are provided by Ombudsmen). It would be cynical to doubt that the observance of human rights by public agencies has greatly improved as a result.

If anything, the political and social aspiration for rights is even more pronounced in the legislative statements of rights adopted in Victoria and the Australian Capital Territory. They are concerned to limit recourse to the courts for remedies. They emphasise the principal role of the courts is to interpret legislation to conform with the statements of rights wherever possible and, where not, to make declarations of inconsistency.

I do not want to make too much of the point that in gauging the success of Parliamentary statements of rights it is a mistake to concentrate on the role of the courts. The role of courts is critical not only to the scheme of ensuring that legislation is construed in conformity with the Bill of Rights Act. It is also critical in ensuring the legality of executive action which affects rights. If the purpose of a Parliamentary Bill of Rights is in part to raise understanding of and respect for rights, the explanations provided through the judgments of the courts in deliberative public processes are an essential bridge to understanding. What is most important in the judicial contribution to human rights may be the processes of engagement. In connection with this, I want to make some remarks about judicial methodology and touch on some of the challenges in each jurisdiction arising out of our own history, constitutional arrangements and traditions.

One more point should be made about the role of the courts. A Parliamentary statement of rights may seem fragile protection at times and may leave judges feeling uncomfortably exposed. The ongoing legal and political debate in Victoria illustrates the anxieties. They include the proposals on review of the legislation to pare it back to a statement of principles for Parliament which cuts out the interpretive role for the courts and the anxiety evident in the *Momcilovic* decision to ensure that it does not disrupt the constitutional order. But such anxieties should not obscure the fact that statements of right seem authentically appealing in our societies. 95 per cent of the submissions received by the Scrutiny of Acts and Regulations Committee into the first four years of the operation of the Victorian Charter, tabled in September 2011, supported retention or strengthening of the legislation.

In any event, the obligation of the courts in our systems is to give effect to the legislation enacted by Parliament, in the spirit in which it is made. It should not be overlooked that a principal function of the courts is not only to check abuse of power but also to vindicate proper executive and legislative action, stilling controversy. Determinations by independent courts that legislation conforms with the standards Parliament has set itself in human rights or that executive action complies with the

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<sup>9</sup> Sir Geoffrey Palmer, preface to A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005).

obligations on those exercising public functions to comply with human rights is important judicial work.

So how are we doing? I am not qualified to comment on the performance of the courts in Victoria so I make some brief comments only about the views that have been expressed about the New Zealand experience, in case they strike a chord or are cautionary.

### **The New Zealand experience**

The effect of the New Zealand Bill of Rights Act has always been the subject of some controversy. Sir Robin Cooke said that the Act “does not merely repeat the old law”<sup>10</sup> and that it was intended to be woven into the fabric of the whole of New Zealand law. But the more generally held view was that the Act was intended to reflect existing law and to be “evolutionary”.<sup>11</sup>

The concern to fit the new Act within the existing law may in part have been a strategic response to the political controversies which surrounded its adoption. Originally, the Bill of Rights to give effect to New Zealand’s commitment under the International Covenant on Civil and Political Rights, had been put forward in a form binding on Parliament, in the manner of the Canadian Charter of Rights and Freedoms on which it was patterned. That proposal was rejected, in part because of fears of the transfer of power to the judiciary in a constitutional order which had previously lacked any such check.

At the time of its enactment, the New Zealand Bill of Rights Act, as a statutory bill of rights, had no equivalent elsewhere. The similar non-entrenched statement of rights in Canada had earlier failed. With that example and with public suspicion of judicial aggrandisement, it is perhaps not surprising that the courts did not talk up the effect of rights and that the legal profession and the public should have been cautious in their invocation of it.

We are now plugged into an international community in which the New Zealand statutory bill of rights model is no longer unique. Some of the solutions we adopted when we thought we were unique are being rejected in other jurisdictions. Caution about recourse to the Bill of Rights Act is suggested by some to mean that our jurisprudence and our methodology are undeveloped. We have been stretched by the developing case law in the United Kingdom. The early New Zealand diet of drunken drivers and petty criminals, in retrospect, may have made the courts a little casual at times. By contrast, the courts of the United Kingdom were pitch-forked into applying human rights in the most contentious cases of the day, those concerned with the threat of terrorism. Although in New Zealand human rights adjudication has not to date been conducted against such high public anxiety, it is evidently past time to get our thinking into order.

Many of the more difficult questions concerning the application and interpretation of the New Zealand Bill of Rights Act are only just emerging, nearly twenty-five years after its

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<sup>10</sup> *R v Te Kira* [1993] 3 NZLR 257 (CA) at 262; *R v Goodwin* [1993] 2 NZLR 153 (CA) at 170.

<sup>11</sup> *R v Jefferies* [1994] 1 NZLR 290 (CA) at 299 per Richardson J.

enactment. Apart from the criminal bar, the profession has been slow to appreciate the potential of the Act. Although the form of our legislation does not prevent development of the common law in conformity with the rights and freedoms expressed in the Act, very few cases have used that methodology. Some commentators have questioned the extent to which administrative law has adjusted to take account of human rights values in the exercise of administrative discretion.<sup>12</sup> I will touch on some of these matters when speaking of the comparative position. But for present purposes it is sufficient to say that the Act may not yet run throughout the whole fabric of New Zealand law, as was the expectation of some in its early years. It is a more long-term project than may have been appreciated at the outset.

Although there have been a number of statements in New Zealand cases that the New Zealand Bill of Rights Act, though derived from the ICCPR, is a New Zealand statute and is to be interpreted in the light of New Zealand conditions,<sup>13</sup> it is not easy to discern a conscious New Zealand jurisprudence. In carrying the project on, we will undoubtedly be influenced by the solutions adopted in other jurisdictions, particularly those with similar legislation. Again, however, I think it is necessary to be careful in analogies from comparative law to keep a sense of when different methods are appropriate to meet domestic conditions. It is therefore unfortunate that we have not yet got further down the track in developing the sense and reach of our own legislation and confidence in our own tradition.

It is thought by some commentators that it may be a disadvantage that the New Zealand Bill of Rights Act was an early model. I am not so sure about that when I look at some of the newer models. Our legislation is however affected by its genesis in a model derived from the Canadian Charter which was originally intended to allow judicial review of legislation. An early view by a leading New Zealand academic commentator that our legislation sets up a statement of “reasonable rights” because of what he considered to be the overarching effect of s 5<sup>14</sup> (the justifiable limits provision patterned on s 1 of the Canadian Charter and to be found in s 7(2) of the Victorian Charter) was not accepted in early Bill of Rights cases by Cooke J and most members of the Court of Appeal, but was supported by Richardson J, whose views on this have now prevailed in the majority judgment of the Supreme Court in *Hansen v R*.<sup>15</sup> Its application to the central interpretative function of the courts under the New Zealand Bill of Rights Act now puts us out of step with Canada and South Africa.

Some commentators have questioned whether the declaratory form of judicial review for human rights values introduced with the New Zealand Bill of Rights Act (by which the courts under s 4 must apply legislation which is inconsistent with the Act) has left us with the worst of all worlds: a view that human rights are the responsibility of courts when the courts cannot insist on their observance. That is said to have led to two

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<sup>12</sup> Claudia Geiringer “Sources of Resistance to Proportionality Review of Administrative Power under the Bill of Rights Act” (2013) 11 NZJPIL 123; Hanna Wilberg “The Bill of Rights in Administrative Law Cases: Taking Stock and Suggesting Some Reassessment” (2013) 25 NZULR 866.

<sup>13</sup> See, for example, *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 554 per Thomas J and *Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC) at [11] and [28]–[31] per Elias CJ.

<sup>14</sup> Paul Rishworth “Interpreting and Invalidating Enactments Under a Bill of Rights: Three Enquiries in Comparative Perspective” in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2003) 251 at 277.

<sup>15</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

further consequences: erosion of the former conventions of Parliamentary observance of human rights and perhaps respect for the decisions of the courts; and timidity on the part of the courts in protecting human rights.

Janet McLean has suggested that, whereas before the Bill of Rights Act “Parliament limited itself”, we are now in danger of adopting what she calls “a s 4 [Bill of Rights] anti-constitutionalism” by which Parliament is liberated to do whatever it wants in relation to human rights. “That”, she says, “was never our constitutional tradition”.<sup>16</sup> She substantiates her concerns by reference to the number of adverse Attorney-General certificates which did not affect enactment of the inconsistent legislation and which were largely unremarked and not debated by Parliament. The position may be even more concerning since, following the decision of the Supreme Court in *Hansen* in 2007, Attorney-General reports are not required by legislative practice if a limitation on rights is considered by the government’s legal advisers to be one that is justified. Parliamentary assessment of that eminently political judgment under a parliamentary Bill of Rights may therefore be avoided. Perhaps in acknowledgement of this potential gap in Parliamentary oversight of rights, the present Attorney-General has indicated he is thinking about providing reports which are not non-compliance reports, where there is public disagreement about whether a proposed measure is justified.<sup>17</sup> In the context of legislation which relies heavily on Parliamentary check to protect rights, that suggestion seems to me to be one very much to be welcomed.

In respect of the performance of the courts, it is sobering that Sir Geoffrey Palmer, in a retrospective review of the first 21 years of the Bill of Rights Act, has said that the Supreme Court needs to “step up” on the subject of human rights. He says that what he sees as the “tactical reticence” of the courts to get into conflict with the political branches of government is destructive of human rights.<sup>18</sup> It is difficult for someone deeply implicated to assess objectively whether these fears are well-founded. But I think the criticism that we are avoiding responsibility is one that has to be taken very seriously indeed.

The Bill of Rights comes to be applied in New Zealand in the context of constitutional balances which are fragile. The institutional position of the courts is not constitutionally protected, as in Victoria it is under the *Kable* doctrine. There is no higher further authority to which appeal can be made, such as is currently available in the United Kingdom with recourse to the European Court of Human Rights. (The scrutiny of the United Nations Human Rights Committee is not comparable.) With that background, judicial method and reasoning are themselves critical in discharging the statutory responsibilities to protect human rights. Close attention to reasoning and method are critical. There may be force in some of the criticisms that this responsibility is not well fulfilled by underwritten or conclusory reasons. In particular, it may be queried whether the at-large and overall balancing we slip in to is sufficient methodology in the

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16 Professor Janet McLean “Bills of Rights and Constitutional Conventions” (Victoria University, Wellington, 30 August 2011).

17 Hon Chris Finlayson QC “Section 7 of the Bill of Rights: an Attorney General’s perspective” *Parliament and the Protection of Human Rights – Pre-Legislative Scrutiny and the Role of s 7 of the Bill of Rights* (New Zealand Centre for Human Rights Law, Policy and Practice, Wellington, 13 March 2014).

18 Geoffrey Palmer “The Bill of Rights after Twenty-one Years: The New Zealand Constitutional Caravan Moves on?” (Victoria University, Wellington, 29 August 2011).

recognition and protection of rights. Judicial methodology is something I return to at the end of my remarks.

### **Some points of comparison between the Victorian Charter and the New Zealand Bill of Rights Act**

Statutory expressions of rights, like all statutes, repay reading in full - and should be re-read frequently. The Victorian Charter is well worth the read. It is a good precept for any advocate or judge looking to the comparative case-law on this topic to look carefully at the legislation which is being applied.

The preamble to the Victorian Charter, for example, has no equivalent in the rather flatly expressed New Zealand Bill of Rights Act. It may well be useful to the courts in developing Bill of Rights reasoning. It starts by recognising that all people are “born free and equal in dignity and rights”. Equality and dignity are therefore at the forefront. They are values all working with the legislation are required to keep in mind. They are values which draw on and refer to the history of ideas and philosophy.

Unlike New Zealand where discrimination is dealt with in a separate statute, the Human Rights Act 1993, non-discrimination is identified as a principal purpose in the preamble and you have legislation integrated in a way that ours is not (and which may have led the courts to be less aware of equality issues). It is significant, too, that under the Charter preamble it is recognised as a responsibility that rights must be exercised “in a way that respects the human rights of others”. This responsibility balances rights but only with the rights of others. Similar balance is to be seen in the ACT legislation also. It is possible that this juxtaposition suggests that justified limits on rights are confined to those found in competing commensurate rights and interests.<sup>19</sup> That is not how justification has been treated in New Zealand.

As in New Zealand, it is an object of the Charter and the ACT legislation to “promote” as well as protect human rights. The means of protection and promotion is however limited to the measures contained in s 1(2), whereas the purpose of promoting rights is not so confined in the New Zealand Act.

The Victorian Charter sets up three principal ways in which human rights are protected: by facilitating parliamentary scrutiny of new legislation for compliance (through the requirement of a statement of compatibility and report by the Scrutiny of Acts and Regulations Committee); by a requirement that legislation be interpreted to comply with human rights where possible and providing a power to declare incompatibility where such interpretation is not possible; and by requiring “public authorities” to act compatibly with human rights and to take them into account in decision-making.

These same mechanisms to achieve compliance with rights are found in the New Zealand and the United Kingdom legislation, but with differences. The policy of limiting litigation, in particular by withholding a remedy in damages for Bill of Rights breaches and by circumscribing the application of the legislation to courts (a restriction that

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<sup>19</sup> But see s 15(3) of the Charter, which provides that “special duties and responsibilities are attached to the right of freedom of expression” and states that the right may be subject to lawful restrictions which are reasonably necessary to respect the rights and reputation of other persons and for the protection of national security, public order, public health or public morality.

narrows the scope for development of the common law in conformity with rights) as well as the restriction of the application of the Charter to categories of public actors rather than more loosely to those exercising public functions, is a point of departure from the legislation in New Zealand and in the United Kingdom. The line-drawing certainly suggests that the Charter will be more technical in application.

The Victorian Charter does not contain a provision equivalent to those in Canada, the United Kingdom and the ACT legislation which permit courts to grant appropriate relief for breach of rights. In order to exclude the New Zealand implication of power to grant such relief (arising in large part from the obligations of the courts themselves to act in conformity with the Bill of Rights Act), the Victorian Charter seems to make existing legal remedies the sole means of redress although, in a clause which is of some difficulty, s 39(1) seems to permit the existing remedy to be based “on a ground of unlawfulness arising because of this Charter”.

I want to mention briefly later questions of remedy and in particular the development of existing tort law, which seems to be encouraged by this Charter. In New Zealand we have tended to think of Bill of Rights remedies as distinct from other remedies available in law, and in particular have treated them as “top-up” vindication where no other remedy is available.<sup>20</sup> It may be, however, that using the statement of rights to galvanise the common law, in the manner in which the Great Charters in the past did so, may yet in some respects be a better route.

The New Zealand Bill of Rights Act, unlike the Victorian Charter,<sup>21</sup> protects legal persons as well as natural persons.<sup>22</sup> But in a number of respects, such as the explicit

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<sup>20</sup> *Taunoa v Attorney-General* [2006] NZSC 95, [2008] 1 NZLR 429.

<sup>21</sup> New Zealand Bill of Rights Act, s 29 provides that except where provisions of the Act *otherwise* provide, the provisions of the Act apply “so far as practicable” to legal persons. Similarly, the South African Bill of Rights (Chapter 2 of the Constitution of the Republic of South Africa), s 8(4) provides that “[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person”. Human rights protection of legal persons is available under the Canadian Charter but a few rights belong exclusively to natural persons. The s 15 equality rights and the s 7 right to life, liberty and security of the person can only be exercised by natural persons; corporations may, however, invoke freedom of expression: *Irwin Toy v Quebec (Attorney-General)* [1989] 1 SCR 927 at 1001-1003. Human Rights Act 1998 (UK), s 7(7) provides that “a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act”. Under Article 34, a “person” can include a legal person. However, some Convention rights have been held to be unavailable to legal persons, such as the right to life, the right to education and the right to be free from inhuman treatment: Clayton and Tomlinson *The Law of Human Rights* (Oxford University Press, Oxford, 2009) at [22.21]–[22.22].

<sup>22</sup> However, in *Magee v Delaney* [2012] VSC 407, the Court concluded that the phrase “other persons” in s 15(3) extends to the rights of non-natural persons, despite the Charter definition of “person” which means a “human being”. Mr Magee had painted over an advertisement displayed in a bus shelter and affixed a “wet paint” sign to it. He was charged with criminal offences relating to the property damage. In the Supreme Court, he argued that his conduct engaged the right to freedom of expression under s 15 of the Charter and that the exercise of that right constituted a “lawful excuse” in respect of the criminal charges. The Court held that the right to freedom of expression did not extend to acts involving violence or property damage, for reasons of public policy. However, the Court then considered whether, if the right to freedom of expression was in fact engaged, it was limited by s 15(3) of the Charter. The Court held that Mr Magee’s conduct impacted on the property rights of non-natural persons – the Council (which



recognition of privacy,<sup>23</sup> the Victorian Charter goes further than the New Zealand Act, which emphasises the civil and political rights and rights of fair criminal procedure. In New Zealand, the Bill of Rights Act affirms rights treated as immanent in existing New Zealand law. We had no transitional provisions equivalent to s 49(2) which has caused much difficulty in Victoria in application. In New Zealand, exclusion of evidence is however available as a response to Bill of Rights Act breach, even if no other illegality exists. The requirement that the courts observe the Bill of Rights Act lends support to the view that they cannot be co-opted in Bill of Rights breaches and is more pointed than the general residual public policy discretion by which evidence may be excluded in Victoria.<sup>24</sup>

As is the case with the New Zealand Act, the Victorian Charter rights are not exclusive but “in addition to other rights and freedoms” recognised under any other law “including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth”.<sup>25</sup> While many of the features of the Victorian and New Zealand legislation are similar, we have no explicit remedy of declaration of inconsistency. The New Zealand courts have, however, indicated their preparedness to make such a declaration<sup>26</sup> and the New Zealand Parliament apparently approves because such a power is directly conferred in the parallel Human Rights legislation.<sup>27</sup>

Unlike the New Zealand Act which binds all those exercising public functions to observance of the Act, the Victorian Charter opts for an institutional approach which defines a public authority (to include among other things court staff) in s 4.<sup>28</sup> It also extends the definition to parliamentary committees and courts and tribunals when they are acting in “an administrative capacity”. The illustration given that committal proceedings and the issuing of warrants by a court or tribunal are examples of a court or tribunal acting in an administrative capacity, as well as actions taken in listing cases or adopting practices and procedures would seem to provide some scope for court responsibility where for example rights are infringed because of delay in hearing cases.

The Charter does not apply to courts and tribunals except “to the extent that they have functions under Part 2 and Division 3 of Part 3”.<sup>29</sup> These strike me as provisions of some considerable difficulty in application. It seems under Part 2, which is the part dealing with the human rights recognised, that limits set by the common law and functions impinging on the rights recognised, are subject to the Charter. On that basis, the development of the common law touching on human rights in claims against public

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23 owned the bus shelter) and Adshell (the advertising company which displayed the advertising material) – so subs (3) would operate to limit Mr Magee’s right to expression.  
Section 30.

24 Evidence Act 2008 (Vic), s 138.

25 Section 5.

26 *Taylor v Attorney-General* [2014] NZHC 1630 at [82]. Taylor, a prisoner, sought a declaration that the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010 was inconsistent with the right to vote under s 12(a) of the New Zealand Bill of Rights Act. Brown J refused to strike out the claim on the basis that the Crown had not demonstrated that the Court did not have jurisdiction to issue such a declaration.

27 Human Rights Act 1993, s 92J.

28 It is notable that the Governor in Council may make regulations prescribing entities to be public authorities and not to be public authorities for the purposes of the Charter: s 46(2).

29 Section 6(2)(b).

authorities (but not in relation to private actors) would seem to be subject to the Charter. So too would the function of interpretation, which has I think the capacity to be transformative of law more generally than in direct human rights litigation because it may arise in litigation by entities which are not themselves subject to the Charter.

Section 38 of the Charter sets out what is implicit in the New Zealand Bill of Rights Act, that it is unlawful for public authorities 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”. That obligation does not apply in circumstances set out in subs (2):

- (2) Sub-section (1) 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 seems to affirm a reasonableness standard of review, although as I want to suggest, I do not think it precludes proportionality reasoning. Sub-section (3) makes it clear that the section does not apply “to an act or decision of a private nature”.

Section 39 seems to be a very difficult provision under the Charter. It permits relief on the ground of unlawfulness arising because of the Charter, but only in claims for relief or remedy against public authorities for acts or decisions which are unlawful “otherwise than because of this Charter”. This seems to permit piggy-back Charter claims but not standalone ones. But perhaps I misread the provision? Subsection (2) prevents damages because of a breach of the Charter,

but does not affect any right to damages a person might have “apart from the operation of this section”.<sup>30</sup>

Section 32 may perhaps be a wider power to interpret for compatibility than s 6 of the New Zealand Bill of Rights Act. Our s 6 requires the courts to give statutes and positive law the meaning which conforms, wherever such a meaning “can” be given.<sup>31</sup>

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**39 Legal proceedings**

- (1) 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 the ground of unlawfulness arising because of this Charter.
- (2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right—
  - (a) To seek judicial review under the Administrative Law Act 1978 or under Order 56 of Chapter 1 of the Rules of the Supreme Court; and
  - (b) To seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.
- (3) A person is not entitled to be awarded any damages because of a breach of this Charter.
- (4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.

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Section 6.

We have not used this provision as assertively as the House of Lords used its equivalent interpretive direction in *Ghaidan v Godin-Mendoza*.<sup>32</sup> In *Hansen*, we took the view that it was not possible to interpret the reverse onus of proof as setting up an evidential onus only, a view taken of similar legislation by the Victorian Court of Appeal in *Momcilovic*.<sup>33</sup> I have wondered however whether the wording of your interpretation provision permits slightly more departure from the text than we have felt ours to allow, since it is tied to the *purpose* of the provision, in what must have been a deliberate choice of language. Since purpose is usually derived from unmistakable text, the difference in wording may not perhaps be significant in practice.

Since international law is available to assist in interpreting a statutory provision under s 32(2), the ICCPR and the commentary on it by the UN Human Rights Committee is imported. The same position is reached in New Zealand by the acknowledgement in the legislation that the Act affirms New Zealand's commitment to the International Covenant on Civil and Political Rights.<sup>34</sup>

A further point of difference in interpretation is provided by s 32(3). Under the New Zealand legislation, no enactment may be held invalid or ineffective "by reason only" that the provision is inconsistent with any provision of the Bill of Rights, nor may a court decline to apply it.<sup>35</sup> "Enactment is not defined under the New Zealand Bill of Rights Act, but under the Interpretation Act 1999 "enactment" includes subordinate legislation which is otherwise amenable to judicial review.<sup>36</sup> The matter has not arisen for decision in New Zealand, but one interpretation is that a court could not invalidate subordinate legislation solely for incompatibility with the Bill of Rights Act (but might on other grounds of invalidity which might draw on the Bill of Rights).<sup>37</sup> This may be contrasted with s 32 of the Charter which appears to leave open the argument that a subordinate instrument is not valid unless it is specifically empowered to be incompatible by the Act under which it is made.

### Horizontal effect

Rights are limited in their reach by the identification in the New Zealand Bill of Rights Act of those obliged to observe them. The New Zealand legislation, unlike the South African Constitution,<sup>38</sup> does not explicitly bind those not exercising public functions. Nor does it explicitly require the judiciary to develop the common law to conform with the rights and freedoms in the Act, thus ensuring "horizontal" application. But the New

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<sup>32</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

<sup>33</sup> *Momcilovic v R* [2010] VSCA 50.

<sup>34</sup> Preamble.

<sup>35</sup> Section 4.

<sup>36</sup> Interpretation Act 1999, s 29.

<sup>37</sup> In *Drew v Attorney-General* [2002] 1 NZLR 58 (CA), the Court of Appeal construed the empowering provision consistently with the Bill of Rights in such a way that the impugned regulation was ultra vires the authorising enactment. Mr Drew was a prisoner who was penalised for a disciplinary offence under Prison Regulations. The prison regulations stated that he did not have a right to a lawyer in defending the charge. The Court held that the provision which conferred the power to make regulations was to be given a meaning consistent with the right to natural justice, protected by s 27 of the Bill of Rights, so that the regulation was ultra vires the empowering provision.

<sup>38</sup> Section 8(2).

Zealand Bill of Rights Act explicitly applies to the judicial branch of government. It also applies to acts done.<sup>39</sup>

By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

We have treated this as requiring the courts to observe human rights in exercising their functions. The stated rights may also be important as principles of interpretation or standards against which to measure reasonableness of behaviour or for the purpose in other areas of law. These are democratically conferred values declared to be “fundamental”; they are an obvious source to use when standards like “reasonableness” are invoked by the general law.

The question of horizontal effect has not been directly confronted by the appellate courts in New Zealand but they seem to have proceeded on the basis that the common law must reflect the values adopted by Parliament in the Bill of Rights Act. So, in *Hosking v Runting*, a majority in the Court of Appeal referred to such values in recognising a tort of invasion of privacy, which in the context of the case was held to outweigh freedom of information interests.<sup>40</sup> The judges in the minority in *Hosking v Runting* took the view that the rights expressed as fundamental in the Act should not be balanced against a value (privacy) which had not been included.<sup>41</sup> In *TVNZ v Rogers* however the judgments of the Supreme Court (admittedly in a case where a qualified right was in issue) proceed on the assumption that freedom of expression may justifiably be limited by the interest in protection of privacy.<sup>42</sup>

Similar horizontal effect has been accepted by the House of Lords in application of the Human Rights Act. In *Campbell v MGN* Lord Nicholls took the view that the privacy values recognised in the European Convention “are as much applicable in disputes between individuals or between an individual and a non-government body such as a newspaper as they are in disputes between individuals and a public authority.”<sup>43</sup> Lord Hoffmann thought there was “no logical ground for saying that a person should have less protection against a private individual than he would have had against the state for the publication of personal information for which there is no justification”.<sup>44</sup>

There has been little exploration in the New Zealand case law to date of the extent to which s 3(b) limits the enjoyment of rights by exempting private actors. The High Court has emphasised that it is necessary to look to the substance of the matter in a “fact-dependent” assessment of the nature of the power being exercised rather than the status of the person exercising it.<sup>45</sup> This position is similar to that reached by the minority judges in the recent United Kingdom case of *YL v Birmingham City Council*, a case in which the House of Lords divided.<sup>46</sup> This is a matter of some moment in

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39 Section 3.

40 *Hosking v Runting* [2005] 1 NZLR 1 (CA) (Gault, Blanchard and Tipping JJ).

41 At [178]-[184] and [208]-[222] (Keith J) and at [265], [267], [269] and [271] (Anderson J).

42 *TVNZ v Rogers* [2007] 1 NZSC 91, [2008] 2 NZLR 277.

43 *Campbell v MGN* [2004] 2 AC 1 (HL) at [17].

44 At [19].

45 *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 at [70] per Randerson J.

46 *YL v Birmingham City Council* [2008] 1 AC 95 (Lords Scott, Mance and Neuberger in the majority and Lord Bingham and Baroness Hale in the minority).

jurisdictions where human rights reaches “public functions”, because of the increased outsourcing of functions previously thought to be public.

The right to the observance of the principles of natural justice conferred by the New Zealand Bill of Rights Act is expected of “any tribunal or other public authority which has the power to make a determination in respect of ... rights, obligations, or interests protected or recognised by law”.<sup>47</sup> To date, the New Zealand courts have interpreted this right narrowly, confining it to bodies with “adjudicative” responsibilities.<sup>48</sup> The case law is however slight on the topic to date and it may be that there is room for some movement in a case where the point directly arises.

### **Constitutional and legal differences**

I have already adverted to differences in our constitutional arrangements. There are others which also shape different responses to the challenges thrown up by domestic human rights instruments. I want to enlarge on these differences a little. But I also want to deal with other differences both in our domestic human rights instruments themselves and in the legal cultures in which they are applied which make transposition difficult, despite the similarities in our common law heritage and the derivation of the human rights standards we observe.

I start with some constitutional differences and differences in legal culture because they are in large measure responsible for the different choices made in the domestic statutes. I do not aim to be comprehensive, but just to illustrate the point I make about the need for care with comparative legal material (a concern expressed in *Momcilovic* by French CJ and Gummow J).<sup>49</sup>

I have already mentioned the absence in New Zealand of constitutional protections for the functions of the judiciary, which mean that courts are particularly exposed when required to enter into matters of political controversy, such as through assessing statutes for compliance with fundamental values. Other important points of difference arising out of the Australian constitution which have shaped responses on human rights protection here include the implications of federalism and the strict separation of powers.

Federalism and separation of powers concerns shaped the form of the legislation in Victoria and the Australian Capital Territory. Pamela Tate, as Solicitor-General, explained the exclusion of courts in developing the common law as prompted by the federal constraints recognised by the High Court in respect of the common law of Australia.<sup>50</sup> Although this reason was criticised as implicitly limiting the authority of state legislatures, and as “an esoteric bit of human rights theory gone awry”,<sup>51</sup> it was

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<sup>47</sup> Section 27(1).

<sup>48</sup> *Chisholm v Auckland City Council* CA 32/02, 29 November 2002 at [32] per Tipping J. See also *Taunoa v Attorney-General* [2008] 1 NZLR 429 at [221] per Blanchard J and at [377] and [379] per McGrath J.

<sup>49</sup> *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1 at [20] per French CJ and at [155]–[159] per Gummow J.

<sup>50</sup> *Kable v Director of Public Prosecutions* (1996) 189 CLR 51; *Lipohar v the Queen* (1999) 200 CLR 485.

<sup>51</sup> Jeremy Gans “Evidence Law under Victoria’s Charter” (2008) 19 PLR 285, at 289-290.

accurate prediction of some of the factors that exercised the High Court in the *Momcilovic* case.

While the need to ensure harmony with the common law of Australia presents challenges for the adoption of overarching fundamental values as in a Charter of Rights, it is difficult to see how line-drawing in respect of common law development can be maintained if the legislation is to be effective.

Strict separation of powers also gives rise to very difficult line-drawing according to whether courts and parliamentary bodies are acting “administratively” rather than in their judicial or legislative capacities. Your system and those of other common law jurisdictions seem to diverge significantly on this point. It is not easy for outsiders to follow why it was possible to decide, as I think was decided in *Momcilovic*, that the power to interpret legislation is a judicial power but that a power to make a declaration of incompatibility is a non-judicial power.

Similar separation of powers concerns make advisory opinions by courts problematic in Australia – but not in Canada. In New Zealand we have an old and useful statutory jurisdiction to make declaratory judgments on the application of any one affected as to the validity or construction of any statute, regulation, by-law, deed, will, document of title, agreement in writing, memorandum or articles of association or any instrument prescribing the powers of any company or body corporate.<sup>52</sup> (In Australian law it seems this would be classified as a “non-judicial power” on the approach taken to s 36 in *Momcilovic*.<sup>53</sup>) I have not yet seen an application for a declaratory opinion about the interpretation of a statutory provision consistently with the rights and freedoms contained in the New Zealand Bill of Rights Act, but one could perhaps turn up.

The separation of powers doctrine followed in Australia sets up a further point of distinction with Canada, where a form of the *Chevron* doctrine partly explains why the Supreme Court has been more relaxed about deference to primary decision-makers in their assessments of rights-compliant determinations than has been acceptable in Australia or New Zealand.<sup>54</sup> The United Kingdom position seems to remain unsettled on application of proportionality analysis to administrative decision-making. I want to enlarge on that matter because I think it is an area of law in which we have not sufficiently integrated human rights doctrine and administrative law doctrine.

More generally, differences in our traditions of administrative law impact on the basis of review for human rights compliance of the discretionary powers conferred for public purposes. So, for example, Canadian preparedness to countenance primary agency choice is partly explained by the case-law developed by the Supreme Court of Canada

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<sup>52</sup> Declaratory Judgments Act 1908, s 3.

<sup>53</sup> *Momcilovic v R* [2011] HCA 34, (2011) 245 CLR 1 at [101] per French CJ, joined by Gummow J at [188], Hayne J at [280] and Heydon J at [457] on the point, and with the concurrence of Bell J at [661].

<sup>54</sup> *Dunsmuir v New Brunswick* 2008 SCC 91; [2008] 1 SCR 190 established that correctness and a single, context-specific reasonableness standard are the two standards applicable to review of administrative decisions. Formal distinctions between law, fact and discretion are mostly dispensed with. The deferential reasonableness standard will apply to almost all questions of fact and discretion and most questions of law.

in *Baker*, requiring reasons to be given by administrative decision-makers (allowing better supervision for rationality).<sup>55</sup>

In Canada, too, reasonableness is treated as a contextual standard (as it is increasingly recognised to be in New Zealand and the United Kingdom). Australian preference for a strict division between review and merits in administrative decision-making and insistence on jurisdictional error (admittedly understood in an increasingly broad sense) or *Wednesbury* unreasonableness may be explicable by reference to both constitutional doctrine and the Australian system of administrative appeals on the merits, but it necessarily results in divergence in addressing breaches of right by administrative decision-makers.

I do not intend to contend that any one system is to be preferred. They no doubt are each serviceable in their own domestic context and may well yield comparable outcomes for human rights overall. My point is that without insight into these differences, translation of approaches to human rights assessments from one jurisdiction to another is risky. I am not sure that we are good enough as comparative lawyers always to be sufficiently discerning in such matters.

### **Human rights and supervision of discretionary decision-making**

I raised the question whether we have sufficiently adapted administrative law principles to integrate human rights. Such integration is particularly pressing in cases where discretionary decision-making affects human rights.

In the United Kingdom, the Courts have acknowledged frankly that they are feeling their way.<sup>56</sup> In *R (ProLife Alliance) v British Broadcasting Corporation* Lord Walker said that the whole area was one where domestic jurisprudence was still developing:<sup>57</sup>

So the court's task is, not to substitute its own view for that of the broadcasters, but to review their decision with an intensity appropriate to all the circumstances of the case.

In *R (SB) v Denbigh High School*, the House of Lords took the view that whether human rights have been infringed is always a matter for objective determination by the court.<sup>58</sup> In *Belfast City Council v Miss Behavin'*, where the House of Lords backtracked in allowing choice to the primary decision-maker in controlling the location of sex shops, Lord Hoffmann criticised the administrative review approach as "tick the box" check for rationality in process potentially destructive of human rights. He also thought it "quite impractical":<sup>59</sup>

What was the Council supposed to have said? "We have thought very seriously about your Convention rights but we think that the appropriate number of sex shops in the locality is nil"? Or: "Taking into account art 10 and art 1 of the First Protocol and doing the best we can, we think that the appropriate number is nil" Would it have been sufficient to say that they had taken convention rights into account, or would they have had to specify the right ones? A construction of the

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<sup>55</sup> *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

<sup>56</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at [27] per Lord Nicholls.

<sup>57</sup> *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at [139].

<sup>58</sup> *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 (HL).

<sup>59</sup> *Belfast City Council v Miss Behavin'* [2007] UKHL 19, [2007] 1 WLR 1420 (HL) at [13].

1998 Act which requires ordinary citizens in local government to produce such formulaic incantations would make it ridiculous. Either the refusal infringed the applicant's convention rights or it did not. If it did, no display of human rights learning by the Belfast City Council would have made the decision lawful. If it did not, it would not matter if the councillors had never heard of art 10 or the First Protocol.

Where human rights are affected, it may not be adequate for a court to be satisfied the decision-maker took human rights into account and came to a decision which was rational. Where human rights are affected, it is necessary for the court to be concerned with the substantive question of compliance. Some sort of proportionality analysis seems inescapable. It is difficult to see that the Court can avoid considering whether the decision reached by the primary decision-maker that human rights were not breached is correct.

The reasoned views of the primary rule-maker may be given weight in coming to that conclusion and some choice may remain if the assessment is one of judgment if the decision-maker has adequately justified the conclusion reached. The judgment of the primary decision-maker is "always relevant and may be decisive".<sup>60</sup>

On the approach taken by Lord Bingham in *Huang v Secretary of State for the Home Department*, close assessment by the courts will however be necessary if the decision-maker has not properly addressed the human rights dimension. The court does not undertake a "secondary, reviewing function", but must itself be of the view that rights have not been infringed.<sup>61</sup>

The topic of deference in human rights has unsurprisingly attracted a great deal of academic comment. Trevor Allan has argued that a doctrine of judicial deference is "either empty or pernicious".<sup>62</sup> If prompted by separation of powers concerns it is "empty" because "that separation is independently secured by the proper application of legal principles defining the scope of individual rights or the limits of public powers".<sup>63</sup> A doctrine of deference is "pernicious" if it:<sup>64</sup>

permits the abdication of judicial responsibility in favour of reliance on the good faith or good sense or special expertise of public officials, whose judgments about the implications of rights in specific cases may well be wrong. In its latter manifestation, judicial deference amounts to the abandonment of impartiality between citizen and state: in acceding to the supposedly superior wisdom of the public agency (or of Parliament), the court is co-opted into the executive (or the legislature), leaving the claimant without any independent means of redress for an arguable violation of rights.

Allan's conclusion is that deference-talk short-circuits proper analysis and that its suggestion of a "direct linkage between deep-level constitutional theory and the

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<sup>60</sup> *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 (HL) at [12].

<sup>61</sup> At [11].

<sup>62</sup> TRS Allan, 'Human Rights and Judicial Review: A Critique of Due Deference' (2006) 65 Cambridge LJ 671 at 675.

<sup>63</sup> At 675.

<sup>64</sup> At 675–676.



resolution of particular rights-claims” generates “only confusion and misunderstanding”.<sup>65</sup>

In New Zealand, we have fluctuated in our approach. Claudia Geiringer, a close observer, takes the view that, contrary to the weight of academic authority, New Zealand case law does not support a conclusion that the Bill of Rights Act mandates proportionality review of administrative action,<sup>66</sup> although she thinks that s 5 (the New Zealand equivalent of s 7(2) of the Victorian Charter) ought to apply, as she thinks s 5 should apply to the question of interpretation (points on which I have considerable doubt).

In the *Moonen* litigation, the Court of Appeal focussed on the process followed by the Film and Literature Board of Review in making its classification that a publication was “objectionable”.<sup>67</sup> In the first case, the Court held that the Board had failed to weigh the right to freedom of expression in its determination. It remitted the classification for further consideration but indicated a proportionality approach should be applied. In the second case, after the Board’s reconsideration found the material was objectionable, the Court refused to supervise more closely than to consider whether there was evidence before the Board upon which it could have come to its conclusion and whether the determination was reasonably open to it. This approach is similar to that taken in the English Court of Appeal in *Denbigh High School* (and repudiated by the House of Lords) and is similar to the approach taken by the minority in the Canadian Supreme Court in *Multani v Commission Scolaire Marguerite-Bourgeoys*.<sup>68</sup>

Geiringer takes the view that the New Zealand courts have not settled whether their approach to review of administrative action for rights compliance is the *R v Oakes* approach taken to proportionality review in Canada or the sort of overall weighing favoured in the early case of *Noort* by Richardson J and, she suggests, now mandated by s 7(2) of the Victorian Charter.

Section 7(2) requires a proportionality assessment, although the formal steps do not follow the sequencing in *Oakes* in which each step must be fulfilled. It permits overall assessment, although failure to meet the conditions identified surely makes it difficult to show compliance with human rights.

In New Zealand cases where a judgment as to compliance with rights turns on mixed questions of interpretation and fact (the assessment of behaviour as disorderly or offensive for example<sup>69</sup>) the courts have supervised powers closely, not deferring to the arresting constable’s assessment. In the case of reasoned decisions taken under statutory authority, however, the standard of supervision may be less straitened. That approach would seem now to be accepted in Canada,<sup>70</sup> in reversion to the view taken

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<sup>65</sup> At 676.

<sup>66</sup> Claudia Geiringer “Sources of Resistance to Proportionality Review of Administrative Power under the New Zealand Bill of Rights Act” (2013) NZJPIL 123.

<sup>67</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA); *Moonen v Film and Literature Board of Review (No 2)* [2002] 2 NZLR 754 (CA).

<sup>68</sup> *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 (Deschamps, Abella and Le Bel JJ).

<sup>69</sup> *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 (“disorderly behaviour”); *Morse v Police* [2011] NZSC 45; [2012] 2 NZLR 1 (“offensive behaviour”).

<sup>70</sup> *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395.

by the minority in *Multani*. It arises however against the background already referred to of a degree of comfort with agency interpretation of their legislation, not a tradition with which we in Australia and New Zealand are particularly comfortable. So, in *Commerce Commission v Air New Zealand*, the Court of Appeal applied proportionality reasoning in interpretation but, having found the power to be available, retreated into standard judicial review.<sup>71</sup>

I am not convinced that the methodology of administrative law and review for rights-compliance should diverge. But that is on the basis of the variable standard of reasonableness which takes its colour from the context that rights are affected. In effect, that may well require application of proportionality analysis to ensure that rights are not unnecessarily eroded. Proportionality is part of what reasonableness requires in that context.

As indicated, I consider there is room to place weight on the reasons given by a primary decision-maker, especially where the decision is a matter of expert judgment. It is also possible that in a particular case there are different outcomes that are rights-compliant in which the views of the primary decision-maker may be accepted without the need for the Court to undertake its own assessment of correctness. It is however one thing for the courts to find the reasoning of the primary decision-maker convincing, and it is quite another thing to defer to that agency in matters of rights unless its conclusion is irrational. In matters of very great moment affecting rights, even a supervisory jurisdiction may require a standard of correctness, as the Canadian Supreme Court recognised in *Dunsmuir v New Brunswick*.<sup>72</sup>

In *Doré*, Abella J for the Supreme Court drew a distinction between cases where the Court was assessing rights-compliance of binding rules of general application, and those where discretionary decision-making was being assessed for compliance with rights. In the first a standard of correctness was appropriate. In the second the standard was reasonableness, assessed “in the context of the particular type of decisionmaking involved and all relevant factors”.<sup>73</sup> The analysis was said by Abella J in *Doré* to require “both decisionmakers and reviewing courts ... [to] remain conscious of the fundamental importance of Charter values in the analysis”.<sup>74</sup> That the assessment is still one of proportionality was made clear by Abella J. The decision-maker must ask how the Charter values in issue are best protected in view of the statutory objectives.<sup>75</sup>

This is at the core of the proportionality exercise, and requires the decisionmaker to balance the severity of the interference of the Charter protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context.

The “proportionality test” is satisfied if the measure “falls within a range of possible, acceptable outcomes”.

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<sup>71</sup> *Commerce Commission v Air New Zealand* [2011] NZCA 64, [2011] 2 NZLR 194.

<sup>72</sup> *Dunsmuir v New Brunswick* 2008 SCC 91, [2008] 1 SCR 190.

<sup>73</sup> *Catalyst Paper Corp v North Cowichan (District)* 2012 SCC 2, [2012] 1 SCR 5 at [18] per McLachlin CJ.

<sup>74</sup> *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395.

<sup>75</sup> At [56].

If the right in issue is internally qualified (as in the “disproportionately severe treatment” in issue in the prisoner rights case in New Zealand of *Taunoa*), then there is no further room for proportionality analysis and further balancing.

What is more controversial is the question whether human rights can be limited to protect values or principles which advance social or government policy but which cannot be ranked as fundamental or as human rights in themselves. In a number of New Zealand cases justifiable limits have been assumed to arise from interests not equivalent to human rights or fundamental constitutional principles. Some greater focus may be necessary. In the United Kingdom, Professor Ashworth has criticised decisions that seem to favour “broad balancing” of rights against other less fundamental public interests.<sup>76</sup> Jeremy Waldron, however, accepts that many conflicts between rights and utility as well as between rights are best addressed by balancing – although he stresses the need for care, context and relativity in time and place.<sup>77</sup> Some academic commentators assume that the values advanced in limitation of rights must be of the same rank, thus setting up “intra-constitutional conflict”.<sup>78</sup> But this does not seem to be the prevailing view in the courts, although it perhaps gets some support from the wording of s 7 of the Victorian Charter.

## Remedies

In both Canada and the United Kingdom, the Court is empowered to grant such remedy as is “appropriate and just”.<sup>79</sup> Although the New Zealand Bill of Rights Act is silent on the question of remedies, the courts have drawn on the obligations in the ICCPR to provide “effective remedy” to develop a range of responses, including a remedy of damages.<sup>80</sup> They have also indicated a willingness to make declarations of incompatibility in appropriate cases, despite the s 4 requirement that the courts must give effect to incompatible legislation. What is required for vindication is contextual. In some cases exclusion of evidence may be sufficient redress. In others it may not be available<sup>81</sup> or may provide incomplete response to the breach of rights.<sup>82</sup>

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<sup>76</sup> Andrew Ashworth *Human Rights, Serious Crime and Criminal Procedure* (2002) at 62-64. He cites *Salabiaku v France* (1988) 13 EHRR 379.

<sup>77</sup> Jeremy Waldron “Rights in Conflict” in *Liberal Rights* (1993) 203 at 223; Jeremy Waldron “Security and Liberty: The Image of Balance” (2003) 11 *The Journal of Political Philosophy* 191.

<sup>78</sup> Stone, Sweet and Matthews “Proportionality Balancing and Global Constitutionalism” (2008) *Columbia Journal of Transnational Law* 1.

<sup>79</sup> Canadian Charter, s 24(1); Human Rights Act 1998 (UK) s 8(1).

<sup>80</sup> See, for example, *Simpson v Attorney-General [Baigent's case]* [1994] 3 NZLR 667 and *Taunoa v Attorney-General* [2007] NZSC 70; [2008] 1 NZLR 429. *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 prevents an award of damages where the breach of rights is due to judicial action.

<sup>81</sup> This is perhaps because discretionary powers to admit evidence notwithstanding illegality are used. In New Zealand, the Evidence Act enacted in 2006 following a reversal by the Court of Appeal of its previous policy of prima facie exclusion of evidence obtained in breach of the Bill of Rights, now adopts the balancing proposed by the Court of Appeal. The exclusion of evidence under s 30 must be “proportionate”, balancing “the impropriety” and taking “proper account of the need for an effective and credible system of justice”. The factors identified by the legislation as bearing on this calculus include “the importance of any right breached by the impropriety and the seriousness of the intrusion on it”, “the nature and quality of the improperly obtained evidence” and “the seriousness of the offence with which the defendant is charged”. This methodology may well be adopted in relation to other responses to breaches of rights. If so, some see a danger that the fundamental values in the Bill of Rights Act will be undermined by expediency in the result.

Again, the case law on remedies is surprisingly little developed yet in New Zealand. Some cases, for example, treat the remedy of damages as a residual remedy. Damages ordered have generally been described as “modest”,<sup>83</sup> in borrowing from English authorities influenced by the approach of the European Court of Human Rights without much consideration of whether the context warrants such transplantation. These matters need much more considered responses.

Section 39 of the Victorian Charter seems to me to provide some incentive to reconsider the application of human rights in the context of other causes of action. I have recently had occasion to consider the intersection between the torts of misfeasance in public office and false imprisonment in connection with rights.

The ancient tort of misfeasance in public office has been given new life in major decisions in Australia,<sup>84</sup> New Zealand,<sup>85</sup> England<sup>86</sup> and Canada.<sup>87</sup> In its most recent restatement by the Canadian Supreme Court it has been defined as “deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff”.<sup>88</sup> In jurisdictions with remedies for breaches of rights, the basis of reconciliation of the tort with remedies for breach of the right remains uncertain.

New Zealand breaches of the Bill of Rights Act have been treated as a category of public law compensation. A path not taken was to build on the tort of misfeasance in public office. If that approach had been taken, the remedy would not have been discretionary, as Bill of Rights damages are in New Zealand. An open question is whether in cases of misfeasance in public office which also entail breaches of the Bill of Rights Act the Bill of Rights Act breach can be taken into account in the damages awarded and, if so, whether proof of damage will remain necessary irrespective of the breach of the right, as the House of Lords has affirmed for the England and Wales in *Watkins v Secretary of State for the Home Department*.<sup>89</sup> At present, however, at least in my jurisdiction, Bill of Rights compensation stands apart.

Although breach of statutory duty is often said to be simply a matter of statutory interpretation, its status as a tort empowers those who are wronged by non-observance of a duty the statute confers upon them. Wade and Forsyth have suggested that Human Rights damages which are available under the UK Act can be seen as a species of breach of statutory duty. That path was also not taken in New Zealand, where the statute was silent on the provision of such a remedy and the legislative history indicated that had been a deliberate decision.<sup>90</sup> Nor has the

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<sup>82</sup> See for example *TVNZ v Rogers* [2007] 1 NZSC 91, [2008] 2 NZLR 277.

<sup>83</sup> See, for instance, *Attorney-General v Taunoa* [2006] 2 NZLR 457 (CA) at [164]–[168] (CA) per O’Regan J for the Court; *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA) at [210] per Hammond J, dissenting.

<sup>84</sup> *Mengel v Northern Territory* [1995] HCA 65, (1995) 185 CLR 307.

<sup>85</sup> *Garrett v Attorney General* [1997] 2 NZLR 332 (CA).

<sup>86</sup> *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 (HL).

<sup>87</sup> *Odhavji Estate v Woodhouse* 2003 SCC 69, [2003] 3 SCR 263.

<sup>88</sup> At [23].

<sup>89</sup> *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395.

<sup>90</sup> Nevertheless, in *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) the Court of Appeal awarded public law damages for breach of the New Zealand Bill of Rights Act.

idea been picked up in England and Wales. Whether it has more scope in Victoria, given the terms of s 39 is something that remains to be seen. It faces the hurdle of s 39(3) and how it is to be reconciled with s 39(1).

The tort of false imprisonment will often occur in circumstances of human rights breach. The tort is committed when someone is detained or imprisoned without lawful justification<sup>91</sup> and is of strict liability, so is not excused by belief that the detention is lawful.<sup>92</sup> Although not confined to public office holders, officials are those principally exposed to liability under the tort. Wrong calculation of release dates<sup>93</sup> or undue delay in bringing a prisoner before the court<sup>94</sup> will trigger false imprisonment.

Some cases in England have considered whether mistreatment or more stringent confinement than is authorised by law constitutes false imprisonment. To date, the view has been taken that these do not constitute false imprisonment on the basis that there is no entitlement to release and no residual liberty interests in those circumstances.<sup>95</sup>

Whether the reluctance to extend liability in tort will ease under the influence of the Human Rights Act is not clear. In New Zealand that may depend on whether remedy under the Act is considered to be sufficient, the view tentatively expressed by the New Zealand Court of Appeal in a claim for negligence as well as Bill of Rights compensation.<sup>96</sup> On the other hand, in the case in which the New Zealand Court of Appeal first awarded damages for breach of the Bill of Rights, *Baigent's case*, Gault J (who dissented from the decision of the Courts to grant a remedy in damages for breach of the Bill of Rights Act) thought that the tort of false imprisonment might well have to develop under the influence of the Bill of Rights Act to deal with cases of failure to charge promptly, or provide access to counsel, or other breaches of rights.<sup>97</sup> So far, that suggestion has not been taken up. In Victoria, the argument may gain some impetus from the wording of s 39(1) and the removal of opportunity to award damages directly for breach of the Charter.

It must be expected that in many cases where officials are liable in tort there will be associated Bill of Rights Act breaches. The compensation awarded in New Zealand under the Bill of Rights Act is discretionary and available only where other remedies (declarations, exclusion of evidence and so on) are not sufficient to mark the breach of rights. In *Taunoa*,<sup>98</sup> a case where there was no private law cause of action brought, the New Zealand Supreme Court emphasised the public law nature of the compensation remedy adopted in *Baigent's case*. Three of the judges thought that compensation might be appropriate to mark the public interest in vindication of rights

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But such damages are discretionary and available only where other remedies are not sufficient to mark the breach of rights.

<sup>91</sup> *Willis v Attorney-General* [1989] 3 NZLR 574 (CA) at 579.

<sup>92</sup> *R v Governor of Brockhill Prison ex parte Evans* [2001] 2 AC 19 (HL).

<sup>93</sup> *R v Governor of Brockhill Prison ex parte Evans* [2001] 2 AC 19 (HL).

<sup>94</sup> *Whithair v Attorney-General* [1996] 2 NZLR 45 (HC).

<sup>95</sup> *R v Deputy Governor of Parkhurst Prison, ex parte Hague; Weldon v Home Office* [1992] 1 AC 58 (HL). The New Zealand Court of Appeal indicated some support for the decision in *Hague* in *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) at [101].

<sup>96</sup> *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA) at 350.

<sup>97</sup> *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) at 711.

<sup>98</sup> *Taunoa v Attorney-General* [2007] NZSC 70; [2008] 1 NZLR 429.

even if full compensation had been provided in tort to the person wronged. A majority of the Judges considered that compensation for Bill of Rights breach should be “moderate” and should not “generally approach the level of damages in tort”.<sup>99</sup> There has been some disagreement in first instance decisions in New Zealand about whether the measure of damages may differ according to whether there was no power to arrest or whether an arrest failed to follow the correct procedure,<sup>100</sup> echoing the issues that exercised the United Kingdom Supreme Court in *Lumba*.

Under the Canadian Charter, too, remedies for breach of the Charter rights are those the court considers “just and appropriate in the circumstances”.<sup>101</sup> The Supreme Court of Canada has made it clear that the existence of a claim in tort does not bar a claimant from obtaining damages under the Charter. But such damages must not lead to a doubling up of compensation and seem also to be modest.<sup>102</sup> The remedy is positioned in public law. McLachlin CJ identified any damages awarded under s 24(1) of the Charter as serving the objectives of “(1) compensating the claimant for loss and suffering caused by the breach; (2) vindicating the right by emphasizing its importance and the gravity of the breach; and (3) deterring state agents from committing future breaches”.<sup>103</sup> She considered that vindication underlines the seriousness of the harm to the claimant, but is also marks “the harm the *Charter* breach causes to the state and to society”.<sup>104</sup>

In *Lumba* the United Kingdom Supreme Court divided on the question whether breach of the Human Rights Act should be marked by an award of “vindicatory damages” in addition to the nominal damages award made in respect of the claimant’s false imprisonment.<sup>105</sup> The Judges in the minority would have made a modest conventional award of £1,000. Despite majority rejection of the “causation defence” to liability for false imprisonment, a majority in the Supreme Court considered that the fact that the detention would inevitably have been lawfully imposed meant that the plaintiff was entitled to nominal damages only. They were of the view that there was no occasion to introduce a new category of “vindicatory damages” to the established categories of compensatory damages (including nominal damages for a trespassory tort where no loss could be shown) and exemplary damages. Lord Dyson explained that the “unruly horse” of “vindicatory damages” was not one to be set loose on “our law”:<sup>106</sup>

It is one thing to say that the award of compensatory damages, whether substantial or nominal, serves a vindicatory purpose: in addition to compensating a claimant’s loss, it vindicates the right that has been infringed. It is another to award a claimant an additional award, not in order to punish the wrongdoer, but to reflect the special nature of the wrong. As Lord Nicholls made clear in

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<sup>99</sup> At [265] and [258] per Blanchard J.

<sup>100</sup> *Attorney-General v Niania* [1994] 3 NZLR 106 and *Caie v Attorney General* [2005] NZAR 703 (HC).

<sup>101</sup> Canadian Charter, s 24(1).

<sup>102</sup> See *Vancouver (City) v Ward* 2010 SCC 27, [2010] 2 SCR 28, where the award of \$5,000 to mark the Bill of Rights breach in respect of a strip search was upheld in addition to the \$5,000 in general damages for false imprisonment.

<sup>103</sup> At [31].

<sup>104</sup> At [28].

<sup>105</sup> *R (Lumba) v Secretary of State for the Home Office* [2011] UKSC 12, [2012] 1 AC 245.

<sup>106</sup> At [100]–[101].

*Ramanoop*, discretionary vindictory damages may be awarded for breach of the Constitution of Trinidad and Tobago in order to reflect the sense of public outrage. ... It is a big leap to apply this reasoning to any private claim against the executive.

... In my view, the purpose of vindicating a claimant's common law rights is sufficiently met by (i) an award of compensatory damages, including (in the case of strict liability torts) nominal damages where no substantial loss is proved; (ii) where appropriate, a declaration in suitable terms; and (iii) again, where appropriate, an award of exemplary damages. There is no justification for awarding vindictory damages for false imprisonment to any of the [plaintiffs].

Whether over time the view that tort damages and Bill of Rights responses are different will remain is open to question. As is the evolution of the private law torts to better reflect the private human right. In Victoria you may have particular reason to look closely at the remedies available in tort law.

### **Concluding thoughts**

That leads in to some final general points about judicial methodology in cases concerning rights.

The former reluctance in Australia about adopting variable intensity review or proportionality analysis may be modifying under the High Court's recent emphasis on contextualism. In New Zealand the development was underway long before adoption of the New Zealand Bill of Rights Act.<sup>107</sup> What is at stake has long been acknowledged to affect the intensity of judicial supervision. But human rights sharpens the focus. Section 7(2) of the Charter sets up proportionality methodology. It is I think accurate and indeed natural to use proportionality reasoning when justifying interference with rights. It seems obvious to say that what are expressed as fundamental rights, essential to human dignity and equality, should not be interfered with unless the interference is justified by some commensurate pressing need and then only to the extent necessary.

Although it was argued by Jowell and Lester many years ago that proportionality is immanent in the common law, so far Lord Diplock's prediction that proportionality would emerge as a general ground of review<sup>108</sup> has not been generally acknowledged outside human rights. Greater familiarity may now change that.<sup>109</sup> While there is some truth in the charge that proportionality analysis dazzles with a show of objective rationality,<sup>110</sup> it provides structure against which decisions may be increasingly organised. Former habits of decision-making may need to shift.

Outcomes need careful justification. Lorraine Weinrib has said of the post-war constitutional paradigm, based on adoption of human rights instruments the onus of substantive justification is not satisfied if the State simply asserts "plenary political

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<sup>107</sup> Paul Craig *Administrative Law* (7th ed, Sweet and Maxwell, London, 2012) at 536-537.

<sup>108</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410.

<sup>109</sup> See, for example, Paul Craig "Proportionality, Rationality and Review" [2010] NZ Law Rev 265.

<sup>110</sup> Mark Aronson and Matthew Groves *Judicial Review of Administrative Action* (5th ed, Thomson Reuters, Sydney, 2013) at [6.520].

authority, promotion of the public good, fidelity to traditional moral values or social roles, or financial constraints”.<sup>111</sup>

If justification for limitations on rights is centre-stage (as it is now in New Zealand even where legislation is interpreted for consistency with human rights), then these concepts need to be unpicked. We need to grapple with the circumstances in which the courts will have to consider matters of “legislative fact”, as the Crown sought to put before the New Zealand Supreme Court in *Hansen v R*. And we need to work harder than expressing overall conclusions because we think the considerations we are required to balance are incommensurable.

The problems of incommensurability can be exaggerated. Overcoming them does however require judges to be prepared to make value judgments in context. One commentator makes the point:<sup>112</sup>

[W]e probably do not believe in complete incommensurability between constitutional values. Few would view with indifference a massive loss of liberty for a marginal gain in national security. Our problem is not that the values are incommensurable but that relative assessments can only be carried out in a crude manner.

The crudeness of the assessment is too often exacerbated, however, by balancing judgments which are “under-written”, jumping straight to conclusions and drawing on the sort of utilitarian calculus that is easier than engagement with wider values. Justification of limitations on rights and determinations that actions taken in the exercise of public functions comply or do not comply with human rights is work that requires careful exposition.

We need to look more closely at the help at hand, such as the statutory texts we work with and the instruments they draw on and reflect. The architecture of the European Convention, for example, constrains and defines the degree to which competing interests may limit rights. Non-derogable rights on this view can never give way to public interest considerations and qualified rights are subject to interference only if one of the stated grounds applies. In between the two are what Ashworth calls “strong rights” – those which are derogable but not specifically qualified.<sup>113</sup> This is the sort of analysis that a conscientious court needs to bring to the determination of whether limitations are permissible or justified.

It is also necessary for a court dealing with these difficult matters to engage with the fundamental values in the legal order. Equality, dignity, what is bedrock in “a free and democratic society.” This is not the sort of work with which judges in our positivist tradition have traditionally been comfortable. So, the White Paper that preceded enactment of the New Zealand Bill of Rights Act explained the omission of a general right to equality in the rights contained in the Bill as being unnecessary because

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<sup>111</sup> Lorraine Weinrib “The Postwar Paradigm and American Exceptionalism” in Choudhry (ed) *The Migration of Constitutional Ideas* (2006) 84 at 96.

<sup>112</sup> Julian Rivers “Proportionality and Variable Intensity of Review” (2006) 65 Cambridge LJ 174 at 201.

<sup>113</sup> *Human Rights, Serious Crime and Criminal Procedure* (2002), p 97.



equality is an aspect of the rule of law,<sup>114</sup> itself a fundamental value in the constitutional order. Such values immanent in our legal traditions may need to be brought into human rights evaluations. To date, there has been little exploration of these values in human rights cases, with the exception of privacy.<sup>115</sup> They plug into a wider world of ideas and scholarship than our generally pragmatic, unintellectual preferences usually admit.

When I started practising law in New Zealand more than forty years ago, human rights were something invoked overseas, not at home. We were proud of our common law heritage and the protections it offered for freedom under law. In a protest case in New Zealand in 1962, one of our senior judges said that the right to protest was “one of the most precious of our individual freedoms” and that “[i]t needed no Charter of the United Nations to make it acceptable to us; it has long been part of our way of life”. The New Zealand Supreme Court recently had occasion to differ<sup>116</sup> from the conclusion he came to in balancing this “most precious of our freedoms” with a right of the Speaker of Parliament to entertain guests “unembarrassed by unseemly behaviour”.<sup>117</sup> I do not think the complacency about rights then was justified. But much more importantly than that, in our representative democracies, the view has been taken that human rights need to be acknowledged and observed as fundamental. As I have suggested, that can only have been because they have authentic popular support. The role assigned to judges in these initiatives is not perhaps the main point. These are points of reference for everyone and their statement in accessible form is clearly thought to be valuable in itself. Such statements of rights do provide organising principles which are democratically conferred and of genuine assistance in better judging. It is exasperating when it is suggested that judges are behind these statements and keen for the power on offer. Any judge working in this area knows this imposed obligation is very hard work indeed and does not conceive of the function exercised in terms of power. As I have tried to point out, it requires deep engagement with the domestic legislation and domestic traditions. Although convergence over the long haul may provide the comfort of analogy and a more beaten track, there is considerable work to be done to get there.

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<sup>114</sup> *A Bill of Rights for New Zealand, A White Paper* (1985), p 86.

<sup>115</sup> See, for example, *Brooker v Police* [2007] NZSC 30, [2007] 2 NZLR 22 and *Lange v Atkinson* [1997] 2 NZLR 22 (HC) and [1998] 3 NZLR 424 (CA).

<sup>116</sup> *Brooker v Police* [2007] NZSC 30, [2007] 2 NZLR 22.

<sup>117</sup> *Melser v Police* [1967] NZLR 437 (CA) at 445–446 per McCarthy J.