INCORPORATION OF HUMAN RIGHTS IN ADMINISTRATIVE DECISION-MAKING: THE IMPACT OF HUMAN RIGHTS INSTRUMENTS IN VICTORIA AND THE ACT

Joanna Davidson*

The *Victorian Charter of Human Rights and Responsibilities Act 2006* (the '*Victorian Act'*) and the *ACT Human Rights Act 2004* (the '*ACT Act'*) impose obligations on public authorities to act compatibly with human rights and to give proper consideration to relevant human rights when making decisions.[1] Failure to comply with the obligations can be a basis for legal proceedings to challenge an act or decision of a public authority. In the ACT there is a direct cause of action for breach of the obligations.[2] In Victoria, breach of the obligations potentially gives rise to new grounds upon which to seek judicial review of the decision.[3]

This paper considers how the obligations may operate in practice and how they may impact upon review of decisions by courts.

The obligations

Section 38 of the *Victorian Act* provides:

> (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
>
> (2) Subsection (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.
>
> Example: Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.

Section 40B of the *ACT Act* provides:

> (1) It is unlawful for a public authority—
>
> (a) to act in a way that is incompatible with a human right; or
>
> (b) in making a decision, to fail to give proper consideration to a relevant human right.
>
> (2) Subsection (1) does not apply if the act is done or decision made under a law in force in the Territory and—

* *Joanna Davidson is Special Counsel, Human Rights, Victorian Government Solicitor's Office.* *This paper was presented at the AIAL 2011 National Administrative Law Conference. Canberra, 22 July 2011.*

(a) the law expressly requires the act to be done or decision made in a particular way and that way is inconsistent with a human right; or

(b) the law cannot be interpreted in a way that is consistent with a human right.

Note: A law in force in the Territory includes a Territory law and a Commonwealth law.

Each of the Acts imposes a substantive obligation (to act compatibly with human rights) and a so-called procedural obligation (to give proper consideration to relevant human rights). However, neither obligation can override a legislative provision. Public authorities must give effect to legislation[4] even if it is incompatible with human rights. The provisions are intended to preserve the sovereignty of Parliament,[5] an important feature of the models adopted by Victoria and the ACT.

The substantive obligation

In the author's view, the question of (in)compatibility with human rights must be determined by reference to the terms of the right in question and whether it is reasonable in the particular circumstances to limit the right.

The terms of the right

Each right contains terms which must be interpreted in order to determine whether the right covers the conduct in question.

All rights contain terms that define whether or not the right is engaged or triggered in the particular circumstances. For example, the right to a fair hearing applies to civil proceedings and to criminal charges. In other jurisdictions, the question of whether there is a criminal charge which will engage or trigger the fair hearing right is not determined by the classification in domestic law but has regard to the substance of the law. In Victoria, the courts have so far taken an expansive view of what is regarded as a 'civil proceeding', with the potential for the right to be engaged by certain administrative decision-making.[6]

Many rights also contain terms that define the extent of the right. These terms are often referred to as 'internal limitations'. Accordingly, the right to a fair hearing applies to the determination of all criminal charges but only requires a 'fair' hearing. The question of whether a hearing is 'fair' has regard to the triangulation of the interests of the accused, the victim and society. It does not require a trial with the most favourable procedures for the accused.[7]

Reasonable limitations

Section 7(2) of the *Victorian Act* and s 28 of the *ACT Act* provide that human rights may be subject only to reasonable limits that can be demonstrably justified in a free and democratic society. The Acts set out a number of factors that are to be taken into account in assessing reasonableness:

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

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

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

In my view, a public authority only acts incompatibly with a human right if it imposes a limit on the right that does not satisfy the general limitations provisions in the relevant Act. Whatever may be said about the interpretive rule, the extrinsic material with respect to the *Victorian Act* makes clear that where a right is reasonable and demonstrably justified in a free and democratic society by reference to the factors in s 7(2), 'then action taken in accordance with that limitation will not be prohibited under the Charter Act, and is not incompatible with the right'.[8] This appears to be accepted by the majority of the High Court in *Momcilovic v The Queen.*[9] As Bell J explained:[10]

> One reason for concluding that compatibility with human rights for the purposes of the Charter is to be understood as compatibility with the rights as reasonably limited under s 7(2) is the improbability that Parliament intended to make unlawful the demonstrably justified acts of public authorities which reasonably limit a Charter right.

I acknowledge that some commentators have argued that the question of compatibility should be determined by reference only to the terms of the right, and not by reference to the reasonable limitations provision. Others have questioned whether the courts should be involved in assessing compatibility by reference to internal limitations. Concerns have been raised about the extent of evidence required to be called in order to consider whether a limit upon a right is reasonable,[11] and that determination of such issues involves policy questions that courts may be ill-equipped to handle. In my view, such concerns are overstated.

As to the role of evidence, the Court of Appeal in *R v Momcilovic* appears to have adopted the Canadian approach to the type of evidence that may be required in order to justify a limit upon a right imposed by legislation.[12] This approach can be contrasted with that of the United Kingdom courts where a more restrictive and pragmatic approach is taken to justificatory material.[13]

Whatever approach is taken with respect to justifying legislative restrictions upon rights, the same concerns do not arise in respect of justifying limitations imposed by a public authority. In such cases, the courts will have access to direct evidence from the public authority as to the reasons for the limitation in the particular circumstances.

As to the potential for a reasonable limits analysis to intrude inappropriately upon the role of the executive in making social policy decisions, as I explain later in this paper, there are existing administrative law principles that can be applied in the human rights context in order to maintain an appropriate balance between the respective branches of government.

The procedural obligation

While the substantive obligation is similar to obligations in comparable human rights instruments, the obligation to give 'proper consideration' to relevant human rights is unique to the Victorian and ACT Acts.

In other jurisdictions, the focus is on substantive compliance with rights. Provided the outcome is compatible with human rights, it does not matter that the public authority did not properly consider human rights or even that the public authority failed altogether to consider human rights. However, the absence of an express procedural obligation does not mean that public authorities in other jurisdictions can feel free to ignore human rights in decision-making. As I explain later in this paper, courts in other jurisdictions have developed principles of affording 'deference', 'weight' or 'margin of discretion' to the primary decision

maker in order to maintain an appropriate balance between the courts and the executive. Where public authorities have given careful consideration to human rights at the time of making the decision, the decision is much more likely to survive scrutiny by the courts.

There are a number of questions that arise with respect to the procedural obligations in the Victorian and ACT Acts.

Firstly, to what 'decisions' will the obligation apply? Will it apply to all decisions made by public authorities, including day to day operational decisions?

Secondly, what is meant by proper consideration? In my view, as with natural justice and procedural fairness, what will be required will depend on the circumstances and, especially so, if 'decision' is given a broad meaning.

Case law concerning 'proper consideration'

Victoria

The leading case in Victoria in respect of the obligation to give proper consideration to human rights is *Castles v Secretary to the Department of Justice ('Castles')*. [14] The case involved a prisoner who sought declaratory relief to enable her to resume the IVF treatment she underwent prior to her incarceration. In determining whether the decision to deny the plaintiff access to the treatment was unlawful, Emerton J undertook a detailed examination of the 'proper consideration' limb of s 38 of the *Victorian Act*.

Emerton J considered the scope of the obligations in s 38 and recognised its potential to apply to a wide range of decisions at all levels of government. In light of the fact that consideration of human rights is intended to become 'a 'common or garden' activity for persons working in the public sector, both senior and junior … proper consideration of human rights should not be a sophisticated legal exercise'.[15] Emerton J considered that:

> Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.

Her Honour concluded that while 'proper consideration' entails that the public authority must do more than simply pay lip-service to *Victorian Act* rights and the terms of s 7, it does not require a comprehensive or detailed analysis:[16]

> While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.

As to whether the decision of the Secretary of the Department of Justice met the requirements of s 38, Emerton J held: [17]

> I am satisfied that the Secretary gave proper consideration to Ms Castles' human rights from the detailed manner in which the competing interests of Ms Castles and what could be described as public interests are weighed up in the briefings that were sent to her, along with the Secretary's own statement that she considered Ms Castles' human rights and weighed them against the rights and obligations imposed by the Corrections Act in making her decision.

Emerton J gave further consideration to the s 38 obligation in *Giotopolous v Director of Housing.* The case concerned an appeal from a decision of the Victorian Civil and Administrative Tribunal ('VCAT') to decline to order the respondent to enter into a tenancy agreement with the applicant under s 232 of the *Residential Tenancies Act 1997* ('*RT Act*').[18] In the course of its decision to decline the appellant's application, VCAT had concluded that, because s 233 operated to enhance a person's rights rather than to limit them, Charter rights were not engaged at all.[19] Emerton J held that that constituted an error on the part of VCAT: the decision to make or not to make a tenancy order did engage the right to non-interference with the tenant's home and family and their entitlement to be protected by society and the State.[20] Emerton J then proceeded to consider whether VCAT had given proper consideration to the rights of the appellant and, in doing so, her Honour applied the test previously outlined in *Castles*.

Her Honour first noted that 'the obligation imposed by s 38(1) is distinct from and additional to the obligation to interpret legislation compatibly with human rights, as required by s 32 of the Charter'.[21] Turning to the decision of VCAT, Emerton J noted that '[n]owhere in its reasons does the Tribunal expressly consider the obligation to act compatibly with human rights in exercising the discretion under s 233 of the [RT] Act'.[22] Her Honour continued:[23]

> The Tribunal, despite this error [its decision that Charter rights were not engaged] purported to carry out a proportionality analysis in relation to interference in home and family in the penultimate paragraph of its reasons. This analysis, which consists almost entirely of a recitation of the terms of s 7(2) of the Charter would, if taken in isolation, have been insufficient to satisfy the requirements of s 38(1) of the Charter…I note however, that there was considerable material before the Tribunal to enable the proportionality analysis to be undertaken and that the Tribunal, in identifying and comparing the respective hardships of Mr Giotopoulos and the Director, went some way to analysing whether the refusal to grant a tenancy order and give Mr Giotopolous security of tenure would be 'justified' in the relevant circumstances of this case.

The case illustrates that substantive consideration of human rights, through identifying and weighing the competing interests at issue, is likely to be more important to satisfying the procedural obligation than formal recitation of the provisions of the *Victorian Act*.

In *Patrick's Case,*[24] Bell J agreed with the comments of the Court in *Castles*[25] and reinforced the view that the consideration of human rights required by s 38 can be done in a variety of ways to suit the particular circumstances. Referring to United Kingdom authority, Bell J noted that decision-makers 'are not expected to approach the application of human rights like a judge "with textbooks on human rights at their elbows"'.[26]

However, Bell J makes some comments which suggest that the requirement to give proper consideration is not merely a procedural one. In respect of the 'so-called procedural obligation', Bell J observed that:

> A consideration by the person who did the act or made the decision will not be 'proper', however seriously and genuinely it was carried out, if the act or decision is incompatible with human rights in terms of s 7(2).

Australian Capital Territory

As in Victoria, there has been relatively little jurisprudence in the ACT in respect of the public authority obligations.

Section 40 B of the *ACT Act* was considered in *Canberra Fathers and Children Services Inc v Michael Watson.* [27] The case raises a number of interesting and controversial issues with respect to the appropriateness of Administrative Tribunals scrutinising decisions for compliance with the obligations in s 40B of the *ACT Act*; these are beyond the scope of this paper. It nevertheless illustrates the potential role that internal guidelines and policies may

play in ensuring compliance with the public authority obligations and evidencing that compliance.

The case concerned an attempt by Canberra Fathers and Children Services Inc ('CANFaCS'), a community organisation which provides emergency accommodation for fathers and their children, to terminate an occupancy agreement with the respondent. The respondent had refused to vacate the subject premises and CANFaCS applied to the Australian Capital Territory Civil and Administrative Tribunal ('ACAT') for a termination and possession order. The respondent argued that CANFaCS's decision contravened the right to privacy in s 12 of the *Human Rights Act 2004* (ACT). That section states:

> Everyone has the right—
>
> (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily…

ACAT began its inquiry by noting that, as a public authority, it was required to give proper consideration of relevant human rights.[28] On this basis ACAT considered it was able to enquire into whether the primary decision maker, also a public authority, had acted compatibly with and given proper consideration to relevant human rights, particularly in giving the notice to vacate.

The right to privacy in s 12 of the *Human Rights Act 2004* (ACT) operates to provide persons with protection from arbitrary interferences. As ACAT observed, interference will not be arbitrary 'if it is governed by clear pre-existing rules and by procedures that are predictable and foreseeable by those to whom they are applied'.[29] The absence of any consistent or objective guidelines upon which decisions to evict were made was a significant factor in finding that CANFaCS had failed to give proper consideration to relevant human rights.[30]

Review of administrative decisions

The ability to challenge decisions for incompatibility with human rights potentially gives courts much greater scope to review administrative decisions. It involves a consideration of the concept of proportionality, the identification and balancing of competing interests and determination of where the balance should lie. This potentially involves greater scrutiny of administrative decisions than traditional *Wednesbury* unreasonableness would otherwise allow. Given that many of these decisions involve questions of difficult social policy, particularly in respect of rights such as privacy, it is understandable that courts may be reluctant to engage in a proportionality analysis, either under internal limitations (eg 'arbitrary' interferences with privacy) or under the general limitations provisions.

However, the experience of other jurisdictions illustrates that courts can engage in such analyses while not intruding inappropriately upon the role of the executive. Principles of 'deference', affording weight or latitude, or a margin of discretion, have been developed in other jurisdictions to ensure that courts do not embark on merits review and that an appropriate balance between courts and the executive is maintained.

While the Canadian doctrine of deference may not be appropriate for Victoria, the Victorian and ACT courts can draw from overseas jurisprudence (particularly the United Kingdom and New Zealand) and develop existing administrative law principles in order to ensure that courts do not inappropriately intrude upon the role of the executive.

Margin of appreciation - an international law concept

Before discussing the jurisprudence in relation to domestic human rights instruments, it is appropriate to mention briefly the 'margin of appreciation' concept that is often referred to in jurisprudence of international courts and tribunals.

The term is most commonly used in relation to decisions by the European Court of Human Rights ('ECHR') to limit its scrutiny of the conduct of member states when applying a proportionality analysis to cases concerning the scope of Convention rights in developing areas of law. By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions.[31] United Kingdom courts have regarded the ECHR's margin of appreciation mechanism as being unavailable to national courts when considering Convention issues arising within their own countries.[32] For the same reasons, it is not appropriate in Victoria or the ACT.

Domestic concepts of deference, weight etc

In other jurisdictions, including the United Kingdom, Canada and New Zealand, courts have developed principles whereby weight may be given to the findings of the primary decision maker. These principles are variously described as 'judicial deference', affording 'weight' or 'latitude', and affording a 'margin of discretion'.

United Kingdom courts have recognised that, in assessing whether a public authority has acted compatibly with human rights, the courts' role is different from that of the primary decision maker. As explained by Beatson et al:[33]

> Proportionality is not treated as a pure question of law or fact. Therefore an appeal from a proportionality determination on a point of law will neither succeed simply because the appeal court would have taken a different view, nor will it fail simply because the lower court's determination cannot be shown to be perverse. It is necessary to examine the lower court's reasons and identify an error in analysis, such as whether it applied the wrong test or standard.[34] In *Huang v SSHD,* the House of Lords held that the task of the appellate immigration authority in immigration appeals[35] is neither that of a primary decision maker nor a secondary reviewing function. However, it was appropriate for the appellate court, in balancing the competing considerations, to give appropriate weight to judgments made by the Secretary of State as to the importance of countervailing public interest considerations.[36] The exercise of giving weight to an assessment or judgement made by a primary decision maker is an exercise that is also carried out in judicial review claims and ordinary civil (or indeed criminal) cases, although in these cases it has often attracted the label of 'deference'.[37]

The United Kingdom courts have recognised that some 'deference' to the legislature or executive is likely to be necessary in order to maintain an appropriate balance between the judicial, legislative and executive branches of government. As Lord Hope has stated:[38]

> [I]n the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality. In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the court to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.

However, United Kingdom courts have criticised the use of the term 'deference' and it is now more common to refer to affording weight or latitude to the decision maker. In *R (ProLife) v BBC* ('*ProLife*'), Lord Hoffman expressed disapproval of the 'overtones of servility' implied by the term 'deference' and, instead, described the principle as involving a determination 'that a decision is within the proper competence of the legislature or executive.'[39]

In *Patrick's Case,* Bell J characterised the principle of weight and latitude that operates in relation to the United Kingdom Human Rights Act as 'a flexible concept of comity and respect reflecting the different institutional functions of the judiciary, the parliament and the executive in the constitutional framework.[40]

Australia

Lord Hoffman's description of the principle of deference as it operates in the United Kingdom is similar to the approach of the High Court of Australia, which has recognised that: [41]

> The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The High Court has emphasised that this is not the product of any doctrine of 'deference', in the sense developed in Canada, but of 'the basic principles of administrative law respecting the exercise of discretionary powers.'[42] Accordingly, while it is for the court to determine whether a primary decision maker acted within jurisdiction,[43] recourse to the findings of the administrative body, while not required, is open to a court in the case of a jurisdictional challenge on an issue of fact where the evidence is 'in all significant respects, substantially the same' as that presented at first instance.[44]

The High Court's approach to judicial review of administrative decisions on traditional grounds applies equally to the review of such decisions on the basis of lawfulness by reason of s 38 of the *Victorian Act*. While there will be some aspects of the reasonable limits analysis that involve pure questions of law (eg the question of the nature of the right) in respect of which it will not be appropriate to afford weight to the primary decision maker, others involve mixed questions of fact and law which lend themselves to the application of the principles enunciated by the High Court. In particular, courts are likely to afford considerable weight to the primary decision maker's assessment of whether there are 'less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve'.

Circumstances when it is appropriate to afford weight to the primary decision maker

The High Court has made it clear that the weight to be given to the findings and decision of the primary decision maker will depend upon the particular circumstances of the case.[45] However, a number of factors have been identified, including: [46]

(a) the field in which the tribunal operates;

(b) the criteria for appointment of its members;

……

(d) the materials upon which it acts in exercising its functions; and

(e) the extent to which its decisions are supported by disclosed processes of reasoning.

Relationship between the substantive obligation and the procedural obligation

It is the last factor identified by the High Court that results in a strong link between the so-called procedural obligation and the substantive obligation.

If, in making its decision, the public authority gives careful consideration to human rights, including balancing competing interests, the assessment of where the balance should lie will

be given weight by a reviewing court. The reviewing court is unlikely to interfere and should not interfere, unless the assessment lies completely outside the acceptable range.

Examples

United Kingdom

As already explained, the United Kingdom's *Human Rights Act 1998* does not impose an express obligation on public authorities to give proper consideration to human rights. However, the authorities make it clear that decisions are much more likely to survive scrutiny for compatibility with human rights where the public authority has given careful consideration to human rights.

The case of *R (SB) v Governors of Denbigh High School* ('*Denbigh High School'*) illustrates this point. The school had a significant number of Muslim students. In choosing its uniform, the school engaged in extensive consultation with the community and religious leaders. The school provided options for Muslim students but did not allow the full burqa to be worn. A student challenged the decision to refuse to allow her to wear the full burqa. The school's decision was upheld. The House of Lords recognised the complexity of the issue, and the difficult balancing exercise involved. Because of the extensive consultation with the community and the careful consideration of the issues by the school, their Lordships were prepared to give significant weight to the decision of the school.

As Lord Bingham remarked:

> if it appears that such a body [a head teacher or school governor] has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder.[47]

The significance of giving careful consideration to human rights in decision-making was also discussed by the House of Lords in *Belfast City Council v Miss Behavin' Ltd*. Baroness Hale began with the general rule that it is for the court to determine whether or not a claimant's Convention rights have been infringed, but continued:[48]

> In doing so, it [the court] is bound to acknowledge that the local authority is much better placed than the court to decide whether the right of sex shop owners to sell pornographic literature and images should be restricted … But the views of the local authority are bound to carry less weight where the local authority has made no attempt to address that question. Had the Belfast City Council expressly set itself the task of balancing the rights of individuals to sell and buy pornographic literature and images against the interests of the wider community, a court would find it hard to upset the balance which the local authority had struck. But where there is no indication that this has been done, the court has no alternative but to strike the balance for itself, giving due weight to the judgments made by those who are in much closer touch with the people and the places involved than the court could ever be.

Lord Mance agreed and added that, where a decision maker has not addressed the balance between competing rights, the court is deprived of the assistance and reassurance provided by the primary decision maker's considered opinion on Convention issues. His Lordship stated that the court's scrutiny is bound to be closer, giving weight to such judgments as were made by the primary decision maker on such matters as he or it did consider.[49] Similarly, Lord Rodger stated:[50]

> where the public authority has carefully weighed the various competing considerations and concluded that interference with a Convention right is justified, a court will attribute due weight to that conclusion in deciding whether the action in question was proportionate and lawful.

Lord Hoffman asserted:[51]

> If the local authority exercises that power [to licence pornography vendors] rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights.

South Buckinghamshire District Council v Porter and another concerned an appeal against injunctions granted to local planning authorities, which prevented the appellant gypsy families from living in caravans on land they had acquired.[52] The Court of Appeal held that where a planning authority applied for an injunction to restrain a breach of a planning control, the court was required by the *Human Rights Act* to take into account the likely effect on the human rights of the appellants. Specifically, although the court was not concerned with the planning merits of the case, it had to be satisfied that the injunction was sufficiently necessary for the legitimate aim of protecting the environment to justify overriding the appellants' right to respect for their home and family life.[53] In detailing the relevant factors to be considered, Simon Brown LJ (with whom Peter Gibson and Tuckey LJJ agreed) said:

> the relevance and weight of their [the local council's] decision will depend above all on the extent to which they can be shown to have had regard to all the material considerations and to have properly posed and approached the article 8(2) [right to respect for home and family life] questions as to necessity and proportionality.[54]

Victorian Civil and Administrative Tribunal ('VCAT') cases

Two recent judgments of VCAT indicate the relationship between the requirement to give proper consideration under s 38 of the *Victorian Act* and the weight that reviewing courts will afford primary decision makers.

The case of *Smith v Hobsons Bay City Council and Ors* concerned an application to delete a condition attached to a planning permit granted by the Council. The condition required the applicant to attach a screen to the balcony of his property to prevent overlooking of the property of the applicant's neighbour.[55] The applicant's neighbour, Mr Davey, claimed that the proposed balcony—if not screened—would breach his right to privacy under s 13 of the *Victorian Act*. That issue was referred to VCAT as a question of law.

Deputy President Dwyer considered the Council's planning scheme, and held that the framework was such that compliance with it would amount to 'proper consideration':

> Although a person's right to privacy in his or her home is fundamentally important, and this is now reinforced by the Charter, the effective application of the planning regulatory framework in Victoria is also important. That framework seeks to balance public and private rights, and seeks to provide for the fair, orderly and sustainable development and use of land by imposing certain restrictions on the use and development of land that most would consider justified in a free and democratic society
>
> …
>
> Any decision that properly considers all relevant planning considerations, including in this case [the relevant clause]…of the Hobsons Bay Planning Scheme, would in my view represent a reasonable, proportionate and justifiable limitation on Mr Davey's right to privacy.[56]

Magee v Boroondara City Council and Anor concerned an application objecting to the Council's decision to grant a permit to construct nine dwellings on land adjoining the applicant's property.[57] The objector's application contended that in granting the permit, the Council failed to give proper consideration to the objector's rights to privacy and a fair hearing.

In relation to the right to privacy, although the Council officer's report contained a bald statement that 'there are no implications under the Victorian Charter of Human Rights and Responsibilities' and contained no reference to the right to privacy, the consideration of the relevant interests had occurred in accordance with the provisions of the planning scheme. Acting President Rickards noted that:[58]

> [U]nder the provisions of the planning scheme there are specific requirements required to be considered when assessing interference to privacy…[including] a requirement to consider such

matters as overlooking. The Council planner in her report assessed the application and its impact on surrounding properties and considered impacts in relation to 'overshadowing and overlooking'. I am therefore unable to conclude there has been any failure to consider the applicant's right to privacy.

Conclusion

The obligations upon public authorities to act compatibly with and give proper consideration to human rights have the potential significantly to impact upon administrative decision-making and the review of such decisions. There is now much greater scope for courts to scrutinise decisions that impact upon human rights.

Judicial decisions to date indicate that courts are likely to apply the procedural obligation in a flexible way having regard to the broad range of decision makers who are subject to the obligation. Early decisions make it clear that substantive consideration of rights issues is more important than formalistic recitation of statutory provisions of the relevant human rights legislation. Substantive consideration involves identification and consideration of the competing interests and forming a judgment about where the balance lies. It is likely that internal policies and guidelines will need to be adapted in order to incorporate human rights considerations and ensure compliance with both the procedural and substantive obligations.

Giving proper consideration to human rights is likely to be important, not only to avoid the decision being quashed for breach of the express procedural obligation but also to defend challenges to administrative decisions on the basis that they are incompatible with human rights. Where public authorities have given careful consideration to human rights and competing interests, their conclusion as to where the balance should lie is much more likely to be given weight by a reviewing court.

Endnotes

1 Section 38 of the *Victorian Act*; s 40B of the *ACT Act*.
2 Section 40C of the *ACT Act*.
3 Section 39 of the *Victorian Act*.
4 Interpreted in accordance with the interpretative rules in s 32 of the *Victorian Act* and s 30 of the *ACT Act*.
5 In respect of the equivalent provision in the *Human Rights Act 1998* (UK), see *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681.
6 See *Kracke v Mental Health Review Board* [2009] VCAT 646, [406]-[419].
7 See *DPP v Mokbel,* Ruling of Whelan J, 22 February 2011.
8 Second Reading Speech, Charter of Human Rights and Responsibilities Bill 2006 (Vic), Victoria, *Parliamentary Debates,* Legislative Assembly, 4 May 2006 (Mr Hulls, Attorney-General), 1291.
9 (2011) 280 ALR 221. Both Bell J and Heydon J expressly held that s 7(2) applies to the concept of incompatibility in s 38 of the *Victorian Act*: see Bell J at [681] and Heydon J at [416]. While not expressly addressing s 38, Gummow J (with whom Hayne J agreed) considered that the requirement to interpret legislation compatibly with human rights included, where it was engaged, s 7(2): at [165]-[168]. The same reasoning would apply to the concept of incompatibility in s 38. Only French CJ considered that s 7(2) did not play a role in the concept of incompatibility in s 38: at [32]-[34]. Crennan and Kiefel JJ did not express a view on the issue.
10 Ibid [681].
11 See *R v Momcilovic* (2010) 265 ALR 751, [143].
12 Idem.
13 See *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, 842-843 [62]-[70] per Lord Nicholls, 865-866 [142] per Lord Hobhouse.
14 *Castles v Secretary to the Department of Justice* [2010] VSC 310.
15 Ibid [185].
16 Ibid [186].
17 Ibid [187].
18 *Giotopolous v Director of Housing* [2011] VSC 20.
19 Ibid [85].
20 Ibid [87].
21 Ibid [84].
22 Ibid [84].
23 Ibid [90].
24 *PJB v Melbourne Health ('Patrick's Case')* [2011] VSC 327.

25 Ibid [312].
26 Ibid [312].
27 *Canberra Fathers and Children Services Inc v Michael Watson* [2010] ACAT 74.
28 Ibid [19].
29 Ibid [37].
30 Ibid [73].
31 See eg *Sahin v Turkey* (2004) 41 EHRR 109, 131–132.
32 *R v Director of Public Prosecutions; ex parte Kebliene* [2000] 2 AC 326 at 380 per Lord Hope.
33 Beatson et al (eds), *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, London, 2008) 3-92.
34 *A v SSHD* [2005] 2 AC 68, [44] per Lord Bingham. See also at [131] per Lord Scott, at [173] per Lord Rodger. The Court of Appeal had refused to overturn the assessment of Special Immigration Appeals Commission on the basis that it had made a finding of fact as to the necessity of detention powers which it could not easily reverse. *A v SSHD* [2004] QB 335, [35] per Lord Woolf CJ, at [91] per Brook LJ, at [150] per Chadwick LJ.
35 The appeal concerned section 65 of the *Immigration and Asylum Act 1999* (UK). The same reasoning applies to the 'one-stop' appeal under section 65 of the *Immigration and Asylum Act 1999* (UK). *Huang v SSHD* [2007] 2 AC 167, 181–182.
36 Ibid 185.
37 For further discussion of weight and latitude in such cases see Beatson et al (eds) above n 7 at 3-182–3-247; Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, Cambridge, 2009) at 167ff.
38 *R v Director of Public Prosecutions; ex parte Kebliene* [2000] 2 AC 326, 380–381.
39 [2004] 1 AC 185, 240.
40 *PJB v Melbourne Health* [2011] VSC 327, [324].
41 *Corporation of the City of Enfield v Development Assessment Commission and Another* (2000) 199 CLR 135, 153 per Gleeson CJ, Gummow, Kirby and Hayne JJ, citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 per Brennan J. The majority noted that Mason J spoke to similar effect when he observed: 'The limited role of a court [in] reviewing the exercise of an administrative discretion must constantly be borne in mind': at 153–154, citing *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 40 per Mason J.
42 Ibid 153.
43 Ibid 155.
44 Ibid.
45 Ibid, 154–155.
46 Ibid.
47 [2007] 1 AC 100, 116.
48 *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, 1432.
49 *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, 1434. Lord Neuburger explicitly agreed with Lord Mance and Baroness Hale on this issue, at 1444.
50 [2007] 1 WLR 1420, 1429.
51 *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, 1426.
52 [2002] 1 WLR 1359.
53 *South Buckinghamshire District Council v Porter and another* [2002] 1 WLR 1359, 1377.
54 [2002] 1 WLR 1359, 1377.
55 (2010) 175 LGERA 221.
56 *Smith v Hobsons Bay City Council and Ors* (2010) 175 LGERA 221, 229.
57 (2010) 177 LGERA 92.
58 *Magee v Boroondara City Council and Anor* (2010) 177 LGERA 92, 111.