

**FEDERAL COURT
SIMPLIFIED ACTION**

BETWEEN:

EDGAR SCHMIDT

Plaintiff

- and -


ATTORNEY GENERAL OF CANADA

Defendant

COUNSEL'S CERTIFICATE

Pursuant to rules 52.2(1)(d) and 279(b) of the *Federal Courts Rules*, I, Alain Préfontaine, of counsel to the Defendant, hereby certify that the attached is the statement of Janet Margaret McLean, an expert the Defendant calls in this matter.

June 2, 2015



Alain Préfontaine
Of counsel to the Defendant

**FEDERAL COURT
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EDGAR SCHMIDT

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

STATEMENT OF JANET MARGARET McLEAN

I. STATEMENT OF THE ISSUES ADDRESSED IN THE REPORT

1. The Defendant has asked me to assist the Court in understanding the context within which the pre-legislative scrutiny and reporting mechanism contained in section 7 of the *New Zealand Bill of Rights 1990* operates and the practice that has developed under it.

2. I was also asked to provide the Court with a similar explanation of the pre-legislative scrutiny and reporting mechanisms found in the legislation of other jurisdictions with which I am familiar. To my knowledge, only the United Kingdom and Australia (at the federal and state level) have adopted pre-legislative scrutiny and reporting mechanisms:

- a) section 19 of the United Kingdom's *Human Rights Act 1998*;
- b) section 37 of the Australian Capital Territory's *Human Rights Act 2004*;
- c) section 28 of the State of Victoria's *Charter of Human Rights and Responsibilities Act 2005*; as well as
- d) section 8 of Australia's *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

3. To that end, I have prepared a report, attached to this statement as Appendix "A".

II. QUALIFICATIONS OF THE EXPERT

4. I enclose, as Appendix "B" to this statement, a copy of my *curriculum vitae*. It summarizes my study and knowledge of pre-legislative scrutiny and reporting obligations.

5. As Appendix "B" chronicles, I was enrolled as a barrister and solicitor of the High Court of New Zealand in 1986 and remain enrolled, although I do not hold a current practising certificate. I have taught law for the last twenty-four years, with broad interests in public law, including the *New Zealand Bill of Rights 1990*. As the list of publications and lectures contained in Exhibit "B" demonstrates, I have published on the topic and lectured about these issues on many occasions.

6. I possess the knowledge of New Zealand law required to provide this Court a complete and unbiased accounting of the context within which section 7 of the *New Zealand Bill of Rights 1990* operates and the practice that has developed under it. Appendix "A" contains this complete and unbiased accounting.

7. Through my research and study of the source documents from the United Kingdom and Australia, as well as my numerous exchanges with law professors from these other jurisdictions, I have acquired the knowledge and understanding required to present to this Court a complete and unbiased accounting of the context within which section 19 of the United Kingdom's *Human Rights Act 1998*, section 37 of the Australian Capital Territory's *Human Rights Act 2004*, section 28 of the State of Victoria's *Charter of Human Rights and Responsibilities Act 2005* as well as section 8 of Australia's *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) operate and the practice that has

developed under them.

8. Appendix "A" also contains an overview of the pre-legislative scrutiny and reporting obligations found in the legislation of the United Kingdom and of Australia.

III. FACTS AND ASSUMPTIONS ON WHICH THE OPINIONS IN THE REPORT ARE BASED

9. My report is not based on assumptions. Rather, I have conducted research, from publicly available documents, about the laws adopted in each of these jurisdictions and the practices that have developed.

IV. SUMMARY OF THE OPINIONS EXPRESSED

10. The standard of pre-legislative legislative scrutiny varies from jurisdiction to jurisdiction, as does the context within which the reporting obligation operates.

V. THE REASONS FOR EACH OPINION EXPRESSED

11. See Appendix "A".

VI. LITERATURE OR OTHER MATERIALS SPECIFICALLY RELIED ON IN SUPPORT OF THE OPINIONS

12. See Appendix "A".

VII. SUMMARY OF THE METHODOLOGY USED

13. Research of the legislation of New Zealand, Australia (federal, the Australian Capital Territory and the state of Victoria), of the relevant websites and of the legal literature.

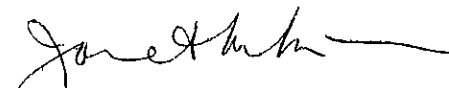
VIII. NECESSARY CAVEATS OR QUALIFICATIONS NECESSARY TO RENDER REPORT COMPLETE AND ACCURATE

14. None.

IX. RELATIONSHIP TO PARTY OR SUBJECT MATTER OF PROPOSED EVIDENCE THAT MIGHT AFFECT EXPERT'S OVERRIDING DUTY TO THE COURT

15. None.

DATE: 1 June 2015



Janet Margaret McLean

**APPENDIX "A" TO THE
STATEMENT OF JANET MARGARET MCLEAN**

***REPORT ON PRE-LEGISLATIVE AND REPORTING MECHANISMS EXISTING IN OTHER
COMMONWEALTH JURISDICTIONS***

Pre-legislative scrutiny and reporting mechanisms exist, in some jurisdictions, to ensure that legislatures can consider the potential impact that proposed legislation may have on constitutional and human rights. Some jurisdictions, other than Canada, have adopted a statutory pre-legislative scrutiny and reporting mechanism - New Zealand,¹ the United Kingdom,² and, in Australia, the Federal legislature,³ the legislature for the State of Victoria⁴ and the Australian Capital Territory Legislative Assembly.⁵ I have studied those pre-legislative scrutiny and reporting mechanisms. The Attorney-General of Canada has asked that I assist the Court in understanding the examination standard used in those jurisdictions, as well as the contexts within which these statutory reporting obligations exist. From my review, I conclude that the differences in language used to create those mechanisms, together with the context in which they operate, assists in understanding how they are implemented.

I enclose a copy of my *curriculum vitae* as Appendix "B" to my statement. I have been enrolled as a Barrister and Solicitor of the High Court of New Zealand since 1986 although I do not currently hold a practising certificate. I have been a professor of law since 1991, with a special interest in public law, and have held full chairs in both New Zealand and the United Kingdom. I am also co-editor of *Public Law Review*, the leading Australasian public law journal. I have, through the course of my research and my publications, studied the pre-legislative scrutiny and reporting mechanisms in existence in New Zealand, the United Kingdom and Australia. I believe that the knowledge I have gained permits me to assist the Court in understanding the examination standard used in those jurisdictions, as well

¹ *New Zealand Bill of Rights Act 1990*, s. 7 (N.Z.).

² *Human Rights Act 1998* s. 19 (U.K.).

³ *The Human Rights (Parliamentary Scrutiny) Act 2011* s.8 (Cth).

⁴ *Victorian Charter of Human Rights and Responsibilities Act 2006* s. 28 (Vict).

⁵ *ACT Human Rights Act 2004* s. 37 (A.C.T.).

as the contexts within which these statutory reporting obligations exist.

1. **PRE-LEGISLATIVE SCRUTINY AND REPORTING MECHANISMS**

Canada was the first of the Commonwealth countries to create a regime to ensure that draft legislation is reviewed for compliance with defined rights, prior to presentation to the law-making body. That regime is anchored in the similar provisions of three acts - section 3 of the *Canadian Bill of Rights*, section 3 of the *Statutory Instruments Act* and section 4.1 of the *Department of Justice Act*. For ease of reference, I quote section 4.1 of the *Department of Justice Act*.

4.1 (1) Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.

(2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the *Statutory Instruments Act* to ensure that it was not inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms*.

Other Commonwealth countries have adopted a regime of pre-legislative review and a reporting mechanism - New Zealand, the United Kingdom and, in Australia, the Federal legislature, the legislature for the State of Victoria and the Australian Capital Territory Legislative Assembly.

In common with the *Canadian Charter of Rights and Freedoms*, each of these statutes provides that it is for the legislature rather than for the courts *ultimately* to decide whether a provision is valid law. For this reason they have been collectively described in the academic literature as the "new Commonwealth model"⁶ of human

⁶ S Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge, Cambridge University Press 2013); S Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001) 49 Am J Comp Law 707; S Gardbaum, "Reassessing the New Commonwealth Model of Constitutionalism" (2010) ICON 167.

rights protection and as providing for "weak form judicial review" in which courts *contribute* to assessing whether legislation complies with human rights obligations but do not *necessarily* have the last word.⁷ Accordingly, in all of these jurisdictions, there are mechanisms designed to ensure that legislatures seriously consider the potential impact that legislation may have on rights. Despite these shared characteristics, the models vary both in their design and their operation in practice. Even *within* the "weak form model" there is a wide variation in the respective roles of the courts and the legislatures. They differ quite dramatically in terms of the balance intended to be struck between legislative and judicial supremacy. The practices of pre-legislative scrutiny too appear to be linked to the degree to which it is the court or the legislature which in practice has the last word. I examine the statutes hereunder.

2. NEW ZEALAND'S BILL OF RIGHTS ACT 1990

1. Reporting obligation

Section 7 of the *New Zealand Bill of Rights Act 1990* provides:

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—

- (a) in the case of a Government Bill, on the introduction of that Bill;
or
- (b) in any other case, as soon as practicable after the introduction of the Bill,—

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

The related provision in the Standing Orders of the House of Representatives differs significantly in wording. Standing Order 265 reads:

265 New Zealand Bill of Rights

(1) Whenever a bill contains any provision which appears to the Attorney-General to be inconsistent with any of the rights and freedoms contained in the New Zealand Bill of Rights Act 1990, the Attorney-General must indicate to the House what that provision is and how it appears to be inconsistent with the New Zealand Bill of Rights Act 1990.

(2) An indication by the Attorney-General to the House concerning the New Zealand Bill of Rights Act 1990 is made by the presentation of a paper,—

⁷ M Tushnet, "Weak Form Judicial Review: Implications for Legislatures" (2004) 2 NZJPI 7.

- (a) in the case of a Government bill, on the introduction of the bill, or
- (b) in any other case, as soon as practicable after the introduction of the bill.
- (3) Where the House has accorded urgency to the introduction of bill, the Attorney-General may, on the bill's introduction, present a paper under this Standing Order in the House.
- (4) A paper presented under this Standing Order is published under the authority of the House.
- (5) When a paper is presented under this Standing Order, it stands referred to a select committee for consideration. The paper allocated by the Clerk to the most appropriate select committee.

2. The examination standard

It would be possible to interpret section 7 as mandating a report every time a *prima facie* inconsistency with the substantive rights and freedoms enumerated has been identified regardless of whether the limit on the right can be demonstrably justified in a free and democratic society, e.g. that it is *prima facie* inconsistency with the rights and freedoms that gives rise to the reporting duty. A related issue has been whether the rights themselves should be defined broadly or narrowly when determining the initial question of whether they are engaged. The standard adopted has been to construe rights relatively broadly, and - adopting the Canadian *Oakes* test⁸ - to assess whether the proposed legislation has placed limits on such rights and finally to judge whether such limits have also failed the proportionality test required by section 5 which states:

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The decision to go beyond questions of *prima facie* inconsistency to consider

⁸ [1986] 1 SCR 103,106. So, for example, if there appears to be a *prima facie* inconsistency with rights, officials will be invited to clarify the effect or purpose of the provision, and to consider other means of achieving the same objective that do not give rise to *Bill of Rights* issues (see Ministry of Justice, *Guidelines on the NZ Bill of Rights Act 1990 Part I* "Vetting and section 7 of the Bill of Rights Act" available at <http://www.justice.govt.nz/publications/t/the-guidelines-on-the-new-zealand-bill-of-rights-act-1990-a-guide-to-the-rights-and-freedoms-in-the-bill-of-rights-act-for-the-public-sector>).

justifications for limiting rights has been reinforced by the different formulation of the Attorney-General's task in the Standing Orders of the House of Representatives. Standing Order 265 refers not only to inconsistencies with rights and freedoms contained in the Bill of Rights but also to inconsistencies with the *New Zealand Bill of Rights Act* as a whole thus allowing consideration of whether the limitations on the rights may nevertheless be justified. A section 7 report will not be issued if a bill satisfies the section 5 justification test.

Such an approach is supported by the initial White Paper proposal for the Bill of Rights which stated that:⁹

In practical terms the Bill of Rights is a most important set of messages to the machinery of government of Government itself. It points to the fact that certain sorts of laws should not be passed, that certain actions should not be engaged in. In that way a Bill of Rights provides a set of navigation lights for the whole process of government to observe.

It has also drawn support from the New Zealand judges. Two of New Zealand's most distinguished judges consider that the s. 5 calculus is for government, the Attorney-General and Parliament alone and should not be used as an interpretative aid by the courts.¹⁰

Section 7 reports include a broad assessment of whether Bills are inconsistent with protected rights and freedoms. They are not framed in the language of litigation risk. They do not involve a calculation of whether the bill in its introduced form would survive a challenge in the courts. The emphasis is on principle and argument. Reports commonly refer to UK, European Court of Human Rights and Canadian authority for both the content of rights and for justifications about the proper limits on rights.¹¹ On occasion they have referred to the possibility of receiving negative comment at the UN Human Rights Committee.

⁹ G Palmer, "A Bill of Rights For New Zealand: A White Paper" [1985] AJHR A 6, 6.

¹⁰ See Cooke P in *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) and Elias C J in *Hansen v R* [2007] NZSC 7 at par. 15.

¹¹ E.g. *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68 on the electoral rights of prisoners.

3. *Pre-legislative scrutiny and practice*

Prior to introduction into the House, New Zealand Bills are submitted to the Cabinet Legislation Committee. The sponsoring Minister is required to certify that he or she has complied with the Legislation Advisory Committee guidelines and the Cabinet Office guidelines. In particular, the Minister is required to indicate whether the bill complies with rights and freedoms contained in the *New Zealand Bill of Rights Act 1990* and the *Human Rights Act 1993* (which contains overlapping antidiscrimination provisions); must state the nature of any potential inconsistencies identified, or state that there are none; note the steps taken to address any issues, or include information on any justifications for the bill infringing a right or freedom and include reasons if the bill does not comply.

Upon introduction to the House of Representatives the reporting duty in section 7 of the *New Zealand Bill of Rights Act 1990* is engaged. The New Zealand legislation vests the reporting function directly in the Attorney-General. The Attorney-General of New Zealand is the first law officer as well as a Minister of the Crown. Typically the Attorney-General is a member of Cabinet though there is precedent for the Attorney to be a Minister outside Cabinet (as in the case of Rt. Hon. David Lange). Though it is usual for qualified lawyers to be appointed to the role, the Attorney is not always a lawyer (an example being the Hon. Sir Michael Cullen). In recent times it has been thought inappropriate for the New Zealand Attorney-General to also hold the office of Minister of Justice but nevertheless she often finds herself playing multiple roles as a political member of the government of the day, as the Crown's primary legal advisor and as a Member of Parliament.

In practice, reports given under section 7 *New Zealand Bill of Rights Act* (hereafter s. 7 reports) are prepared by officials in the Ministry of Justice, or, if the Bill is sponsored by the Ministry of Justice, by the Crown Law Office. As practice was evolving, it may have been possible for a constitutional convention to have emerged that the Solicitor-General (the most senior government lawyer and a public servant) would effectively exercise the reporting role. This never happened. While it is a matter of public record that the Attorney-General takes advice from officials, in practice the decision to issue a s. 7 report is ultimately a matter for the independent judgment of the Attorney-General.

Despite the absence of any legislative requirement to do so, s. 7 reports and their reasoning, and even advice which does not lead to a s. 7 report being given, is usually made public. Section 7 reports are available to Members of Parliament and the general public (who sometimes use them in submissions to select committees). They are published in the Appendices to the Journal of the House of Representatives and, since August 2002, on Parliament's website. The Attorney-General is not required to notify the House of Representatives when a Bill appears to be consistent with the *Bill of Rights Act*. However the practice has evolved that where a Bill appears to be consistent with the *Bill of Rights Act*, the Ministry's and the Crown Law Office's advice to the Attorney-General is usually published on the Ministry's website (from 2003) effectively waiving any claim to legal privilege and also informing parliamentarians and the greater public.

These practices were acknowledged in *Boscawen v Attorney-General*:¹²

even where the Attorney-General makes no report under s. 7, the advice of officials, or in rare cases the reasons of the Attorney-General, as to whether any provision in a Bill appears to be inconsistent... are available both publicly, and of course to members of parliament.

Successive Attorneys-General have taken a personal interest in the contents of reports and have on occasion added their own reasons to the legal advice given. The incumbent Attorney-General Hon. Christopher Finlayson QC has indicated in public speeches that it is a matter for his personal judgement whether or not to give a negative report. There is an established practice and understanding that the s. 7 duty is a political as well as a legal one.

There has been a question of whether the Attorney-General's political role is an executive or a parliamentary one. If it is the latter, then the exercise of the reporting function would be protected from judicial scrutiny by Article 9 of the *Bill of Rights 1689*. This was one of the points in contention in the Court of Appeal decision *Boscawen v Attorney-General*.¹³ This was an attempt to challenge the Attorney-General's decision not to issue a report under s. 7 in relation to the *Electoral Finance Bill 2007*. In response to an argument that judicial review of the s. 7 duty would be contrary to art 9 of the *Bill of Rights 1689* and the principle of comity between the

¹² [2009] 2 NZLR 229 at par. 15.

¹³ [2009] 2 NZLR 229.

courts and parliament, the Court of Appeal acknowledged that it was arguable that the Attorney-General's role under s. 7 was undertaken as a member of the executive, as law officer and as a member of parliament. The Court concluded, however, that "the Attorney-General's reporting role under s. 7 is part of the legislative process and therefore covered by the principle of comity".¹⁴ It found that the Attorney-General could not be required "to speak in Parliament in a manner contrary to his or her own wishes"¹⁵ and that a finding that the Attorney-General had failed to speak in the House would be equally problematic as impeaching what he or she did say in Parliament.

The Court of Appeal left open what their approach would be to a situation where a hypothetical Attorney-General "steadfastly refused to make a report to Parliament in the face of legislation clearly interfering with rights... despite advice to the contrary and in plain dereliction of duty...".¹⁶ It distinguished such a hypothetical case as raising problems of process rather than a substantive disagreement about the legal assessment.¹⁷

The Court of Appeal regarded the role of the s. 7 reporting function as informing the political debate in Parliament and aiding the legislative process. It also regarded consistency with rights as a matter about which there could be reasonable disagreement both about the content of rights and whether limits on rights are reasonably justified in a free and democratic society on the "dialogue model" made famous by Alison Bushnell and Peter Hogg.¹⁸ The objective of s. 7 is to ensure Parliament has the benefit of the Attorney-General's assessment: "There may be room for different views, but the view which Parliament is to be provided with under s. 7 is the genuinely held view of the Attorney-General, whether others consider that view right or wrong."¹⁹

Somewhat controversially Attorneys-General have voted for Bills containing

¹⁴ [2009] 2 NZLR 229 at par. 32.

¹⁵ *Op. cit.*, par. 32.

¹⁶ *Op. cit.*, par. 40.

¹⁷ *Op. cit.*, par. 40.

¹⁸ A Bushnell and P Hogg, "The Charter Dialogue Between Courts and Legislatures (or perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall L J 75.

¹⁹ *Op. cit.*, par. 20.

provisions that they have certified as inconsistent with the *New Zealand Bill of Rights Act 1990*. This seems to indicate that although the Attorney-General has a certain independence from his Cabinet colleagues as the government's legal advisor, ultimately the convention of cabinet collective responsibility prevails.

It may have been predicted that vesting the power to scrutinise bills in a law officer who is not necessarily a lawyer and is also an elected politician and usually a member of Cabinet would necessarily lead to infrequent reports finding bills to be inconsistent. This prediction has not been borne out in practice. Since the *New Zealand Bill of Rights Act* came into force on 25 September 1990 there have been 59 s. 7 reports relating to 28 government Bills and 31 non-government (private members') bills (as at 15 May 2015).

The reports assess whether rights are engaged and whether any limitations on the rights have been demonstrably justified. Accordingly in relation to 28 *government* bills the Attorney-General has signalled that the Bill is inconsistent with rights and freedoms and those limitations are *not* demonstrably justified in a free and democratic society and yet that the Bill should proceed.

There is no special select committee which has particular jurisdiction in relation to Bill of Rights compliance though compliance issues can and have been raised with the different subject specific committees. Politics tends to govern whether bills are moderated during their passage, or repealed after there is a change of government.

4. *The context within which it operates*

In form the *New Zealand Bill of Rights Act 1990* looks very similar to the UK *Human Rights Act 1990*. Its central provision is s. 6 which requires courts to interpret legislation consistently with protected rights where it is possible to do so. Section 4 preserves Parliamentary supremacy stating that courts should not hold any provision of legislation "impliedly repealed or revoked, or to be in any way invalid or ineffective" or to "decline to apply any provision" "by reason only of its inconsistency with the Bill of Rights".²⁰ On its face, the availability of a remedy appears to depend on

²⁰ No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

(a) hold any provision of the enactment to be impliedly repealed or

whether it is *possible* to interpret a statute in a way that complies with the Bill of Rights. In the face of plain unambiguous words that are inconsistent with rights the legislation prevails.

While there is no express power to do so, some judges have suggested that in an appropriate case they may have power to make a "declaration of inconsistency" which draws attention to the extent to which a provision fails to meet human rights standards including the s. 5 justification test.²¹ Given s. 4, such a declaration could not affect the validity or application of a provision. There is an *express* provision in the UK *Human Rights Act 1998* s. 4 for a declaration of this kind (called a "declaration of incompatibility" in the UK context). In the absence of an equivalent provision the existence and utility of such a power in New Zealand has been controversial, and as at 15 May 2015 the Supreme Court has not yet granted such a *formal* declaration. In some cases, however, judges have been prepared to go beyond the question of what is *possible* by way of interpretation, to consider whether the clear wording and intention of legislation falls short of the human rights standards contained in the *Bill of Rights*.²² A leading example is the majority decision in *Hansen v R*²³ though in that case the Judges avoided the "declaration of inconsistency" language of earlier judgments.

Sometimes statutes have been subsequently amended after judicial proceedings to make them more rights compliant but of late there have been several provisions (such s. 6 (6) of the *Misuse of Drugs Act 1975* at issue in the *Hansen v R* case) found to be inconsistent with the *Bill of Rights* which have survived negative judicial comment unchanged. There is no equivalent to s. 33 of the *Canadian Charter of Rights and Freedoms* – the "notwithstanding" clause. The House of Representatives

revoked, or to be in any way invalid or ineffective; or

(b) decline to apply any provision of the enactment—

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

²¹ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

²² See further C Geiringer, "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613-645.

²³ [2007] NZSC 7.

does not need to take any positive action for the impugned legislation to survive.

In its operation the *New Zealand Bill of Rights Act* leans towards legislative supremacy. The courts' role is at the weak end of "weak form" judicial review in that the legislature has the last word and may exercise its supremacy without undertaking any special legislative procedures.

Given this framework the rigour of the s. 7 reporting mechanism is crucial to the proper operation of the Act. This context helps to explain, for example, why the proportionality calculus is undertaken rather than an assessment of *prima facie* inconsistency. Pre-legislative processes are commonly the only place where a s. 5 argument will be entertained. Litigants are usually understandably loath to make s. 5 arguments from which they may not gain any immediate benefit given the absence of a judicial invalidation power.

I have criticised the number of s. 7 reports as being too high.²⁴ In my view either inconsistencies ought to have been identified early in the policy process and removed before introduction, or the government should have done more to justify such limitations on rights. To report an *unjustified* limitation on protected rights and nevertheless to proceed with a Bill is a serious thing indeed, and issuing too frequent reports without consequences risks the appearance that the processes are not being taken sufficiently seriously within executive government.

Having said that, it is crucial given the overall institutional framework in New Zealand that s. 7 reports are not underutilised. Given the constitutional balance in favour of Parliamentary supremacy, it is important that Parliament be as fully informed as possible at the point at which it considers Bills. Given the absence of a select committee with a mandate to assess rights consistency, the s. 7 report may be the *only* place where rights arguments including s. 5 can be fully aired.

²⁴ J McLean, "The New Zealand Bill of Rights and Constitutional Convention" 11 NZJPL 19-28.

3. THE UNITED KINGDOM'S HUMAN RIGHTS ACT 1998

a. Reporting obligation

Section 19 is the relevant provision which places the duty of assessing the "compatibility" of bills with the rights and freedoms protected by the *European Convention on Human Rights* upon their introduction to Parliament on the Minister in charge rather than the Attorney-General. Compatibility assessments require a consideration of whether provisions of bills meet the standards set out in the Convention rights to which the UK has acceded. These are defined in the Convention by reference to the permissible justifications and derogations allowed in relation to each of the rights. Unlike the *Canadian Charter of Rights and Freedoms* s. 1, or the *NZ Bill of Rights Act* s. 5, there is no *general* "reasonable limitations" clause. Section 19 provides:

(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

b. The examination standard

Professor David Feldman, a former legal advisor to the Joint Committee on Human Rights in the House of Parliament UK, refers in an article to the *Human Rights Act Guidance to Departments*. According to Professor Feldman, writing in 2005, the guidance indicated that legal advice on issues of pre-legislative compatibility should be taken from departmental advisors and, if necessary, the Law Officers.²⁵ The internal guidance also requires that before a Minister can make a statement of compatibility the Minister "must be satisfied that the balance of arguments favours

²⁵ Lord Chancellor's Department, *Human Rights Act 1998 Guidance for Departments* 2 ed para 36 discussed in D Feldman, "The Impact of Human Rights on the UK Legislative Process" (2005) 25(2) *Statute Law Review* 91-115, 98.

the view that the Bill is likely to survive Convention scrutiny in the Courts".²⁶ Professor Feldman suggests that this operates in practice as a "51 per cent probability test".²⁷ He defends this approach as justified in that such assessments are difficult to make in the light of the speed at which the case law of the European Court of Human Rights is evolving and that the test itself is a recognition that it is "ultimately for the courts, not Ministers or Parliament, to decide questions of compatibility".²⁸ In other words this is the place in which Ministers and legislatures are given some leeway to make their own assessments of compatibility. There is public reference to a new edition of the legislative guidance but as far as I have been able to establish it is not publicly available.

c. *Pre-legislative scrutiny and practice*

Statements of compatibility and incompatibility are reproduced in the explanatory note to Bills as introduced. These also contain a very general indication of reasons though these are not as specific nor as thoroughly elaborated as, for example, in New Zealand or Victoria. On occasion a Bill has been accompanied by a separate more detailed memorandum on its human rights implications (e.g., *Protection of Freedoms Bill*).

Between December 1998 and 15 May 2015 there have been three occasions on which Ministers have been unable to certify that a Bill is compatible with the *ECHR*. The first involved the bill which became the *Local Government Act 1999*. As introduced, the Bill would have repealed an existing provision prohibiting local authorities from promoting the acceptability of homosexuality as a "pretended family relationship". The House of Lords amended the Bill to remove the repealing provision. When the amended Bill went to the House of Commons, the Minister used s. 19 to make a political point against the House of Lords declaring that he was unable to say if the Bill was compatible but that nevertheless the government wished the House to consider it.

The second example is a more straightforward one involving what became the *Communications Act 2003*. The Bill proposed to retain an absolute ban on political

²⁶ Feldman, *ibid.*

²⁷ Feldman *ibid.*

²⁸ *Ibid.*

advertising in the broadcast media. In an earlier consultation on the Bill, the Joint House of Commons and House of Lords Committee on Human Rights had identified a potential incompatibility with freedom of expression citing a decision of the European Court of Human Rights from Switzerland on a similar question. The Minister stated he was unable to give a statement of compatibility but that nonetheless the government wished to proceed with the Bill. The problematic provision became the focus of intense scrutiny in Parliament. The government explained that it would, if necessary, strenuously defend the provision before the courts in the UK and Strasbourg arguing that it was a part of the UK model of democracy that the relative wealth of political actors should not determine their access to the media. The Bill containing the provision imposing the absolute prohibition was subsequently passed.

When a challenge was brought to the legislation in Strasbourg,²⁹ the European Court of Human Rights by a bare majority found it to be compatible. The majority referred at length to the Parliamentary scrutiny that the Bill had received.

The third example involved the contentious issue of prisoner voting rights. The then Deputy Prime Minister said he could not declare the coalition government's Lords Reform Bill compatible with the Convention rights as prisoners would be banned from voting for the Lords if the bill became law, but that the government wished Parliament to proceed nevertheless. The UK's blanket ban on prisoner voting had earlier been found incompatible with Convention rights in the Grand Chamber of the European Court of Human Rights decision in *Hirst v UK (No 2)*³⁰ and in a series of UK and European Court of Human Rights judgements decided since then.³¹

In this example the decision to proceed with a bill notwithstanding the admitted incompatibility with the Convention rights represents a political confrontation between the UK Government and the European Court of Human Rights. The Lords Reform Bill itself did not proceed for other political reasons.

²⁹ *Animal Defenders v United Kingdom* (48876/08).

³⁰ (2006) 42 EHRR 41.

³¹ The most recent, *McHugh v United Kingdom*, (51987/08) was decided Feb 10, 2015.

d. *The context within which it operates*

The UK *Human Rights Act 1998* is an ordinary statute designed to give "further effect to the *European Convention on Human Rights*". Legislative supremacy is formally preserved.³² "Ordinary" primary legislation may authorise public authorities to act in a manner incompatible with rights.³³ UK courts are, however, required to take European Court of Human Rights jurisprudence "into account".³⁴ Section 3(2) directs the judges "so far as it is possible to do so" to give effect to legislation in a way that is compatible with the ECHR but without affecting the validity of such legislation. They have gone further than the New Zealand judges in how they have construed their interpretative power.³⁵ The 1998 Act s. 4 empowers the higher courts to make a declaration of incompatibility in relation to legislation which does not meet Convention standards³⁶ but such a declaration does not render the statute invalid or unenforceable and neither is it binding on the parties. Should such a declaration be granted, there is provision in s. 10 for the Minister to make a remedial order to amend the legislation to make it compatible.

Having exhausted domestic remedies, claimants may take a case to the European Court of Human Rights in Strasbourg. The European Court of Human Rights cannot invalidate UK legislation but it is able to make remedial orders and grant "just satisfaction" including damages awards. There is a significant international dimension to the supervision and enforcement of European Court of Human Rights judgments in the Committee of Ministers of the 47 Member states (provided by Art 46 ECHR).

There is no formal legislative override procedure or the equivalent of a s. 33 "notwithstanding" clause.³⁷ On the face of it the UK *Human Rights Act* looks like it is

³² This is not so for the Northern Ireland Assembly and Scottish Parliament where incompatible legislation is ultra vires and invalid.

³³ Section 6.

³⁴ Section 2.

³⁵ In *Hansen v R* [2007] NZSC 7 the New Zealand Supreme Court unanimously found that the New Zealand interpretative provision in s. 6 was weaker than s. 3 United Kingdom *Human Rights Act 1998*.

³⁶ Section 4.

³⁷ While there is no "notwithstanding" clause or override provision that can be exercised *ex post*, the UK is able *ex ante* to register derogations from particular

designed to ensure legislative supremacy. But while it appears to provide for a weak form of judicial review similar to that of New Zealand, in all but one case in which courts have given a declaration of incompatibility, legislation has been amended to render it compatible with the *ECHR* as determined by the UK courts and or the European Court of Human Rights. Judicial judgements of compatibility in practice almost always *prevail* over (or on a different view of constitutional dialogue *persuade*) legislatures in the end. The ongoing controversy about prisoner voting rights has been exceptional. The *Human Rights Act 1998* effectively confers strong powers of constitutional review on courts.³⁸

While the UK government is able to join other state parties in the European Court of Human Rights in defending legislation against human rights challenges, it is unable to formally appeal a case to Strasbourg. The European Court of Human Rights may only receive applications from any person, non-governmental organisation or group of individuals claiming to be the *victim* of a violation by one of the High Contracting Parties.³⁹ Effectively the only way for a government to get a ruling of the European Court of Human Rights overturned would be to pass legislation which it believes to be compatible and to have it unsuccessfully challenged in court by an aggrieved individual. If one takes the view that people can reasonably disagree about rights then the practice of governments introducing legislation where there is even a good chance they will subsequently be found incompatible by a court may be democratically justified.

The practice in the UK is that governments quite frequently take their own independent and sometimes robust view of the constitutionality of a legislative measure knowing that that view will almost certainly be subsequently tested in the courts. In the vast majority of cases it will be the courts which effectively decide what is required by way of human rights protection. The operation of the UK Human Rights Act 1998 is towards the strong end of weak form judicial review.

provisions and to lodge reservations through the treaty mechanism.

³⁸ See A Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge University Press, 2009).

³⁹ Article 34.

4. AUSTRALIA

There are three different pre-legislative scrutiny frameworks in operation in Australia – in Canberra, in Victoria, and at Federal level.

a. *Australian Capital Territory Human Rights Act 2004*

i) Reporting Obligation

The ACT model explicitly requires both negative and positive statements of compatibility. Section 37 provides:

- (1) This section applies to each bill presented to the Legislative Assembly by a Minister.
- (2) The Attorney-General must prepare a written statement (the **compatibility statement**) about the bill for presentation to the Legislative Assembly.
- (3) The compatibility statement must state—
 - (a) whether, in the Attorney-General's opinion, the bill is consistent with human rights; and
 - (b) if it is not consistent, how it is not consistent with human rights.

ii) Examination Standard

The rights enumerated in the ACT Human Rights Act 2004 are primarily based on the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, but are not limited to them. Reasonable limitations may be placed on a human right where this limitation "can be demonstrably justified in a free and democratic society". Section 28 (which came into force in 2008) sets out the factors that must be taken into account when determining whether a limitation is proportionate which are: the nature of the right protected, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and any less restrictive means available to achieve its purpose.

Section 31 states that international law, and the judgments of foreign and international courts and tribunals may be considered in interpreting and applying the right.

iii) Pre-legislative scrutiny and practice

I have been unable to find evidence of the existence of a report of a negative statement of incompatibility. In practice, controversy about Attorney-General's statements has centred on the degree to which he or she provides a record of his or her reasoning especially given that s. 32 allows international human rights standards to be considered when interpreting provisions. It is the Legislative Assembly's Scrutiny Committee which appears to have had the most impact in ensuring that human rights are taken into account in the legislative process. Section 38 requires that the relevant standing committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly. That Committee frequently disagrees with the Attorney-General's views. While failure to comply with either s. 37 or s. 38 does not affect the validity, operation or enforcement of any Territory law, in practice the standing committees' reports on the human rights compatibility of Bills has had a significant impact on the quality of legislation.⁴⁰ Moreover, in addition to a power to intervene in litigation, the Human Rights Commission has undertaken the independent scrutiny of rights compliance.

iv) The context in which it operates

The Australian Capital Territory Legislative Assembly *Human Rights Act 2004* is similar to the New Zealand model. It imposes a duty on public authorities to act in a manner consistent with human rights. It protects most of the civil and political rights expressed in the *ICCPR*⁴¹ and subjects these to a general limitation provision. Section 30 is a narrower interpretative provision than appears in the UK or New Zealand. It requires:

"So far as it is possible to do so *consistently with its purpose*, a Territory law must be interpreted in a way that is compatible with human rights". (my emphasis)

However, the Act contains much more specific directions on how the pre-legislative scrutiny should be conducted. It is more explicit in empowering the Supreme Court to declare a law incompatible with rights. Section 32 allows the Supreme Court to grant a declaration of incompatibility but this does not have the effect of invalidating the

⁴⁰ *The Human Rights Act 2004 (Act): The First Five Years of Operation* available at http://acthra.anu.edu.au/acthra_res_proj.php.

⁴¹ See sections 8-27 in Part 3 of the Act.

law or rendering it ineffective. It sets out a process by which the Assembly is notified and can respond in such situations. The Attorney-General must present the declaration to the Legislative Assembly within 6 days and provide a written response to the declaration of incompatibility within 6 months.

b. Victorian Charter of Human Rights and Responsibilities Act 2006

i) Reporting Obligation

The pre-legislative scrutiny regime is contained in s. 28:

- (1) A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.
- (2) A member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under subsection (1) to be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.
- (3) A statement of compatibility must state—
 - (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and
 - (b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.
- (4) A statement of compatibility made under this section is not binding on any court or tribunal.

Section 29 provides that:

A failure to comply with section 28 in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or of any other statutory provision.

Parliament also clearly retains power to "override" the human rights set out in the *Charter* through an *express declaration* in a new Act. Section 31 provides:

- (1) Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human

rights or despite anything else set out in this Charter.

- (2) If an override declaration is made in respect of an Act or a provision of an Act that declaration must be taken to extend to any subordinate instrument made under or for the purpose of that Act or provision.
- (3) A member of Parliament who introduces a Bill containing an override declaration, or another member acting on his or her behalf, must make a statement to the Legislative Council or the Legislative Assembly, as the case requires, explaining the exceptional circumstances that justify the inclusion of the override declaration.
- (4) It is the intention of Parliament that an override declaration will only be made in exceptional circumstances.
- (5) A statement under subsection (3) must be made—
 - (a) during the second reading speech for the Bill that contains the override declaration; or
 - (b) after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill; or
 - (c) with the leave of the Legislative Council or the Legislative Assembly, as the case requires, at any time before the third reading of the Bill.
- (6) If an override declaration is made in respect of a statutory provision, then to the extent of the declaration this Charter has no application to that provision.
- (7) A provision of an Act containing an override declaration expires on the 5th anniversary of the day on which that provision comes into operation or on such earlier date as may be specified in that Act.
- (8) Parliament may, at any time, re-enact an override declaration, and the provisions of this section apply to any re-enacted declaration.
- (9) A failure to comply with subsection (3) or (5) in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or of any other statutory provision.

The effect of the override declaration is that a statement of compatibility may not be required to be prepared in respect of the provisions of Bills for which an override declaration is intended to be made.

ii) Examination standard

Section 3(1) defines "human rights" as the rights set out in Part 2 of the *Charter*. Hettiarachi argues that "critically the s. 7(2) limitation mechanism is separate from and does not form part of that definition. This is relevant because "compatible with a right" may deliver different meanings depending on whether a right compatible or a *right as limited* compatible meaning is the focus".⁴²

In practice, however, statements of compatibility routinely consider not only whether rights are engaged but whether the limitations on such rights are reasonable. The templates developed by the Human Rights Unit inside the Department of Justice incorporate a 2 stage test whereby the right is defined and then subjected to a reasonable limits test.⁴³ In preparing a statement of compatibility the engaged rights must be identified, and if rights are engaged there must be a discussion of whether and how the right is affected, and whether any limitation is "reasonable" and "demonstrably justified in a free and democratic society based on human dignity, equality and freedom". A version of the *Oakes* test⁴⁴ is adopted. The Minister must describe the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve the purpose that limitation seeks to achieve.⁴⁵ If the Bill or provision of the Bill is incompatible according to this test, the member introducing the bill must state this and explain how it is incompatible⁴⁶ and indicate why he or she nonetheless wishes to proceed with the Bill. In exceptional circumstances a Bill or part of a Bill may contain a s. 31 "override declaration". Such Bills must be accompanied by a statement explaining the exceptional circumstances, such as threats to security or states of emergency,

⁴² P Hettiarachi, "Some Things Borrowed, Some Things New: An overview of Judicial Review of Legislation Under the Charter of Human Rights and Responsibilities" 2007 OUCIJ 61, 79

⁴³ Victorian Department of Justice, *Charter Guidelines* Section 1, footnote 43.

⁴⁴ See *R v Oakes* [1986] 1 SCR 103,106 cited in Victorian Department of Justice, *Charter Guidelines* Section 1 at footnote 38 and in accompanying text.

⁴⁵ Victorian Department of Justice, *Charter Guidelines* Section 1 at pp 29, 49.

⁴⁶ Victorian Department of Justice, *Charter Guidelines* Section 1 at 2.1, see also Flowchart B on p 49.

which justify the inclusion of a declaration.⁴⁷

iii) Pre-legislative scrutiny and practice

The Victorian *Charter* is more rigorous than the *Human Rights Act 2004* (ACT) in that it requires statements of compatibility to demonstrate the government's reasoning and not take the form of mere assertion. Statements of compatibility are developed through the policy and legal process prior to the introduction of a legislative measure. The Department of Justice has created a Guideline for the assessment of policies and legislation against human rights standards. Prior to introduction, departmental officials must prepare a human rights impact statement in consultation with the Human Rights Unit and the Victorian Government Solicitor's Office. Notwithstanding that ultimately it is the Minister rather than the Attorney-General who is responsible for the statement of compatibility, the Department of Justice Human Rights Unit and Office of Parliamentary Counsel offer some degree of centralised control and consistency.

Between 2007 and 2011 there were 2 instances in which Ministers found bills to be (partially) incompatible with the *Charter* namely the *Summary Offences and Control of Weapons Act Amendment Bill (2009)* and the *Control of Weapons Amendment Bill (2010)* (providing for random searches for weapons in central Melbourne). I could not find an example of the use of the s. 31 legislative override as at 15 May 2015.

As with the ACT *Human Rights Act 2004*, the statute requires that all Bills be reviewed by a Parliamentary Select Committee for compatibility with human rights (in this case to the Scrutiny of Acts and Regulations Committee (SARC)).⁴⁸ Between 2007 and 2010 the Parliamentary Committee (SARC) has disagreed with the Minister's assessment of compatibility 62 times though this has not always resulted in amendment to the contested provisions.⁴⁹

The Act also confers an educational and supervisory role on the Victorian Equal Opportunity and Human Rights Commission. The Commission may intervene as of

⁴⁷ Ibid.

⁴⁸ Section 30.

⁴⁹ J B Kelly, "A Difficult Dialogue: Statements of Compatibility and the Victorian Charter of Human Rights and Responsibilities Act" *Australian Journal of Political Science* 46:2, 257-279 (2011).

right in any proceeding before a court or tribunal (s. 41), and issues an annual report to the Attorney-General in relation to the operation of the *Charter* (s. 41). Statements of compatibility, and the responses of the SARC and Ministers to them, are available on the Commission's website.

iv) The context in which it operates

The Victorian *Charter of Human Rights and Responsibilities Act 2006* is at the weaker end of weak-model judicial review and this is combined with a very "dialogic" model of pre-legislative scrutiny which multiplies the sites for and seeks to enhance the quality of legislative debate surrounding human rights compliance.

The judicial power to interpret the provision consistently with human rights may not be used to undermine the statutory purpose⁵⁰ and courts are unable to 'strike down' or invalidate the provision in question.

If the Supreme Court finds that a statutory provision is incompatible with human rights, it may make a declaration that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant minister to respond to that declaration (called a declaration of inconsistent interpretation). The Minister must table a written response to the declaration.⁵¹ It will then be up to Parliament to decide what action (if any) to take.

So far there has only been one declaration of inconsistent interpretation. It was given in relation to the reverse onus provision in the *Drugs, Poisons and Controlled Substances Act 1981*. In the same case, the very constitutionality of the provision conferring on the Victorian Supreme Court the power to make a declaration of incompatibility was questioned.⁵² The High Court found by a 4:3 majority that the declaration power was valid under Chapter III of the Australian Constitution but one of the four majority judges (French CJ) also held that it could not be exercised in Federal jurisdiction. This decision has created uncertainty and potentially limits the jurisdictional scope for judicial review under the *Charter*.

⁵⁰ Section 32(1).

⁵¹ Sections 36- 37.

⁵² *Momcilovic v The Queen* [2011] HCA 34.

It is difficult to compare the Victorian *Charter* with the other regimes discussed given the presence of the override power (s. 31 set out above) which would render a statement of incompatibility unnecessary.

The regime as a whole is founded in a strong version of the separation of powers reflecting the Australian Commonwealth constitution.

c. *Commonwealth of Australia: The Human Rights
(Parliamentary Scrutiny) Act 2011 (Cth)*

i) Reporting obligation

The Federal level is governed by a purely parliamentary process regulated by the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)* which came into effect on 4 January 2012.⁵³ Section 8 requires:

- (1) A member of Parliament who proposes to introduce a Bill for an Act into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill;
- (2) A member of Parliament who proposes to introduce a Bill for an Act into a House of Parliament, or another member acting on his or her behalf, must cause a statement of compatibility prepared under subsection (1) to be presented to the House;
- (3) A statement of compatibility must include an assessment of whether the Bill is compatible with human rights;
- (4) A statement of compatibility prepared under subsection (1) is not binding on any court or tribunal.
- (5) A failure to comply with this section in relation to a Bill that becomes an Act does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth.

Human rights compatibility is assessed against 7 core human rights treaties to which Australia has acceded which are listed in s. 3(1). They include: the *International Convention on the Elimination of All Forms of Racial Discrimination*; the *International Covenant on Economic, Social and Cultural Rights*; the *International*

⁵³ See for an explanation of the framework G Williams and L Burton, "Australia's Exclusive Parliamentary Model of Rights Protection" (2013) *Statute Law Review* 34(1) 58-94.

Covenant on Civil and Political Rights; the Convention on the Elimination of all Forms of Discrimination Against Women; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and the Convention on the Rights of Persons with Disabilities.

ii) Examination Standard

There is no prescribed form for statements of compatibility but the Attorney-General's department provides a template and assessment tool and guidance sheets. This guidance includes information about the principles for lawfully limiting rights and information about rights that cannot be limited. Such guidance reflects the wording of the respective treaties including whether the protected rights are derogable or non-derogable and if they are derogable the basis on which such limitations on the rights are lawful. There are references to the UN Human Rights Committee and various other UN agencies' attempts to define the terms of various treaties, as well as to domestic law judicial interpretations of statutes purporting to give effect to Treaty rights. In other words, the standard will depend on the Treaty wording and jurisprudence.

iii) Pre-legislative scrutiny and practice

The Act does not specify when or how compatibility statements should be presented but typically statements appear as part of the explanatory memorandum to a Bill. In practice the statement is prepared by the responsible Minister in relation to government bills and the sponsoring member for non-government bills. The Office of the Attorney-General is not required to approve statements of compatibility but does provide legal advice.

Bills go to a standing Parliamentary Joint Committee on Human Rights established by the Act which has jurisdiction to examine legislative instruments for compatibility with rights.

In the first 6 months of its operation 129 out of 134 bills were accompanied by a statement of compatibility. 57 statements identified that rights were indeed engaged. 35 statements identified rights limitations (many of the international human rights treaties allow specific rights to be derogated from in certain limited circumstances)

and no statements identified incompatibility.⁵⁴

iv) The context within which it operates

The Act sets out a process strictly internal to Parliament. No consequences flow from a failure to present a statement of compatibility⁵⁵ and the statement is not "binding on any court or tribunal".⁵⁶ The approach the courts will take is still unclear but it is envisaged that such statements may assist in judicial interpretations of statutes and regulations.

5. CONCLUSION

The regimes for pre-legislative scrutiny differ widely in their terms and in the contexts in which they operate and cannot be assessed without considering the overall constitutional balance reached both formally and in practice between judicial and parliamentary supremacy in each jurisdiction. Simple comparisons, such as the number of reports, are likely to be misleading.

6. SUMMARY OF THE METHODOLOGY USED

My report is not based on assumptions. Rather I have conducted research from publicly available documents, about the laws and practices adopted in each of these jurisdictions, from related documentation and commentary as well as from learned articles. I have attempted so far as possible to be accurate as at 15 May 2015 or as otherwise indicated.

7. RELATIONSHIP WITH THE PARTIES

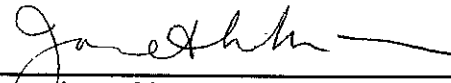
Except for the retainer I have received for the preparation of this report, I have no relation to any of the parties to this action, neither are there any caveats or qualifications that I should express to render my report complete and accurate.

⁵⁴ *Ibid*, 80.

⁵⁵ S. 8(5)

⁵⁶ S. 8(4)

DATED: 1 June 2015



Janet Margaret McLean

8. APPENDICES

- a. Curriculum vitae of Janet Margaret McLean
- b. New Zealand
 - i. *New Zealand's Bill of Rights 1990*
- c. United Kingdom
 - i. *Human Rights Act 1998*
- d. Australian Capital Territory
 - i. *Human Rights Act 2004*
- e. Victoria
 - i. *Charter of Human Rights and Responsibilities Act 2006*
- f. Commonwealth
 - i. *Human Rights (Parliamentary Scrutiny) Act 2011*

University of Auckland
Standard
ACADEMIC CV



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1986 Victoria University of Wellington LLB (Hons)
1990 University of Michigan LLM

PREVIOUS APPOINTMENTS:

2006-2011 University of Dundee: Professor, Chair of law and Governance
1999-2006 The University of Auckland: Associate Professor of Law 2004-2006,
senior lecturer 1999-2004
1997-1999 Victoria University of Wellington: Senior Lecturer in Law and Director of the New Zealand
Institute of Public Law
1991-1997 The University of Auckland: Lecturer in law and senior lecturer (1997)
1990-1991 Legislative Drafter, Alberta, Canada
1986-1989 Legal Research Officer, New Zealand Law Commission

SIGNIFICANT DISTINCTIONS / AWARDS:

2013 J F Northey Memorial Book Award for best book published by a NZ based legal author
2010-2011 Visiting Fellow, Woodrow Wilson School of Public and International Affairs and the Law
and Public Affairs Program, Princeton University
2002-2004 George P Smith Distinguished Visiting Chair in Law, University of Indiana
2001 Visiting Fellow, Law Program, Research School of Social Sciences, The Australian
National University
1990 Research Scholar, The University of Michigan Law School
1989-1990 Fulbright Graduate Scholar
1982-1984 Lissie Rathbone Scholar, Victoria University of Wellington

Research Publications:

Books:

2012 McLEAN, J. *Searching for the State in British Legal Thought*, Cambridge Press, Cambridge
2012 334 pp

Edited Collections:

1999 McLEAN, J. *Property and the Constitution*, 1999, Hart Publishing, Oxford 1999 261pp

Refereed Articles:

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- 1995 McLEAN, J. "Equality and Antidiscrimination Law: Are They The Same?" in G. Huscroft and P. Rishworth (eds), *Rights and Freedoms in New Zealand*, Brookers 1995, 263-296
- 1995 McLEAN, J. "Discrimination" in McKay and McCartney (eds), *Mazengarb's Employment Law*, (commentary on the Human Rights Act 1993) Butterworths 1995, J/i-J283

Technical Reports and Papers:

- 2004 ASHTON, T., CUMMING, J., McLEAN, J., McKINLAY, M., FAE, E. *Contracting for Health Services: Lessons from New Zealand* WHO Regional Office for the Western Pacific ISBN 92 9081 067 0 88pp
- 2000 McLEAN, J. *Discussion Paper: Re-evaluation of the Human Rights Protections in New Zealand*, Ministry of Justice (with P.COOPER, W. MANSFIELD, and P. HUNT) 118 pp esp 27-53

Research Grants / Funding:

- 2009 The New Zealand Law Foundation \$134,769NZD: The Queen of New Zealand and Her Governor-General with Dame Alison Quentin-Baxter 12 January 2009
- 2000 WHO Regional Office for the Western Pacific Grant (with Dr Toni Ashton University of Auckland) *Contracting for Health Services: Lessons from New Zealand* \$40,000NZD
- 1999 The New Zealand Law Foundation \$40,000 Property and the Constitution Conference and British Council and German Consular funding for visiting speakers

Invited Lectures:

- 2015 Speaker New Zealand Higher Judges Conference March Waitangi
- 2014 Invited as leading expert to Halbert Centre for Canadian Studies Workshop Hebrew Workshop on Judicial Review December 2014 Hebrew University
- 2014 Invitation to colloquium on Government Contracting and Neoliberalism University of Western Sydney Nov 11 "What is New About Neo-Liberalism?"
- 2014 Invited speaker Inaugural Public Law Conference Cambridge University September 15-17
- 2013 "The New Zealand Constitutional Review" University of Tel Aviv April 29
- 2013 "Unearthing New Zealand's Constitutional Traditions: Tradition and Change" NZ Centre for Public Law Conference: "Unearthing New Zealand's Constitutional Traditions", VUW 29-30 August 3, Parliament Buildings Wellington (published on SSRN and submitted for publication)
- 2013 "Public Authority, The State and Sovereignty: Lessons From History?" Draft Working Paper for Research Workshop: The Public Authority in the Era of Globalization Whitlam Institute, University of Western Sydney, 12-14 August 2013, (invited for submission March 2014)
- 2013 "Government under Law?: Written and Unwritten Constitutions" Draft working paper for Australasian Constitutionalism I.CON symposium Centre for Constitutional Studies Melbourne University 12-13 December
- 2011 "The New Zealand Bill of Rights and Constitutional Convention" Public Lecture Victoria University of Wellington August 29
- 2010 "Nineteenth Century Administrative law before Dicey" Constitutional Theory Workshop, Oxford University May 24
- 2010 "Damages and Human Rights" Constitutional Theory Group, Edinburgh Law School March 10
- 2009 "The Crown, State and Corporation" Paper to Glasgow Constitutional Law Workshop 28 October
- 2009 Commentary and discussion leader on Thomas Poole and Adam Tomkins Papers "The Role of Courts in Constitutional Law" University of Glasgow and Toronto invited Workshop 26 June
- 2009 "Damages in Public Law" Discussion leader Cambridge invited Workshop on Compensation 22 May
- 2009 "British Idealism and Administrative Law" Paper to Yale Law School Comparative Administrative Law Conference 7-9 May
- 2007 "The Crown and the Treaty of Waitangi" Conference in Honour of HE Rt Hon Sir Kenneth Keith, Victoria University of Wellington and NZ Centre for Public Law
- 2007 "The Bill of Rights and Administrative law Revisited" Rights and Freedoms in New Zealand: The Bill of Rights Comes of Age, Legal Research Foundation and University of Auckland
- 2006 "Legal Personhood" Paper to Oxford Constitutional Theory series May 1
- 2004 "The State, the Citizen and Transnational Government" ANU Centre for International and Public Law & Gilbert and Tobin Centre of Public Law: Expert Workshop International Challenges to the Australian Legal System

- 2004 "Parliamentary Definitions of the Executive" Centre for Public Law, Victoria University of Wellington, Parliament Conference
- 2003 "Persons Populating the Legal World: Representation and Legal Identity" Centre for History and Economics, Kings College, Cambridge, Forms of Representation Workshop
- 2003 "The Transnational Corporation in History: Lessons for Today?" Indiana University School of Law at Bloomington: George P Smith Distinguished Visiting Lecture
- 2003 "From Empire to Globalization" Indiana Law School at Bloomington Globalization and Courts Seminar
- 2003 "Government to State" Indiana Law School at Bloomington Globalization and Democracy Seminar
- 2003 "Updates on Administrative Law" New Zealand Law Society Auckland, Wellington, Christchurch, Hamilton Roadshow
- 2003 "Rules and Standards" Legal Research Foundation Auckland Statutes: Their Making and Meaning Conference
- 2002 "Bill of Rights and Administrative Law" New Zealand Law Society Auckland and Wellington: Litigating Against the Crown Conference
- 2001 "New Zealand Bill of Rights" Melbourne University Law School, Staff Seminar
- 2001 "Interpretative Bills of Rights" University of NSW, Bill of Rights Seminar
- 2001 "Statutory Interpretation" New Zealand Judges Conference
- 2000 "Referendums" Institute of Policy Studies Wellington, Building the Constitution Conference
- 2000 "Health Reforms" Legal Research Foundation Wellington, State Sector Reforms Conference
- 2000 "Public Law of Tort and Contract" Bristol University Local Government Conference
- 2000 "Administrative Law: New Zealand Update" Canberra AIC Conference
- 1997 "Intermediate Associations and the State" Saskatchewan Law School Canada, The Province of Administrative Law Conference
- 1996 "Privatization and Corporatization in New Zealand" Griffith University Australia, Privatization Conference
- 1996 "Associations and the State" Political Science Dept, The University of Auckland, Groups and Democracy Conference
- 1997 "Administrative Law and the Constitution": Legal Research Foundation Auckland Lord Cooke Conference
- 1992 "Bill of Rights and Administrative Law": Legal Research Foundation Auckland Bill of Rights Conference

PROFESSIONAL SOCIETIES / SERVICE / OTHER ACTIVITIES:

- 2012- Associate Dean Research Auckland Law Faculty, University Research Committee, Faculty of Arts Research Committee, Faculty of Law Management Committee, Medical School Fitness to Practice Committee

- 2006-2011 **University of Dundee:** Research Committee (as outstanding scholar from the College of Arts and Humanities); Director Post-Graduate Research; Law School Research Committee (including for last RAE selection); Convenor, Law Library Liaison Committee; Coordinator, Centre for Freedom of Information (a joint venture with the Scottish Information Commissioner which runs a seminar series and is an avenue for research impact); Law School Management Team; Professorial Research supporter and probationer advisor; Service on appointments committees in the University and the law school; Service on grievance panels to the University.
- 1999-2006 **University of Auckland:** Education Committee 1999-2000; EEO and E Ed O Committee;
- Women in Leadership Programme 2000-2003; Senior Academic Programme 2004; Vice Chancellor Selection Committee 2004; Ombudsman Inquiry into research misconduct 2004.
- Law School: Deputy Dean 1999-2001; Administrator Chapman Tripp Research Fund; Chair Discretionary Conference Fund Committee.

Other Contributions

- 2014- Co-editor Public Law Review Australia
- 2007-2009 External examiner in Public Law, University of Glasgow
- 2000-2005 Attorney-General's appointee to New Zealand Legislation Advisory Committee
- 2000 Attorney-General's advisor on New Zealand Human Rights Protection
- 1997-2005 NZ Law Society Public and Administrative Law Consultative Committee 1997-2005
- 1999-present Book Review Editor Public Law Review
- Editorial Boards: NZ Law Rev, NZJPIL
- Referee for Cambridge University Press, Oxford University Press, Modern Law Review, Federal Law Review, Public Law Review, NZ Law Review, ICON (NYU)
- New Zealand Legal Research Foundation Member

TEACHING: [Undergraduate Programmes, Postgraduates – number, dates, achievements, development, qualitative evidence, teaching profile, summary of evaluations, etc]

- 2013 Public Law, European Public Law, Advanced public Law
- 2012 European Public law
- Advanced Public Law
- State and Crown Liability (Masters)
- Public Law
- 1991-2010, 2012 Compulsory Public Law (Constitutional law)
- 2008 International and Domestic law (masters)
- 2006-2010 Masters International and Comparative Human Rights
- 2006-2010 Masters Legal Methodology and research skills
- 2003-2004 Administrative law

I have also taught Legal Method, Public Contracting, Legislation, and Advanced Constitutional law.

**Reprint
as at 1 July 2013**



**New Zealand Bill of Rights Act
1990**

Public Act 1990 No 109
Date of assent 28 August 1990
Commencement see section 1(2)

Contents

	Page
Title	2
1 Short Title and commencement	3
Part 1	
General provisions	
2 Rights affirmed	3
3 Application	3
4 Other enactments not affected	3
5 Justified limitations	3
6 Interpretation consistent with Bill of Rights to be preferred	4
7 Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights	4

Note

Changes authorised by section 17C of the Acts and Regulations Publication Act 1989 have been made in this reprint.

A general outline of these changes is set out in the notes at the end of this reprint, together with other explanatory material about this reprint.

This Act is administered by the Ministry of Justice.

Part 2**Civil and political rights***Life and security of the person*

8	Right not to be deprived of life	4
9	Right not to be subjected to torture or cruel treatment	4
10	Right not to be subjected to medical or scientific experimentation	4
11	Right to refuse to undergo medical treatment	5

Democratic and civil rights

12	Electoral rights	5
13	Freedom of thought, conscience, and religion	5
14	Freedom of expression	5
15	Manifestation of religion and belief	5
16	Freedom of peaceful assembly	5
17	Freedom of association	5
18	Freedom of movement	6

Non-discrimination and minority rights

19	Freedom from discrimination	6
20	Rights of minorities	6

Search, arrest, and detention

21	Unreasonable search and seizure	6
22	Liberty of the person	6
23	Rights of persons arrested or detained	7
24	Rights of persons charged	7
25	Minimum standards of criminal procedure	8
26	Retroactive penalties and double jeopardy	8
27	Right to justice	9

Part 3**Miscellaneous provisions**

28	Other rights and freedoms not affected	9
29	Application to legal persons	9

An Act—

- (a) to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
- (b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights

1 Short Title and commencement

- (1) This Act may be cited as the New Zealand Bill of Rights Act 1990.
- (2) This Act shall come into force on the 28th day after the date on which it receives the Royal assent.

Part 1
General provisions

2 Rights affirmed

The rights and freedoms contained in this Bill of Rights are affirmed.

3 Application

This Bill of Rights applies only to acts done—

- (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or
- (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

4 Other enactments not affected

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

- (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
- (b) decline to apply any provision of the enactment—
by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5 Justified limitations

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6 Interpretation consistent with Bill of Rights to be preferred

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

7 Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—

- (a) in the case of a Government Bill, on the introduction of that Bill; or
- (b) in any other case, as soon as practicable after the introduction of the Bill,—

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

Part 2

Civil and political rights

Life and security of the person

8 Right not to be deprived of life

No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

9 Right not to be subjected to torture or cruel treatment

Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

10 Right not to be subjected to medical or scientific experimentation

Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

- 11 Right to refuse to undergo medical treatment**
Everyone has the right to refuse to undergo any medical treatment.

Democratic and civil rights

- 12 Electoral rights**
Every New Zealand citizen who is of or over the age of 18 years—
- (a) has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
 - (b) is qualified for membership of the House of Representatives.
- 13 Freedom of thought, conscience, and religion**
Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.
- 14 Freedom of expression**
Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.
- 15 Manifestation of religion and belief**
Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.
- 16 Freedom of peaceful assembly**
Everyone has the right to freedom of peaceful assembly.
- 17 Freedom of association**
Everyone has the right to freedom of association.

18 Freedom of movement

- (1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.
- (2) Every New Zealand citizen has the right to enter New Zealand.
- (3) Everyone has the right to leave New Zealand.
- (4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

*Non-discrimination and minority rights***19 Freedom from discrimination**

- (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
- (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

Section 19: substituted, on 1 February 1994, by section 145 of the Human Rights Act 1993 (1993 No 82).

20 Rights of minorities

A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

*Search, arrest, and detention***21 Unreasonable search and seizure**

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

22 Liberty of the person

Everyone has the right not to be arbitrarily arrested or detained.

23 Rights of persons arrested or detained

- (1) Everyone who is arrested or who is detained under any enactment—
- (a) shall be informed at the time of the arrest or detention of the reason for it; and
 - (b) shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
 - (c) shall have the right to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful.
- (2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.
- (3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.
- (4) Everyone who is—
- (a) arrested; or
 - (b) detained under any enactment—
- for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.
- (5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

24 Rights of persons charged

Everyone who is charged with an offence—

- (a) shall be informed promptly and in detail of the nature and cause of the charge; and
- (b) shall be released on reasonable terms and conditions unless there is just cause for continued detention; and
- (c) shall have the right to consult and instruct a lawyer; and
- (d) shall have the right to adequate time and facilities to prepare a defence; and
- (e) shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for 2 years or more; and

- (f) shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and
- (g) shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

Section 24(e): amended, on 1 July 2013, by section 4 of the New Zealand Bill of Rights Amendment Act 2011 (2011 No 92).

25 Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

- (a) the right to a fair and public hearing by an independent and impartial court;
- (b) the right to be tried without undue delay;
- (c) the right to be presumed innocent until proved guilty according to law;
- (d) the right not to be compelled to be a witness or to confess guilt;
- (e) the right to be present at the trial and to present a defence;
- (f) the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution;
- (g) the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty;
- (h) the right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both;
- (i) the right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

26 Retroactive penalties and double jeopardy

- (1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence

by such person under the law of New Zealand at the time it occurred.

- (2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

27 Right to justice

- (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
- (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
- (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

Part 3

Miscellaneous provisions

28 Other rights and freedoms not affected

An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

29 Application to legal persons

Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

Contents

- 1 General
 - 2 Status of reprints
 - 3 How reprints are prepared
 - 4 Changes made under section 17C of the Acts and Regulations Publication Act 1989
 - 5 List of amendments incorporated in this reprint (most recent first)
-

Notes**1 General**

This is a reprint of the New Zealand Bill of Rights Act 1990. The reprint incorporates all the amendments to the Act as at 1 July 2013, as specified in the list of amendments at the end of these notes.

Relevant provisions of any amending enactments that contain transitional, savings, or application provisions that cannot be compiled in the reprint are also included, after the principal enactment, in chronological order. For more information, see <http://www.pco.parliament.govt.nz/reprints/>.

2 Status of reprints

Under section 16D of the Acts and Regulations Publication Act 1989, reprints are presumed to correctly state, as at the date of the reprint, the law enacted by the principal enactment and by the amendments to that enactment. This presumption applies even though editorial changes authorised by section 17C of the Acts and Regulations Publication Act 1989 have been made in the reprint.

This presumption may be rebutted by producing the official volumes of statutes or statutory regulations in which the principal enactment and its amendments are contained.

3 How reprints are prepared

A number of editorial conventions are followed in the preparation of reprints. For example, the enacting words are not included in Acts, and

provisions that are repealed or revoked are omitted. For a detailed list of the editorial conventions, see <http://www.pco.parliament.govt.nz/editorial-conventions/> or Part 8 of the *Tables of New Zealand Acts and Ordinances and Statutory Regulations and Deemed Regulations in Force*.

4 Changes made under section 17C of the Acts and Regulations Publication Act 1989

Section 17C of the Acts and Regulations Publication Act 1989 authorises the making of editorial changes in a reprint as set out in sections 17D and 17E of that Act so that, to the extent permitted, the format and style of the reprinted enactment is consistent with current legislative drafting practice. Changes that would alter the effect of the legislation are not permitted.

A new format of legislation was introduced on 1 January 2000. Changes to legislative drafting style have also been made since 1997, and are ongoing. To the extent permitted by section 17C of the Acts and Regulations Publication Act 1989, all legislation reprinted after 1 January 2000 is in the new format for legislation and reflects current drafting practice at the time of the reprint.

In outline, the editorial changes made in reprints under the authority of section 17C of the Acts and Regulations Publication Act 1989 are set out below, and they have been applied, where relevant, in the preparation of this reprint:

- omission of unnecessary referential words (such as “of this section” and “of this Act”)
- typeface and type size (Times Roman, generally in 11.5 point)
- layout of provisions, including:
 - indentation
 - position of section headings (eg, the number and heading now appear above the section)
- format of definitions (eg, the defined term now appears in bold type, without quotation marks)
- format of dates (eg, a date formerly expressed as “the 1st day of January 1999” is now expressed as “1 January 1999”)

- position of the date of assent (it now appears on the front page of each Act)
- punctuation (eg, colons are not used after definitions)
- Parts numbered with roman numerals are replaced with arabic numerals, and all cross-references are changed accordingly
- case and appearance of letters and words, including:
 - format of headings (eg, headings where each word formerly appeared with an initial capital letter followed by small capital letters are amended so that the heading appears in bold, with only the first word (and any proper nouns) appearing with an initial capital letter)
 - small capital letters in section and subsection references are now capital letters
- schedules are renumbered (eg, Schedule 1 replaces First Schedule), and all cross-references are changed accordingly
- running heads (the information that appears at the top of each page)
- format of two-column schedules of consequential amendments, and schedules of repeals (eg, they are rearranged into alphabetical order, rather than chronological).

5 *List of amendments incorporated in this reprint
(most recent first)*

New Zealand Bill of Rights Amendment Act 2011 (2011 No 92)
Human Rights Act 1993 (1993 No 82): section 145



Human Rights Act 1998

CHAPTER 42

ARRANGEMENT OF SECTIONS

- Introduction*
- Section
1. The Convention Rights.
 2. Interpretation of Convention rights.

- Legislation*
3. Interpretation of legislation.
 4. Declaration of incompatibility.
 5. Right of Crown to intervene.

- Public authorities*
6. Acts of public authorities.
 7. Proceedings.
 8. Judicial remedies.
 9. Judicial acts.

- Remedial action*
10. Power to take remedial action.

- Other rights and proceedings*
11. Safeguard for existing human rights.
 12. Freedom of expression.
 13. Freedom of thought, conscience and religion.

- Derogations and reservations*
14. Derogations.
 15. Reservations.
 16. Period for which designated derogations have effect.
 17. Periodic review of designated reservations.

- Judges of the European Court of Human Rights*
18. Appointment to European Court of Human Rights.

Parliamentary procedure

Section

19. Statements of compatibility.

Supplemental

20. Orders etc. under this Act.
21. Interpretation, etc.
22. Short title, commencement, application and extent.

SCHEDULES:

Schedule 1—The Articles.

Part I—The Convention.

Part II—The First Protocol.

Part III—The Sixth Protocol.

Schedule 2—Remedial Orders.

Schedule 3—Derogation and Reservation.

Part I—Derogation.

Part II—Reservation.

Schedule 4—Judicial Pensions.



Human Rights Act 1998

1998 CHAPTER 42

An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.

[9th November 1998]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Introduction

1.—(1) In this Act “the Convention rights” means the rights and fundamental freedoms set out in—

The Convention Rights.

- (a) Articles 2 to 12 and 14 of the Convention,
- (b) Articles 1 to 3 of the First Protocol, and
- (c) Articles 1 and 2 of the Sixth Protocol,

as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

(4) The Secretary of State may by order make such amendments to this Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol.

(5) In subsection (4) “protocol” means a protocol to the Convention—

- (a) which the United Kingdom has ratified; or
- (b) which the United Kingdom has signed with a view to ratification.

(6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.

Interpretation of
Convention rights.

2.—(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
- (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
- (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
- (d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section “rules” means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section—

- (a) by the Lord Chancellor or the Secretary of State, in relation to any proceedings outside Scotland;
- (b) by the Secretary of State, in relation to proceedings in Scotland; or
- (c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland—
 - (i) which deals with transferred matters; and
 - (ii) for which no rules made under paragraph (a) are in force.

Legislation

Interpretation of
legislation.

3.—(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

- (a) applies to primary legislation and subordinate legislation whenever enacted;
- (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
- (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Declaration of
incompatibility.

4.—(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—

- (a) that the provision is incompatible with a Convention right, and
- (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

(5) In this section “court” means—

- (a) the House of Lords;
- (b) the Judicial Committee of the Privy Council;
- (c) the Courts-Martial Appeal Court;
- (d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;
- (e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.

(6) A declaration under this section (“a declaration of incompatibility”)—

- (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
- (b) is not binding on the parties to the proceedings in which it is made.

5.—(1) Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court. Right of Crown to intervene.

(2) In any case to which subsection (1) applies—

- (a) a Minister of the Crown (or a person nominated by him),
- (b) a member of the Scottish Executive,
- (c) a Northern Ireland Minister,
- (d) a Northern Ireland department,

is entitled, on giving notice in accordance with rules of court, to be joined as a party to the proceedings.

(3) Notice under subsection (2) may be given at any time during the proceedings.

(4) A person who has been made a party to criminal proceedings (other than in Scotland) as the result of a notice under subsection (2) may, with leave, appeal to the House of Lords against any declaration of incompatibility made in the proceedings.

(5) In subsection (4)—

“criminal proceedings” includes all proceedings before the Courts-Martial Appeal Court; and

“leave” means leave granted by the court making the declaration of incompatibility or by the House of Lords.

Public authorities

Acts of public
authorities.

6.—(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

- (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
- (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section “public authority” includes—

- (a) a court or tribunal, and
- (b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) “Parliament” does not include the House of Lords in its judicial capacity.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) “An act” includes a failure to act but does not include a failure to—

- (a) introduce in, or lay before, Parliament a proposal for legislation; or
- (b) make any primary legislation or remedial order.

Proceedings.

7.—(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

- (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
- (b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) “appropriate court or tribunal” means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.

(5) Proceedings under subsection (1)(a) must be brought before the end of—

- (a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,
but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) "legal proceedings" includes—

- (a) proceedings brought by or at the instigation of a public authority; and
- (b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, 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.

(8) Nothing in this Act creates a criminal offence.

(9) In this section "rules" means—

- (a) in relation to proceedings before a court or tribunal outside Scotland, rules made by the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court,
- (b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,
- (c) in relation to proceedings before a tribunal in Northern Ireland—
 - (i) which deals with transferred matters; and
 - (ii) for which no rules made under paragraph (a) are in force,rules made by a Northern Ireland department for those purposes,

and includes provision made by order under section 1 of the Courts and Legal Services Act 1990. 1990 c. 41.

(10) In making rules, regard must be had to section 9.

(11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to—

- (a) the relief or remedies which the tribunal may grant; or
- (b) the grounds on which it may grant any of them.

(12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.

(13) "The Minister" includes the Northern Ireland department concerned.

8.—(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. Judicial remedies.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

- (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
- (b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—

- (a) whether to award damages, or
- (b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

(5) A public authority against which damages are awarded is to be treated—

1940 c. 42.

- (a) in Scotland, for the purposes of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;

1978 c. 47.

- (b) for the purposes of the Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(6) In this section—

“court” includes a tribunal;

“damages” means damages for an unlawful act of a public authority; and

“unlawful” means unlawful under section 6(1).

Judicial acts.

9.—(1) Proceedings under section 7(1)(a) in respect of a judicial act may be brought only—

- (a) by exercising a right of appeal;
- (b) on an application (in Scotland a petition) for judicial review; or
- (c) in such other forum as may be prescribed by rules.

(2) That does not affect any rule of law which prevents a court from being the subject of judicial review.

(3) In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.

(4) An award of damages permitted by subsection (3) is to be made against the Crown; but no award may be made unless the appropriate person, if not a party to the proceedings, is joined.

(5) In this section—

“appropriate person” means the Minister responsible for the court concerned, or a person or government department nominated by him;

“court” includes a tribunal;

“judge” includes a member of a tribunal, a justice of the peace and a clerk or other officer entitled to exercise the jurisdiction of a court;

“judicial act” means a judicial act of a court and includes an act done on the instructions, or on behalf, of a judge; and

“rules” has the same meaning as in section 7(9).

Remedial action

10.—(1) This section applies if—

Power to take
remedial action.

(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies—

(i) all persons who may appeal have stated in writing that they do not intend to do so;

(ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or

(iii) an appeal brought within that time has been determined or abandoned; or

(b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.

(3) If, in the case of subordinate legislation, a Minister of the Crown considers—

(a) that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and

(b) that there are compelling reasons for proceeding under this section,

he may by order make such amendments to the primary legislation as he considers necessary.

(4) This section also applies where the provision in question is in subordinate legislation and has been quashed, or declared invalid, by reason of incompatibility with a Convention right and the Minister proposes to proceed under paragraph 2(b) of Schedule 2.

(5) If the legislation is an Order in Council, the power conferred by subsection (2) or (3) is exercisable by Her Majesty in Council.

(6) In this section “legislation” does not include a Measure of the Church Assembly or of the General Synod of the Church of England.

(7) Schedule 2 makes further provision about remedial orders.

Other rights and proceedings

Safeguard for
existing human
rights.

11. A person’s reliance on a Convention right does not restrict—

- (a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or
- (b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9.

Freedom of
expression.

12.—(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied—

- (a) that the applicant has taken all practicable steps to notify the respondent; or
- (b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

- (a) the extent to which—
 - (i) the material has, or is about to, become available to the public; or
 - (ii) it is, or would be, in the public interest for the material to be published;
- (b) any relevant privacy code.

(5) In this section—

“court” includes a tribunal; and

“relief” includes any remedy or order (other than in criminal proceedings).

Freedom of
thought,
conscience and
religion.

13.—(1) If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

(2) In this section “court” includes a tribunal.

Derogations and reservations

14.—(1) In this Act “designated derogation” means—

Derogations.

- (a) the United Kingdom’s derogation from Article 5(3) of the Convention; and
- (b) any derogation by the United Kingdom from an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State.

(2) The derogation referred to in subsection (1)(a) is set out in Part I of Schedule 3.

(3) If a designated derogation is amended or replaced it ceases to be a designated derogation.

(4) But subsection (3) does not prevent the Secretary of State from exercising his power under subsection (1)(b) to make a fresh designation order in respect of the Article concerned.

(5) The Secretary of State must by order make such amendments to Schedule 3 as he considers appropriate to reflect—

- (a) any designation order; or
- (b) the effect of subsection (3).

(6) A designation order may be made in anticipation of the making by the United Kingdom of a proposed derogation.

15.—(1) In this Act “designated reservation” means—

Reservations.

- (a) the United Kingdom’s reservation to Article 2 of the First Protocol to the Convention; and
- (b) any other reservation by the United Kingdom to an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State.

(2) The text of the reservation referred to in subsection (1)(a) is set out in Part II of Schedule 3.

(3) If a designated reservation is withdrawn wholly or in part it ceases to be a designated reservation.

(4) But subsection (3) does not prevent the Secretary of State from exercising his power under subsection (1)(b) to make a fresh designation order in respect of the Article concerned.

(5) The Secretary of State must by order make such amendments to this Act as he considers appropriate to reflect—

- (a) any designation order; or
- (b) the effect of subsection (3).

16.—(1) If it has not already been withdrawn by the United Kingdom, a designated derogation ceases to have effect for the purposes of this Act—

Period for which designated derogations have effect.

- (a) in the case of the derogation referred to in section 14(1)(a), at the end of the period of five years beginning with the date on which section 1(2) came into force;

- (b) in the case of any other derogation, at the end of the period of five years beginning with the date on which the order designating it was made.
- (2) At any time before the period—
 - (a) fixed by subsection (1)(a) or (b), or
 - (b) extended by an order under this subsection,
 comes to an end, the Secretary of State may by order extend it by a further period of five years.
- (3) An order under section 14(1)(b) ceases to have effect at the end of the period for consideration, unless a resolution has been passed by each House approving the order.
- (4) Subsection (3) does not affect—
 - (a) anything done in reliance on the order; or
 - (b) the power to make a fresh order under section 14(1)(b).
- (5) In subsection (3) “period for consideration” means the period of forty days beginning with the day on which the order was made.
- (6) In calculating the period for consideration, no account is to be taken of any time during which—
 - (a) Parliament is dissolved or prorogued; or
 - (b) both Houses are adjourned for more than four days.
- (7) If a designated derogation is withdrawn by the United Kingdom, the Secretary of State must by order make such amendments to this Act as he considers are required to reflect that withdrawal.

Periodic review of
designated
reservations.

- 17.—(1) The appropriate Minister must review the designated reservation referred to in section 15(1)(a)—
- (a) before the end of the period of five years beginning with the date on which section 1(2) came into force; and
 - (b) if that designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).
- (2) The appropriate Minister must review each of the other designated reservations (if any)—
- (a) before the end of the period of five years beginning with the date on which the order designating the reservation first came into force; and
 - (b) if the designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).
- (3) The Minister conducting a review under this section must prepare a report on the result of the review and lay a copy of it before each House of Parliament.

Judges of the European Court of Human Rights

- 18.—(1) In this section “judicial office” means the office of—
- (a) Lord Justice of Appeal, Justice of the High Court or Circuit judge, in England and Wales;
- (b) judge of the Court of Session or sheriff, in Scotland;
- (c) Lord Justice of Appeal, judge of the High Court or county court judge, in Northern Ireland.
- (2) The holder of a judicial office may become a judge of the European Court of Human Rights (“the Court”) without being required to relinquish his office.
- (3) But he is not required to perform the duties of his judicial office while he is a judge of the Court.
- (4) In respect of any period during which he is a judge of the Court—
- (a) a Lord Justice of Appeal or Justice of the High Court is not to count as a judge of the relevant court for the purposes of section 2(1) or 4(1) of the Supreme Court Act 1981 (maximum number of judges) nor as a judge of the Supreme Court for the purposes of section 12(1) to (6) of that Act (salaries etc.); 1981 c. 54.
- (b) a judge of the Court of Session is not to count as a judge of that court for the purposes of section 1(1) of the Court of Session Act 1988 (maximum number of judges) or of section 9(1)(c) of the Administration of Justice Act 1973 (“the 1973 Act”) (salaries etc.); 1988 c. 36. 1973 c. 15.
- (c) a Lord Justice of Appeal or judge of the High Court in Northern Ireland is not to count as a judge of the relevant court for the purposes of section 2(1) or 3(1) of the Judicature (Northern Ireland) Act 1978 (maximum number of judges) nor as a judge of the Supreme Court of Northern Ireland for the purposes of section 9(1)(d) of the 1973 Act (salaries etc.); 1978 c. 23.
- (d) a Circuit judge is not to count as such for the purposes of section 18 of the Courts Act 1971 (salaries etc.); 1971 c. 23.
- (e) a sheriff is not to count as such for the purposes of section 14 of the Sheriff Courts (Scotland) Act 1907 (salaries etc.); 1907 c. 51.
- (f) a county court judge of Northern Ireland is not to count as such for the purposes of section 106 of the County Courts Act (Northern Ireland) 1959 (salaries etc.). 1959 c. 25 (N.I.).
- (5) If a sheriff principal is appointed a judge of the Court, section 11(1) of the Sheriff Courts (Scotland) Act 1971 (temporary appointment of sheriff principal) applies, while he holds that appointment, as if his office is vacant. 1971 c. 58.
- (6) Schedule 4 makes provision about judicial pensions in relation to the holder of a judicial office who serves as a judge of the Court.
- (7) The Lord Chancellor or the Secretary of State may by order make such transitional provision (including, in particular, provision for a temporary increase in the maximum number of judges) as he considers appropriate in relation to any holder of a judicial office who has completed his service as a judge of the Court.

Appointment to
European Court
of Human Rights.

Parliamentary procedure

Statements of
compatibility.

19.—(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—

- (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or
- (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

Supplemental

Orders etc. under
this Act.

20.—(1) Any power of a Minister of the Crown to make an order under this Act is exercisable by statutory instrument.

(2) The power of the Lord Chancellor or the Secretary of State to make rules (other than rules of court) under section 2(3) or 7(9) is exercisable by statutory instrument.

(3) Any statutory instrument made under section 14, 15 or 16(7) must be laid before Parliament.

(4) No order may be made by the Lord Chancellor or the Secretary of State under section 1(4), 7(11) or 16(2) unless a draft of the order has been laid before, and approved by, each House of Parliament.

(5) Any statutory instrument made under section 18(7) or Schedule 4, or to which subsection (2) applies, shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) The power of a Northern Ireland department to make—

- (a) rules under section 2(3)(c) or 7(9)(c), or
- (b) an order under section 7(11),

S.I. 1979/1573
(N.I. 12).

is exercisable by statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979.

1954 c. 33 (N.I.).

(7) Any rules made under section 2(3)(c) or 7(9)(c) shall be subject to negative resolution; and section 41(6) of the Interpretation Act (Northern Ireland) 1954 (meaning of “subject to negative resolution”) shall apply as if the power to make the rules were conferred by an Act of the Northern Ireland Assembly.

(8) No order may be made by a Northern Ireland department under section 7(11) unless a draft of the order has been laid before, and approved by, the Northern Ireland Assembly.

Interpretation,
etc.

21.—(1) In this Act—

“amend” includes repeal and apply (with or without modifications);

“the appropriate Minister” means the Minister of the Crown having charge of the appropriate authorised government department (within the meaning of the Crown Proceedings Act 1947);

1947 c. 44.

“the Commission” means the European Commission of Human Rights;

“the Convention” means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 as it has effect for the time being in relation to the United Kingdom;

“declaration of incompatibility” means a declaration under section 4;

“Minister of the Crown” has the same meaning as in the Ministers of the Crown Act 1975; 1975 c. 26.

“Northern Ireland Minister” includes the First Minister and the deputy First Minister in Northern Ireland;

“primary legislation” means any—

- (a) public general Act;
- (b) local and personal Act;
- (c) private Act;
- (d) Measure of the Church Assembly;
- (e) Measure of the General Synod of the Church of England;
- (f) Order in Council—
 - (i) made in exercise of Her Majesty’s Royal Prerogative;
 - (ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or 1973 c. 36.
 - (iii) amending an Act of a kind mentioned in paragraph (a), (b) or (c);

and includes an order or other instrument made under primary legislation (otherwise than by the National Assembly for Wales, a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland department) to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation;

“the First Protocol” means the protocol to the Convention agreed at Paris on 20th March 1952;

“the Sixth Protocol” means the protocol to the Convention agreed at Strasbourg on 28th April 1983;

“the Eleventh Protocol” means the protocol to the Convention (restructuring the control machinery established by the Convention) agreed at Strasbourg on 11th May 1994;

“remedial order” means an order under section 10;

“subordinate legislation” means any—

- (a) Order in Council other than one—
 - (i) made in exercise of Her Majesty’s Royal Prerogative;
 - (ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or
 - (iii) amending an Act of a kind mentioned in the definition of primary legislation;
- (b) Act of the Scottish Parliament;

1973 c. 17.

- (c) Act of the Parliament of Northern Ireland;
- (d) Measure of the Assembly established under section 1 of the Northern Ireland Assembly Act 1973;
- (e) Act of the Northern Ireland Assembly;
- (f) order, rules, regulations, scheme, warrant, byelaw or other instrument made under primary legislation (except to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation);
- (g) order, rules, regulations, scheme, warrant, byelaw or other instrument made under legislation mentioned in paragraph (b), (c), (d) or (e) or made under an Order in Council applying only to Northern Ireland;
- (h) order, rules, regulations, scheme, warrant, byelaw or other instrument made by a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland department in exercise of prerogative or other executive functions of Her Majesty which are exercisable by such a person on behalf of Her Majesty;

“transferred matters” has the same meaning as in the Northern Ireland Act 1998; and

“tribunal” means any tribunal in which legal proceedings may be brought.

(2) The references in paragraphs (b) and (c) of section 2(1) to Articles are to Articles of the Convention as they had effect immediately before the coming into force of the Eleventh Protocol.

(3) The reference in paragraph (d) of section 2(1) to Article 46 includes a reference to Articles 32 and 54 of the Convention as they had effect immediately before the coming into force of the Eleventh Protocol.

(4) The references in section 2(1) to a report or decision of the Commission or a decision of the Committee of Ministers include references to a report or decision made as provided by paragraphs 3, 4 and 6 of Article 5 of the Eleventh Protocol (transitional provisions).

1955 c. 18.
1955 c. 19.
1957 c. 53.

(5) Any liability under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 to suffer death for an offence is replaced by a liability to imprisonment for life or any less punishment authorised by those Acts; and those Acts shall accordingly have effect with the necessary modifications.

Short title,
commencement,
application and
extent.

22.—(1) This Act may be cited as the Human Rights Act 1998.

(2) Sections 18, 20 and 21(5) and this section come into force on the passing of this Act.

(3) The other provisions of this Act come into force on such day as the Secretary of State may by order appoint; and different days may be appointed for different purposes.

(4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.

(5) This Act binds the Crown.

(6) This Act extends to Northern Ireland.

(7) Section 21(5), so far as it relates to any provision contained in the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957, extends to any place to which that provision extends.

1955 c. 18.

1955 c. 19.

1957 c. 53.

SCHEDULES

Section 1(3).

SCHEDULE 1

THE ARTICLES

PART I

THE CONVENTION

RIGHTS AND FREEDOMS

Article 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term "forced or compulsory labour" shall not include:

- (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
- (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
- (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- (d) any work or service which forms part of normal civic obligations.

Article 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

SCH. 1

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

*Article 7**No punishment without law*

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

*Article 8**Right to respect for private and family life*

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

*Article 9**Freedom of thought, conscience and religion*

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12

Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 16

Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

SCH. 1

Article 17

Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18

Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

PART II

THE FIRST PROTOCOL

Article 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2

Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3

Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

PART III

THE SIXTH PROTOCOL

Article 1

Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

*Article 2**Death penalty in time of war*

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

SCHEDULE 2

Section 10.

REMEDIAL ORDERS

Orders

- 1.—(1) A remedial order may—
 - (a) contain such incidental, supplemental, consequential or transitional provision as the person making it considers appropriate;
 - (b) be made so as to have effect from a date earlier than that on which it is made;
 - (c) make provision for the delegation of specific functions;
 - (d) make different provision for different cases.
- (2) The power conferred by sub-paragraph (1)(a) includes—
 - (a) power to amend primary legislation (including primary legislation other than that which contains the incompatible provision); and
 - (b) power to amend or revoke subordinate legislation (including subordinate legislation other than that which contains the incompatible provision).
- (3) A remedial order may be made so as to have the same extent as the legislation which it affects.
- (4) No person is to be guilty of an offence solely as a result of the retrospective effect of a remedial order.

Procedure

2. No remedial order may be made unless—
 - (a) a draft of the order has been approved by a resolution of each House of Parliament made after the end of the period of 60 days beginning with the day on which the draft was laid; or
 - (b) it is declared in the order that it appears to the person making it that, because of the urgency of the matter, it is necessary to make the order without a draft being so approved.

Orders laid in draft

- 3.—(1) No draft may be laid under paragraph 2(a) unless—
 - (a) the person proposing to make the order has laid before Parliament a document which contains a draft of the proposed order and the required information; and
 - (b) the period of 60 days, beginning with the day on which the document required by this sub-paragraph was laid, has ended.
- (2) If representations have been made during that period, the draft laid under paragraph 2(a) must be accompanied by a statement containing—
 - (a) a summary of the representations; and
 - (b) if, as a result of the representations, the proposed order has been changed, details of the changes.

SCH. 2

Urgent cases

4.—(1) If a remedial order (“the original order”) is made without being approved in draft, the person making it must lay it before Parliament, accompanied by the required information, after it is made.

(2) If representations have been made during the period of 60 days beginning with the day on which the original order was made, the person making it must (after the end of that period) lay before Parliament a statement containing—

- (a) a summary of the representations; and
- (b) if, as a result of the representations, he considers it appropriate to make changes to the original order, details of the changes.

(3) If sub-paragraph (2)(b) applies, the person making the statement must—

- (a) make a further remedial order replacing the original order; and
- (b) lay the replacement order before Parliament.

(4) If, at the end of the period of 120 days beginning with the day on which the original order was made, a resolution has not been passed by each House approving the original or replacement order, the order ceases to have effect (but without that affecting anything previously done under either order or the power to make a fresh remedial order).

Definitions

5. In this Schedule—

“representations” means representations about a remedial order (or proposed remedial order) made to the person making (or proposing to make) it and includes any relevant Parliamentary report or resolution; and

“required information” means—

- (a) an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order; and
- (b) a statement of the reasons for proceeding under section 10 and for making an order in those terms.

Calculating periods

6. In calculating any period for the purposes of this Schedule, no account is to be taken of any time during which—

- (a) Parliament is dissolved or prorogued; or
- (b) both Houses are adjourned for more than four days.

SCHEDULE 3
DEROGATION AND RESERVATION

Sections 14 and
15.

PART I

DEROGATION

The 1988 notification

The United Kingdom Permanent Representative to the Council of Europe presents his compliments to the Secretary General of the Council, and has the honour to convey the following information in order to ensure compliance with the obligations of Her Majesty's Government in the United Kingdom under Article 15(3) of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.

There have been in the United Kingdom in recent years campaigns of organised terrorism connected with the affairs of Northern Ireland which have manifested themselves in activities which have included repeated murder, attempted murder, maiming, intimidation and violent civil disturbance and in bombing and fire raising which have resulted in death, injury and widespread destruction of property. As a result, a public emergency within the meaning of Article 15(1) of the Convention exists in the United Kingdom.

The Government found it necessary in 1974 to introduce and since then, in cases concerning persons reasonably suspected of involvement in terrorism connected with the affairs of Northern Ireland, or of certain offences under the legislation, who have been detained for 48 hours, to exercise powers enabling further detention without charge, for periods of up to five days, on the authority of the Secretary of State. These powers are at present to be found in Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984, Article 9 of the Prevention of Terrorism (Supplemental Temporary Provisions) Order 1984 and Article 10 of the Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order 1984.

Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 provides for a person whom a constable has arrested on reasonable grounds of suspecting him to be guilty of an offence under Section 1, 9 or 10 of the Act, or to be or to have been involved in terrorism connected with the affairs of Northern Ireland, to be detained in right of the arrest for up to 48 hours and thereafter, where the Secretary of State extends the detention period, for up to a further five days. Section 12 substantially re-enacted Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1976 which, in turn, substantially re-enacted Section 7 of the Prevention of Terrorism (Temporary Provisions) Act 1974.

Article 10 of the Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order 1984 (SI 1984/417) and Article 9 of the Prevention of Terrorism (Supplemental Temporary Provisions) Order 1984 (SI 1984/418) were both made under Sections 13 and 14 of and Schedule 3 to the 1984 Act and substantially re-enacted powers of detention in Orders made under the 1974 and 1976 Acts. A person who is being examined under Article 4 of either Order on his arrival in, or on seeking to leave, Northern Ireland or Great Britain for the purpose of determining whether he is or has been involved in terrorism connected with the affairs of Northern Ireland, or whether there are grounds for suspecting that he has committed an offence under Section 9 of the 1984 Act, may be detained under Article 9 or 10, as appropriate, pending the conclusion of his examination. The period of this examination may exceed 12 hours if an examining officer has reasonable grounds for suspecting him to be or to have been involved in acts of terrorism connected with the affairs of Northern Ireland.

Where such a person is detained under the said Article 9 or 10 he may be detained for up to 48 hours on the authority of an examining officer and thereafter, where the Secretary of State extends the detention period, for up to a further five days.

SCH. 3

In its judgment of 29 November 1988 in the Case of *Brogan and Others*, the European Court of Human Rights held that there had been a violation of Article 5(3) in respect of each of the applicants, all of whom had been detained under Section 12 of the 1984 Act. The Court held that even the shortest of the four periods of detention concerned, namely four days and six hours, fell outside the constraints as to time permitted by the first part of Article 5(3). In addition, the Court held that there had been a violation of Article 5(5) in the case of each applicant.

Following this judgment, the Secretary of State for the Home Department informed Parliament on 6 December 1988 that, against the background of the terrorist campaign, and the over-riding need to bring terrorists to justice, the Government did not believe that the maximum period of detention should be reduced. He informed Parliament that the Government were examining the matter with a view to responding to the judgment. On 22 December 1988, the Secretary of State further informed Parliament that it remained the Government's wish, if it could be achieved, to find a judicial process under which extended detention might be reviewed and where appropriate authorised by a judge or other judicial officer. But a further period of reflection and consultation was necessary before the Government could bring forward a firm and final view.

Since the judgment of 29 November 1988 as well as previously, the Government have found it necessary to continue to exercise, in relation to terrorism connected with the affairs of Northern Ireland, the powers described above enabling further detention without charge for periods of up to 5 days, on the authority of the Secretary of State, to the extent strictly required by the exigencies of the situation to enable necessary enquiries and investigations properly to be completed in order to decide whether criminal proceedings should be instituted. To the extent that the exercise of these powers may be inconsistent with the obligations imposed by the Convention the Government has availed itself of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice.

Dated 23 December 1988.

The 1989 notification

The United Kingdom Permanent Representative to the Council of Europe presents his compliments to the Secretary General of the Council, and has the honour to convey the following information.

In his communication to the Secretary General of 23 December 1988, reference was made to the introduction and exercise of certain powers under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984, Article 9 of the Prevention of Terrorism (Supplemental Temporary Provisions) Order 1984 and Article 10 of the Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order 1984.

These provisions have been replaced by section 14 of and paragraph 6 of Schedule 5 to the Prevention of Terrorism (Temporary Provisions) Act 1989, which make comparable provision. They came into force on 22 March 1989. A copy of these provisions is enclosed.

The United Kingdom Permanent Representative avails himself of this opportunity to renew to the Secretary General the assurance of his highest consideration.

23 March 1989.

PART II

RESERVATION

At the time of signing the present (First) Protocol, I declare that, in view of certain provisions of the Education Acts in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.

Dated 20 March 1952. Made by the United Kingdom Permanent Representative to the Council of Europe.

SCHEDULE 4

Section 18(6).

JUDICIAL PENSIONS

Duty to make orders about pensions

1.—(1) The appropriate Minister must by order make provision with respect to pensions payable to or in respect of any holder of a judicial office who serves as an ECHR judge.

(2) A pensions order must include such provision as the Minister making it considers is necessary to secure that—

- (a) an ECHR judge who was, immediately before his appointment as an ECHR judge, a member of a judicial pension scheme is entitled to remain as a member of that scheme;
- (b) the terms on which he remains a member of the scheme are those which would have been applicable had he not been appointed as an ECHR judge; and
- (c) entitlement to benefits payable in accordance with the scheme continues to be determined as if, while serving as an ECHR judge, his salary was that which would (but for section 18(4)) have been payable to him in respect of his continuing service as the holder of his judicial office.

Contributions

2. A pensions order may, in particular, make provision—

- (a) for any contributions which are payable by a person who remains a member of a scheme as a result of the order, and which would otherwise be payable by deduction from his salary, to be made otherwise than by deduction from his salary as an ECHR judge; and
- (b) for such contributions to be collected in such manner as may be determined by the administrators of the scheme.

Amendments of other enactments

3. A pensions order may amend any provision of, or made under, a pensions Act in such manner and to such extent as the Minister making the order considers necessary or expedient to ensure the proper administration of any scheme to which it relates.

Definitions

4. In this Schedule—

“appropriate Minister” means—

- (a) in relation to any judicial office whose jurisdiction is exercisable exclusively in relation to Scotland, the Secretary of State; and

SCH. 4

(b) otherwise, the Lord Chancellor;

"ECHR judge" means the holder of a judicial office who is serving as a judge of the Court;

"judicial pension scheme" means a scheme established by and in accordance with a pensions Act;

"pensions Act" means—

1959 c. 25 (N.I.).

(a) the County Courts Act (Northern Ireland) 1959;

1961 c. 42.

(b) the Sheriffs' Pensions (Scotland) Act 1961;

1981 c. 20.

(c) the Judicial Pensions Act 1981; or

1993 c. 8.

(d) the Judicial Pensions and Retirement Act 1993; and

"pensions order" means an order made under paragraph 1.

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Australian Capital Territory

Human Rights Act 2004

A2004-5

Republication No 8

Effective: 1 January 2013

Republication date: 1 January 2013

Last amendment made by A2012-41

Authorised by the ACT Parliamentary Counsel

About this republication

The republished law

This is a republication of the *Human Rights Act 2004* (including any amendment made under the *Legislation Act 2001*, part 11.3 (Editorial changes)) as in force on 1 January 2013. It also includes any amendment, repeal or expiry affecting the republished law to 1 January 2013.

The legislation history and amendment history of the republished law are set out in endnotes 3 and 4.

Kinds of republications

The Parliamentary Counsel's Office prepares 2 kinds of republications of ACT laws (see the ACT legislation register at www.legislation.act.gov.au):

- authorised republications to which the *Legislation Act 2001* applies
- unauthorised republications.

The status of this republication appears on the bottom of each page.

Editorial changes

The *Legislation Act 2001*, part 11.3 authorises the Parliamentary Counsel to make editorial amendments and other changes of a formal nature when preparing a law for republication. Editorial changes do not change the effect of the law, but have effect as if they had been made by an Act commencing on the republication date (see *Legislation Act 2001*, s 115 and s 117). The changes are made if the Parliamentary Counsel considers they are desirable to bring the law into line, or more closely into line, with current legislative drafting practice.

This republication includes amendments made under part 11.3 (see endnote 1).

Uncommenced provisions and amendments

If a provision of the republished law has not commenced or is affected by an uncommenced amendment, the symbol **U** appears immediately before the provision heading. The text of the uncommenced provision or amendment appears only in the last endnote.

Modifications

If a provision of the republished law is affected by a current modification, the symbol **M** appears immediately before the provision heading. The text of the modifying provision appears in the endnotes. For the legal status of modifications, see *Legislation Act 2001*, section 95.

Penalties

At the republication date, the value of a penalty unit for an offence against this law is \$110 for an individual and \$550 for a corporation (see *Legislation Act 2001*, s 133).



Australian Capital Territory

Human Rights Act 2004

Contents

	Page
Preamble	2
Part 1	Preliminary
1 Name of Act	3
3 Dictionary	3
4 Notes	3
Part 2	Human rights
5 What are <i>human rights</i> ?	4
6 Who has human rights?	4
7 Rights apart from Act	4
Part 3	Civil and political rights
8 Recognition and equality before the law	5
9 Right to life	5
10 Protection from torture and cruel, inhuman or degrading treatment etc	6

R8	Human Rights Act 2004	contents 1
01/01/13	Effective: 01/01/13	

Contents

	Page
11 Protection of the family and children	6
12 Privacy and reputation	6
13 Freedom of movement	7
14 Freedom of thought, conscience, religion and belief	7
15 Peaceful assembly and freedom of association	7
16 Freedom of expression	7
17 Taking part in public life	8
18 Right to liberty and security of person	8
19 Humane treatment when deprived of liberty	9
20 Children in the criminal process	9
21 Fair trial	10
22 Rights in criminal proceedings	10
23 Compensation for wrongful conviction	11
24 Right not to be tried or punished more than once	12
25 Retrospective criminal laws	12
26 Freedom from forced work	12
27 Rights of minorities	13
Part 3A Economic, social and cultural rights	
27A Right to education	14
Part 3B Limits on human rights	
28 Human rights may be limited	15
Part 4 Application of human rights to Territory laws	
29 Application of pt 4	16
30 Interpretation of laws and human rights	16
31 Interpretation of human rights	16
32 Declaration of incompatibility	17
33 Attorney-General's action on receiving declaration of incompatibility	17
34 Notice to Attorney-General and commission	18
35 Attorney-General's right to intervene on human rights	18
36 Human rights commissioner may intervene	19

		Contents
		Page
Part 5	Scrutiny of proposed Territory laws	
37	Attorney-General's statement on government bills	20
38	Consideration of bills by standing committee of Assembly	20
39	Noncompliance with s 37 and s 38	21
Part 5A	Obligations of public authorities	
40	Meaning of <i>public authority</i>	22
40A	Meaning of <i>function of a public nature</i>	22
40B	Public authorities must act consistently with human rights	23
40C	Legal proceedings in relation to public authority actions	24
40D	Other entities may choose to be subject to obligations of public authorities	25
Part 6	Miscellaneous	
41	Review of effect of territory laws on human rights	26
42	Regulation-making power	27
43	Review of economic, social and cultural rights	27
Schedule 1	ICCPR source of human rights	28
Schedule 2	ICESCR source of human rights	30
Dictionary		31
Endnotes		
1	About the endnotes	33
2	Abbreviation key	33
3	Legislation history	34
4	Amendment history	35
5	Earlier republications	37



Australian Capital Territory

Human Rights Act 2004

An Act to respect, protect and promote human rights

R8
01/01/13

Human Rights Act 2004
Effective: 01/01/13

page 1

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

Preamble

- 1 Human rights are necessary for individuals to live lives of dignity and value.
- 2 Respecting, protecting and promoting the rights of individuals improves the welfare of the whole community.
- 3 Human rights are set out in this Act so that individuals know what their rights are.
- 4 Setting out these human rights also makes it easier for them to be taken into consideration in the development and interpretation of legislation.
- 5 This Act encourages individuals to see themselves, and each other, as the holders of rights, and as responsible for upholding the human rights of others.
- 6 Few rights are absolute. Human rights may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. One individual's rights may also need to be weighed against another individual's rights.
- 7 Although human rights belong to all individuals, they have special significance for Indigenous people—the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.

The Legislative Assembly for the Australian Capital Territory therefore enacts as follows:

Part 1 Preliminary

1 Name of Act

This Act is the *Human Rights Act 2004*.

3 Dictionary

The dictionary at the end of this Act is part of this Act.

Note 1 The dictionary at the end of this Act defines certain terms used in this Act, and includes references (*signpost definitions*) to other terms defined elsewhere.

For example, the signpost definition '*human rights*—see section 5.' means that the term 'human rights' is defined in that section.

Note 2 A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156 (1)).

4 Notes

A note included in this Act is explanatory and is not part of this Act.

Note See Legislation Act, s 127 (1), (4) and (5) for the legal status of notes.

Part 2 Human rights

5 What are *human rights*?

In this Act:

human rights means—

- (a) the civil and political rights in part 3; and
- (b) the economic, social and cultural rights in part 3A.

6 Who has human rights?

Only individuals have human rights.

7 Rights apart from Act

This Act is not exhaustive of the rights an individual may have under domestic or international law.

Examples of other rights

- 1 rights under the *Discrimination Act 1991* or another Territory law
- 2 rights under the ICCPR not listed in this Act
- 3 rights under the ICESCR not listed in this Act
- 4 rights under other international conventions

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

Part 3 Civil and political rights

Note The primary source of these rights is the International Covenant on Civil and Political Rights.

8 Recognition and equality before the law

- (1) Everyone has the right to recognition as a person before the law.
- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

Examples of discrimination

Discrimination because of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

9 Right to life

- (1) Everyone has the right to life. In particular, no-one may be arbitrarily deprived of life.
- (2) This section applies to a person from the time of birth.

10 Protection from torture and cruel, inhuman or degrading treatment etc

- (1) No-one may be—
 - (a) tortured; or
 - (b) treated or punished in a cruel, inhuman or degrading way.
- (2) No-one may be subjected to medical or scientific experimentation or treatment without his or her free consent.

11 Protection of the family and children

Note Family has a broad meaning (see ICCPR General Comment 19 (39th session, 1990)).

- (1) The family is the natural and basic group unit of society and is entitled to be protected by society.
- (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

Examples of distinction or discrimination

Distinction or discrimination because of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

12 Privacy and reputation

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have his or her reputation unlawfully attacked.

13 Freedom of movement

Everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT.

14 Freedom of thought, conscience, religion and belief

- (1) Everyone has the right to freedom of thought, conscience and religion. This right includes—
 - (a) the freedom to have or to adopt a religion or belief of his or her choice; and
 - (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.
- (2) No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

15 Peaceful assembly and freedom of association

- (1) Everyone has the right of peaceful assembly.
- (2) Everyone has the right to freedom of association.

16 Freedom of expression

- (1) Everyone has the right to hold opinions without interference.
- (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

17 Taking part in public life

Every citizen has the right, and is to have the opportunity, to—

- (a) take part in the conduct of public affairs, directly or through freely chosen representatives; and
- (b) vote and be elected at periodic elections, that guarantee the free expression of the will of the electors; and
- (c) have access, on general terms of equality, for appointment to the public service and public office.

18 Right to liberty and security of person

- (1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.
- (2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.
- (3) Anyone who is arrested must be told, at the time of arrest, of the reasons for the arrest and must be promptly told about any charges against him or her.
- (4) Anyone who is arrested or detained on a criminal charge—
 - (a) must be promptly brought before a judge or magistrate; and
 - (b) has the right to be tried within a reasonable time or released.
- (5) Anyone who is awaiting trial must not be detained in custody as a general rule, but his or her release may be subject to guarantees to appear for trial, at any other stage of the judicial proceeding, and, if appropriate, for execution of judgment.
- (6) Anyone who is deprived of liberty by arrest or detention is entitled to apply to a court so that the court can decide, without delay, the lawfulness of the detention and order the person's release if the detention is not lawful.

- (7) Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention.
- (8) No-one may be imprisoned only because of the inability to carry out a contractual obligation.

19 Humane treatment when deprived of liberty

- (1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- (2) An accused person must be segregated from convicted people, except in exceptional circumstances.

Note An accused child must also be segregated from accused adults (see s 20 (1))

- (3) An accused person must be treated in a way that is appropriate for a person who has not been convicted.

20 Children in the criminal process

- (1) An accused child must be segregated from accused adults.
- (2) An accused child must be treated in a way that is appropriate for a person of the child's age who has not been convicted.
- (3) A child must be brought to trial as quickly as possible.
- (4) A convicted child must be treated in a way that is appropriate for a person of the child's age who has been convicted.

21 Fair trial

- (1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (2) However, the press and public may be excluded from all or part of a trial—
 - (a) to protect morals, public order or national security in a democratic society; or
 - (b) if the interest of the private lives of the parties require the exclusion; or
 - (c) if, and to the extent that, the exclusion is strictly necessary, in special circumstances of the case, because publicity would otherwise prejudice the interests of justice.
- (3) But each judgment in a criminal or civil proceeding must be made public unless the interest of a child requires that the judgment not be made public.

22 Rights in criminal proceedings

- (1) Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.
- (2) Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else:
 - (a) to be told promptly and in detail, in a language that he or she understands, about the nature and reason for the charge;
 - (b) to have adequate time and facilities to prepare his or her defence and to communicate with lawyers or advisors chosen by him or her;
 - (c) to be tried without unreasonable delay;

- (d) to be tried in person, and to defend himself or herself personally, or through legal assistance chosen by him or her;
 - (e) to be told, if he or she does not have legal assistance, about the right to legal assistance chosen by him or her;
 - (f) to have legal assistance provided to him or her, if the interests of justice require that the assistance be provided, and to have the legal assistance provided without payment if he or she cannot afford to pay for the assistance;
 - (g) to examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as prosecution witnesses;
 - (h) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court;
 - (i) not to be compelled to testify against himself or herself or to confess guilt.
- (3) A child who is charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.
- (4) Anyone convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher court in accordance with law.

23 Compensation for wrongful conviction

- (1) This section applies if—
- (a) anyone is convicted by a final decision of a criminal offence; and
 - (b) the person suffers punishment because of the conviction; and
 - (c) the conviction is reversed, or he or she is pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.

- (2) If this section applies, the person has the right to be compensated according to law.
- (3) However, subsection (2) does not apply if it is proved that the nondisclosure of the unknown fact in time is completely or partly the person's own doing.

24 Right not to be tried or punished more than once

No-one may be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with law.

25 Retrospective criminal laws

- (1) No-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in.
- (2) A penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed. If the penalty for an offence is reduced after anyone commits the offence, he or she benefits from the reduced penalty.

26 Freedom from forced work

- (1) No-one may be held in slavery or servitude.
- (2) No-one may be made to perform forced or compulsory labour.
- (3) In subsection (2):

forced or compulsory labour does not include—

- (a) work or service normally required of an individual who is under detention because of a lawful court order, or who has been conditionally released from detention under a court order; or
- (b) work or service required because of an emergency or calamity threatening the life or wellbeing of the community; or

- (c) work or service that forms part of normal civil obligations.

27 Rights of minorities

Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.

Part 3A Economic, social and cultural rights

Note The primary source of these rights is the International Covenant on Economic, Social and Cultural Rights.

27A Right to education

- (1) Every child has the right to have access to free, school education appropriate to his or her needs.
- (2) Everyone has the right to have access to further education and vocational and continuing training.
- (3) These rights are limited to the following immediately realisable aspects:
 - (a) everyone is entitled to enjoy these rights without discrimination;
 - (b) to ensure the religious and moral education of a child in conformity with the convictions of the child's parent or guardian, the parent or guardian may choose schooling for the child (other than schooling provided by the government) that conforms to the minimum educational standards required under law.

Part 3B Limits on human rights

28 Human rights may be limited

- (1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.
- (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
 - (a) the nature of the right affected;
 - (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 the limitation seeks to achieve.

Part 4 Application of human rights to Territory laws

29 Application of pt 4

This part applies to all Territory laws.

30 Interpretation of laws and human rights

So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.

31 Interpretation of human rights

- (1) International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right.
- (2) In deciding whether material mentioned in subsection (1) or any other material should be considered, and the weight to be given to the material, the following matters must be taken into account:
 - (a) the desirability of being able to rely on the ordinary meaning of this Act, having regard to its purpose and its provisions read in the context of the Act as a whole;
 - (b) the undesirability of prolonging proceedings without compensating advantage;
 - (c) the accessibility of the material to the public.

Note The matters to be taken into account under this subsection are consistent with those required to be taken into account under the Legislation Act, s 141 (2).

- (3) For subsection (2) (c), material in the ACT legislation register is taken to be accessible to the public.

32 Declaration of incompatibility

- (1) This section applies if—
 - (a) a proceeding is being heard by the Supreme Court; and
 - (b) an issue arises in the proceeding about whether a Territory law is consistent with a human right.
- (2) If the Supreme Court is satisfied that the Territory law is not consistent with the human right, the court may declare that the law is not consistent with the human right (the *declaration of incompatibility*).
- (3) The declaration of incompatibility does not affect—
 - (a) the validity, operation or enforcement of the law; or
 - (b) the rights or obligations of anyone.
- (4) The registrar of the Supreme Court must promptly give a copy of the declaration of incompatibility to the Attorney-General.

33 Attorney-General's action on receiving declaration of incompatibility

- (1) This section applies if the Attorney-General receives a copy of a declaration of incompatibility.
- (2) The Attorney-General must present a copy of the declaration of incompatibility to the Legislative Assembly within 6 sitting days after the day the Attorney-General receives the copy.
- (3) The Attorney-General must prepare a written response to the declaration of incompatibility and present it to the Legislative Assembly not later than 6 months after the day the copy of the declaration is presented to the Legislative Assembly.

34 Notice to Attorney-General and commission

- (1) This section applies—
 - (a) if—
 - (i) a question arises in a proceeding in the Supreme Court that involves the application of this Act; or
 - (ii) the Supreme Court is considering making a declaration of incompatibility in a proceeding; and
 - (b) if the Territory is not a party to the proceeding.
- (2) The Supreme Court must not allow the proceeding to continue or make the declaration unless the court is satisfied that—
 - (a) notice of the proceeding has been given to the Attorney-General and the commission; and
 - (b) a reasonable time has passed since the giving of the notice for the Attorney-General and the commission to decide whether to intervene in the proceeding.
- (3) For subsection (2), the Supreme Court may—
 - (a) direct a party to give notice of the proceeding to the Attorney-General and the commission; and
 - (b) continue to hear evidence and argument concerning matters severable from any matter involving the application of this Act.
- (4) Subsection (2) does not prevent the Supreme Court from hearing and deciding a proceeding, to the extent that the proceeding relates to the grant of urgent relief of an interlocutory nature, if the court considers it necessary in the interests of justice.

35 Attorney-General's right to intervene on human rights

The Attorney-General may intervene in a proceeding before a court that involves the application of this Act.

36 Human rights commissioner may intervene

- (1) The human rights commissioner may intervene in a proceeding before a court that involves the application of this Act with the leave of the court.
- (2) The court may give leave subject to conditions.

Part 5 Scrutiny of proposed Territory laws

37 Attorney-General's statement on government bills

- (1) This section applies to each bill presented to the Legislative Assembly by a Minister.
- (2) The Attorney-General must prepare a written statement (the *compatibility statement*) about the bill for presentation to the Legislative Assembly.
- (3) The compatibility statement must state—
 - (a) whether, in the Attorney-General's opinion, the bill is consistent with human rights; and
 - (b) if it is not consistent, how it is not consistent with human rights.

38 Consideration of bills by standing committee of Assembly

- (1) The relevant standing committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.
- (2) In this section:
relevant standing committee means—
 - (a) the standing committee of the Legislative Assembly nominated by the Speaker for this section; or
 - (b) if no nomination under paragraph (a) is in effect—the standing committee of the Legislative Assembly responsible for the consideration of legal issues.

39 Noncompliance with s 37 and s 38

A failure to comply with section 37 or section 38 in relation to a bill does not affect the validity, operation or enforcement of any Territory law.

Part 5A Obligations of public authorities

40 Meaning of *public authority*

- (1) Each of the following is a *public authority*:
- (a) an administrative unit;
 - (b) a territory authority;
 - (c) a territory instrumentality;
 - (d) a Minister;
 - (e) a police officer, when exercising a function under a Territory law;
 - (f) a public employee;
 - (g) an entity whose functions are or include functions of a public nature, when it is exercising those functions for the Territory or a public authority (whether under contract or otherwise).

Note A reference to an entity includes a reference to a person exercising a function of the entity, whether under a delegation, subdelegation or otherwise (see Legislation Act, s 184A (1)).

- (2) However, *public authority* does not include—
- (a) the Legislative Assembly, except when acting in an administrative capacity; or
 - (b) a court, except when acting in an administrative capacity.

40A Meaning of *function of a public nature*

- (1) In deciding whether a function of an entity is a *function of a public nature*, the following matters may be considered:
- (a) whether the function is conferred on the entity under a territory law;

- (b) whether the function is connected to or generally identified with functions of government;
 - (c) whether the function is of a regulatory nature;
 - (d) whether the entity is publicly funded to perform the function;
 - (e) whether the entity performing the function is a company (within the meaning of the Corporations Act) the majority of the shares in which are held by or for the Territory.
- (2) Subsection (1) does not limit the matters that may be considered in deciding whether a function is of a public nature.
- (3) Without limiting subsection (1) or (2), the following functions are taken to be of a public nature:
- (a) the operation of detention places and correctional centres;
 - (b) the provision of any of the following services:
 - (i) gas, electricity and water supply;
 - (ii) emergency services;
 - (iii) public health services;
 - (iv) public education;
 - (v) public transport;
 - (vi) public housing.

40B Public authorities must act consistently with human rights

- (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—

- (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.

(3) In this section:

human rights do not include the economic, social and cultural rights in part 3A.

public authority includes an entity for whom a declaration is in force under section 40D.

40C Legal proceedings in relation to public authority actions

(1) This section applies if a person—

- (a) claims that a public authority has acted in contravention of section 40B; and
- (b) alleges that the person is or would be a victim of the contravention.

(2) The person may—

- (a) start a proceeding in the Supreme Court against the public authority; or
- (b) rely on the person's rights under this Act in other legal proceedings.

(3) A proceeding under subsection (2) (a) must be started not later than 1 year after the day (or last day) the act complained of happens, unless the court orders otherwise.

- (4) The Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages.
- (5) This section does not affect—
 - (a) a right a person has (otherwise than because of this Act) to seek relief in relation to an act or decision of a public authority; or
 - (b) a right a person has to damages (apart from this section).

Note See also s 18 (7) and s 23.

- (6) In this section:

public authority includes an entity for whom a declaration is in force under section 40D.

40D Other entities may choose to be subject to obligations of public authorities

- (1) An entity that is not a public authority under section 40 may ask the Minister, in writing, to declare that the entity is subject to the obligations of a public authority under this part.
- (2) On request under subsection (1), the Minister must make the declaration.
- (3) The Minister may revoke the declaration only if the entity asks the Minister, in writing, to revoke it.
- (4) A declaration under this section is a notifiable instrument.

Note A notifiable instrument must be notified under the Legislation Act.

Part 6 Miscellaneous

41 Review of effect of territory laws on human rights

- (1) The commission has the following functions:
 - (a) review the effect of territory laws, including the common law, on human rights;
 - (b) report in writing to the Attorney-General on the results of the review.
- (2) The Attorney-General must present a copy of a report mentioned in subsection (1) to the Legislative Assembly within 6 sitting days after the day the Attorney-General receives the report.
- (3) However, the Attorney-General may amend the report (including by omitting part of the report) before presenting it to the Legislative Assembly to prevent the report—
 - (a) disclosing the identity of—
 - (i) a person whose human rights have, or may have been, contravened; or
 - (ii) someone who may have contravened someone else's rights; or
 - (b) allowing the identity of someone mentioned in paragraph (a) to be worked out; or
 - (c) disclosing information if the disclosure of the information could, in the Attorney-General's opinion, harm the public interest.
- (4) If the Attorney-General amends the report, the Attorney-General must present a statement to the Legislative Assembly with the report that tells the Assembly that the report has been amended.

42 Regulation-making power

The Executive may make regulations for this Act.

Note Regulations must be notified, and presented to the Legislative Assembly, under the Legislation Act.

43 Review of economic, social and cultural rights

- (1) The Attorney-General must review the operation of the human rights in part 3A and present a report of the review to the Legislative Assembly not later than 1 January 2015.
- (2) The review must include a consideration of whether—
 - (a) other economic, social or cultural rights should be included in this Act; and
 - (b) part 5A should apply to the economic, social and cultural rights in part 3A; and
 - (c) the economic, social and cultural rights in part 3A should be subject to progressive realisation.
- (3) This section expires on 1 January 2016.

Schedule 1 ICCPR source of human rights

(see pt 3)

column 1 item	column 2 section	column 3 description	column 4 ICCPR article
1	8 (1)	right to recognition as person	16
2	8 (2)	right to enjoy rights without distinction etc	2 (1)
3	8 (3)	equality before law and equal protection	26
4	9 (1)	right to life	6 (1)
5	10	protection from torture and cruel, inhuman or degrading treatment etc	7
6	11 (1)	protection of family	23 (1)
7	11 (2)	protection of children	24 (1)
8	12	privacy and reputation	17 (1)
9	13	freedom of movement	12 (1)
10	14 (1)	freedom of thought, conscience and religion	18 (1), (3)
11	14 (2)	no coercion to limit religious freedom	18 (2), (3)
12	15 (1)	peaceful assembly	21
13	15 (2)	freedom of association	22
14	16 (1)	right to hold opinions	19 (1)
15	16 (2)	freedom of expression	19 (2), (3)
16	17	taking part in public life	25
17	18 (1)-(7)	right to liberty and security of person	9
18	18 (8)	no imprisonment for contractual obligations	11

column 1 item	column 2 section	column 3 description	column 4 ICCPR article
19	19	humane treatment when deprived of liberty	10 (1), (2) (a)
20	20	children in the criminal process	10 (2) (b), (3)
21	21	fair trial	14 (1)
22	22 (1)	rights in criminal proceedings	14 (2)
23	22 (2)	minimum guarantees for those charged	14 (3)
24	22 (3)	rights of child charged	14 (4)
25	22 (4)	right of review	14 (5)
26	23	compensation for wrongful conviction	14 (6)
27	24	right not to be tried or punished more than once	14 (7)
28	25	retrospective criminal laws	15 (1)
29	26	freedom from forced work	8 (1), (2), (3) (a), (3) (c)
30	27	rights of minorities	27

Schedule 2 ICESCR source of human rights

(see pt 3A)

column 1 item	column 2 section	column 3 description	column 4 ICESCR article
1	27A	right to education	13

Dictionary

(see s 3)

Note 1 The Legislation Act contains definitions and other provisions relevant to this Act.

Note 2 For example, the Legislation Act, dict, pt 1, defines the following terms:

- Act (see s 7)
- emergency service
- entity
- foreign country
- individual
- may (see s 146)
- proceeding
- statutory instrument (see s 13).

act, for part 5A (Obligations of public authorities), includes fail to act and propose to act.

commission means the human rights commission.

conduct includes omission.

court includes the following:

- (a) the ACAT;
- (b) an entity prescribed by regulation.

declaration of incompatibility—see section 32.

engage in conduct means—

- (a) do an act; or
- (b) omit to do an act.

function of a public nature—see section 40A.

human rights—see section 5.

ICCPR means the International Covenant on Civil and Political Rights.

ICESCR means the International Covenant on Economic, Social and Cultural Rights.

international law includes—

- (a) the International Covenant on Civil and Political Rights and other human rights treaties to which Australia is a party; and
- (b) general comments and views of the United Nations human rights treaty monitoring bodies; and
- (c) declarations and standards adopted by the United Nations General Assembly that are relevant to human rights.

public authority—see section 40.

Territory law means an Act or statutory instrument.

Endnotes

1 About the endnotes

Amending and modifying laws are annotated in the legislation history and the amendment history. Current modifications are not included in the republished law but are set out in the endnotes.

Not all editorial amendments made under the *Legislation Act 2001*, part 11.3 are annotated in the amendment history. Full details of any amendments can be obtained from the Parliamentary Counsel's Office.

Uncommenced amending laws and expiries are listed in the legislation history and the amendment history. These details are underlined. Uncommenced provisions and amendments are not included in the republished law but are set out in the last endnote.

If all the provisions of the law have been renumbered, a table of renumbered provisions gives details of previous and current numbering.

The endnotes also include a table of earlier republications.

2 Abbreviation key

am = amended	ord = ordinance
amdt = amendment	orig = original
ch = chapter	par = paragraph/subparagraph
def = definition	pres = present
dict = dictionary	prev = previous
disallowed = disallowed by the Legislative Assembly	(prev...) = previously
div = division	pt = part
exp = expires/expired	r = rule/subrule
Gaz = gazette	renum = renumbered
hdg = heading	reloc = relocated
IA = Interpretation Act 1967	R[X] = Republication No
ins = inserted/added	RI = reissue
LA = Legislation Act 2001	s = section/subsection
LR = legislation register	sch = schedule
LRA = Legislation (Republication) Act 1996	sdiv = subdivision
mod = modified/modification	sub = substituted
o = order	SL = Subordinate Law
om = omitted/repealed	<u>underlining</u> = whole or part not commenced or to be expired

Endnotes

3 Legislation history

3 Legislation history

Human Rights Act 2004 A2004-5

notified LR 10 March 2004

s 1, s 2 commenced 10 March 2004 (LA s 75 (1))

remainder commenced 1 July 2004 (s 2)

as amended by

Human Rights Commission Legislation Amendment Act 2005

A2005-41 sch 1 pt 1.7 (as am by A2006-3 amdt 1.3)

notified LR 1 September 2005

s 1, s 2 commenced 1 September 2005 (LA s 75 (1))

sch 1 pt 1.7 commenced 1 November 2006 (s 2 (3) (as am by A2006-3 amdt 1.3) and see Human Rights Commission Act 2005 A2005-40, s 2 (as am by A2006-3 s 4) and CN2006-21)

Human Rights Commission Legislation Amendment Act 2006

A2006-3 amdt 1.3

notified LR 22 February 2006

s 1, s 2 commenced 22 February 2006 (LA s 75 (1))

amdt 1.3 commenced 23 February 2006 (s 2)

Note This Act only amends the Human Rights Commission Legislation Amendment Act 2005 A2005-41

Human Rights Amendment Act 2008 A2008-3

notified LR 17 March 2008

s 1, s 2 commenced 17 March 2008 (LA s 75 (1))

ss 7-9 commenced 1 January 2009 (s 2 (1))

remainder commenced 18 March 2008 (s 2 (2))

ACT Civil and Administrative Tribunal Legislation Amendment

Act 2008 A2008-36 sch 1 pt 1.30

notified LR 4 September 2008

s 1, s 2 commenced 4 September 2008 (LA s 75 (1))

sch 1 pt 1.30 commenced 2 February 2009 (s 2 (1) and see ACT Civil and Administrative Tribunal Act 2008 A2008-35, s 2 (1) and CN2009-2)

Human Rights Amendment Act 2012 A2012-41

notified LR 29 August 2012

s 1, s 2 commenced 29 August 2012 (LA s 75 (1))

remainder commenced 1 January 2013 (s 2)

4 Amendment history

Commencement

s 2 om LA s 89 (4)

What are *human rights*?

s 5 sub A2012-41 s 4

Rights apart from Act

s 7 ins A2012-41 s 5

Economic, social and cultural rights

pt 3A hdg ins A2012-41 s 6

Right to education

s 27A ins A2012-41 s 6

Limits on human rights

pt 3B hdg ins A2012-41 s 6

Human rights may be limited

s 28 am A2008-3 s 4; A2012-41 s 7

Interpretation of laws and human rights

s 30 sub A2008-3 s 5

Notice to Attorney-General and commission

s 34 hdg sub A2005-41 amdt 1.101

s 34 am A2005-41 amdts 1.102-1.104

sub A2008-3 s 6

Obligations of public authorities

pt 5A hdg ins A2008-3 s 7

Meaning of *public authority*

s 40 om A2005-41 amdt 1.105

ins A2008-3 s 7

Meaning of *function of a public nature*

s 40A ins A2008-3 s 7

Public authorities must act consistently with human rights

s 40B ins A2008-3 s 7; A2012-41 s 8

Legal proceedings in relation to public authority actions

s 40C ins A2008-3 s 7

Other entities may choose to be subject to obligations of public authorities

s 40D ins A2008-3 s 7

Miscellaneous

pt 6 hdg orig pt 6 hdg om A2005-41 amdt 1.105

(prev pt 7 hdg) renum A2005-41 amdt 1.107

Endnotes

4 Amendment history

Miscellaneous

pt 7 hdg renum as pt 6 hdg

Review of effect of territory laws on human rights

s 41 om A2005-41 amdt 1.105
 ins A2005-41 amdt 1.106

Review of economic, social and cultural rights

s 43 exp 1 January 2007 (s 43 (3))
 ins A2012-41 s 9
 exp 1 January 2016 (s 43 (3))

Review of Act

s 44 exp 1 January 2010 (s 44 (2))

Legislation amended—sch 2

s 45 om LA s 89 (3)

ICESCR source of human rights

sch 2 om LA s 89 (3)
 ins A2012-41 s 10

Dictionary

dict am A2008-3 s 8
 def **act** ins A2008-3 s 9
 def **commission** ins A2005-41 amdt 1.108
 def **court** sub A2008-36 amdt 1.351
 def **ICESCR** ins A2012-41 s 11
 def **function of a public nature** ins A2008-3 s 9
 def **human rights commissioner** om A2005-41 amdt 1.109
 def **public authority** ins A2008-3 s 9

5 Earlier replications

Some earlier replications were not numbered. The number in column 1 refers to the publication order.

Since 12 September 2001 every authorised republication has been published in electronic pdf format on the ACT legislation register. A selection of authorised replications have also been published in printed format. These replications are marked with an asterisk (*) in column 1. Electronic and printed versions of an authorised republication are identical.

Replication No and date	Effective	Last amendment made by	Replication for
R1 1 July 2004	1 July 2004– 31 October 2006	not amended	new Act
R2 1 Nov 2006	1 Nov 2006– 1 Jan 2007	A2006-3	amendments by A2005-41 as amended by A2006-3
R3 2 Jan 2007	2 Jan 2007– 17 Mar 2008	A2006-3	commenced expiry
R4 18 Mar 2008	18 Mar 2008– 31 Dec 2008	<u>A2008-3</u>	amendments by A2008-3
R5 1 Jan 2009	1 Jan 2009– 1 Feb 2009	<u>A2008-36</u>	amendments by A2008-3
R6 2 Feb 2009	2 Feb 2009– 1 Jan 2010	A2008-36	amendments by A2008-36
R7* 2 Jan 2010	2 Jan 2010– 31 Dec 2012	A2008-36	commenced expiry

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R8
01/01/13

Human Rights Act 2004
Effective: 01/01/13

page 37

Version No. 013
Charter of Human Rights and
Responsibilities Act 2006

No. 43 of 2006

Version incorporating amendments as at
1 July 2014

TABLE OF PROVISIONS

<i>Section</i>	<i>Page</i>
PART 1—PRELIMINARY	2
1 Purpose and citation	2
2 Commencement	3
3 Definitions	3
4 What is a public authority?	5
5 Human rights in this Charter in addition to other rights and freedoms	9
6 Application	9
PART 2—HUMAN RIGHTS	11
7 Human rights—what they are and when they may be limited	11
8 Recognition and equality before the law	11
9 Right to life	12
10 Protection from torture and cruel, inhuman or degrading treatment	12
11 Freedom from forced work	12
12 Freedom of movement	13
13 Privacy and reputation	13
14 Freedom of thought, conscience, religion and belief	13
15 Freedom of expression	14
16 Peaceful assembly and freedom of association	14
17 Protection of families and children	14
18 Taking part in public life	15
19 Cultural rights	15
20 Property rights	16
21 Right to liberty and security of person	16
22 Humane treatment when deprived of liberty	17
23 Children in the criminal process	17
24 Fair hearing	18
25 Rights in criminal proceedings	18

<i>Section</i>	<i>Page</i>
26 Right not to be tried or punished more than once	20
27 Retrospective criminal laws	20
PART 3—APPLICATION OF HUMAN RIGHTS IN VICTORIA	21
Division 1—Scrutiny of new legislation	21
28 Statements of compatibility	21
29 No effect on Victorian law	22
30 Scrutiny of Acts and Regulations Committee	22
Division 2—Override declaration	22
31 Override by Parliament	22
Division 3—Interpretation of laws	24
32 Interpretation	24
33 Referral to Supreme Court	24
34 Attorney-General's right to intervene	25
35 Notice to Attorney-General and Commission	26
36 Declaration of inconsistent interpretation	26
37 Action on declaration of inconsistent interpretation	28
Division 4—Obligations on public authorities	29
38 Conduct of public authorities	29
39 Legal proceedings	30
PART 4—VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION	31
40 Intervention by Commission	31
41 Functions of the Commission	31
42 Powers	32
43 Reports to be laid before Parliament	32
PART 5—GENERAL	34
44 Review of Charter after 4 years of operation	34
45 Review of Charter after 8 years of operation	35
46 Regulations	35
48 Savings provision	37
49 Transitional provisions	37

<i>Section</i>	<i>Page</i>
ENDNOTES	40
1. General Information	40
2. Table of Amendments	41
3. Explanatory Details	43

Version No. 013
Charter of Human Rights and
Responsibilities Act 2006

No. 43 of 2006

Version incorporating amendments as at
1 July 2014

Preamble

On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.

This Charter is founded on the following principles—

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

The Parliament of Victoria therefore enacts:

PART 1—PRELIMINARY

1 Purpose and citation

- (1) This Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act.
- (2) The main purpose of this Charter is to protect and promote human rights by—
 - (a) setting out the human rights that Parliament specifically seeks to protect and promote; and
 - (b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and
 - (c) imposing an obligation on all public authorities to act in a way that is compatible with human rights; and
 - (d) requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and
 - (e) conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.
- (3) In addition, this Charter—
 - (a) enables Parliament, in exceptional circumstances, to override the application of the Charter to a statutory provision; and

(b) renames the Equal Opportunity Commission as the Victorian Equal Opportunity and Human Rights Commission and confers additional functions on it; and

(c) makes consequential amendments to certain Acts.

2 Commencement

- (1) This Charter (except Divisions 3 and 4 of Part 3) comes into operation on 1 January 2007.
- (2) Divisions 3 and 4 of Part 3 come into operation on 1 January 2008.

3 Definitions

- (1) In this Charter—

Aboriginal means a person belonging to the indigenous peoples of Australia, including the indigenous inhabitants of the Torres Strait Islands, and any descendants of those peoples;

act includes a failure to act and a proposal to act;

Charter means the Charter of Human Rights and Responsibilities;

child means a person under 18 years of age;

Commission means the Victorian Equal Opportunity and Human Rights Commission under the **Equal Opportunity Act 2010**;

S. 3(1) def. of *Commission* amended by No. 16/2010 s. 209(Sch. Item 1.1).

court means the Supreme Court, the County Court, the Magistrates' Court, the Children's Court or the Coroners Court;

S. 3(1) def. of *court* amended by No. 77/2008 s. 129(Sch. 2 Item 5).

Charter of Human Rights and Responsibilities Act 2006
No. 43 of 2006
Part 1—Preliminary

s. 3

S. 3(1) def. of
discrimination
amended by
No. 16/2010
s. 209(Sch.
items 1.2, 1.3).
(as amended
by
No. 26/2011
s. 34(Sch.
item 10.1)).

declaration of inconsistent interpretation means
a declaration made by the Supreme Court
under section 36(2);

discrimination, in relation to a person, means
discrimination (within the meaning of the
Equal Opportunity Act 2010) on the basis
of an attribute set out in section 6 of that Act;

Note

Section 6 of the **Equal Opportunity Act 2010** lists a
number of attributes in respect of which
discrimination is prohibited, including age; disability;
political belief or activity; race; religious belief or
activity; sex; and sexual orientation.

human rights means the civil and political rights
set out in Part 2;

interpreter means—

- (a) an interpreter accredited by a
prescribed body; or
- (b) if an accredited interpreter is not readily
available, a competent interpreter—

and relates only to the oral rendering of the
meaning of the spoken word or other form of
communication from one language or form
of communication into another language or
form of communication;

override declaration means a declaration made by
Parliament under section 31;

Parliamentary Committee has the same meaning
as ***Joint House Committee*** has in the
Parliamentary Committees Act 2003;

person means a human being;

public authority has the meaning given in
section 4;

statutory provision means an Act (including this Charter) or a subordinate instrument or a provision of an Act (including this Charter) or of a subordinate instrument;

trial, in relation to the Magistrates' Court or the Children's Court, means hearing of a charge;

S. 3(1) def. of *trial* inserted by No. 68/2009 s. 97(Sch. item 18.1).

Victoria Police has the same meaning as in the **Victoria Police Act 2013**.

S. 3(1) def. of *Victoria Police* substituted by No. 37/2014 s. 10(Sch. item 15).

(2) In this Charter—

- (a) a reference to a function includes a reference to a power, authority and duty; and
- (b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

4 What is a public authority?

(1) For the purposes of this Charter a public authority is—

- (a) a public official within the meaning of the **Public Administration Act 2004**; or

Note

A public official under the **Public Administration Act 2004** includes employees of the public service, including the Head of a government department or an Administrative Office (such as the Secretary to the Department of Justice or the Chairman of the Environment Protection Authority) and the Victorian Public Sector Commissioner. It also includes the directors and staff of certain public entities, court staff, parliamentary officers and holders of certain statutory or prerogative offices.

Note to s. 4(1)(a) amended by No. 6/2014 s. 14.

Charter of Human Rights and Responsibilities Act 2006

No. 43 of 2006

Part 1—Preliminary

s. 4

- (b) an entity established by a statutory provision that has functions of a public nature; or

Notes

1 In section 38 of the **Interpretation of Legislation Act 1984** *entity* is defined to include a person (both a human being and a legal person) and an unincorporated body.

2 See subsection (2) in relation to "functions of a public nature".

- (c) an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise); or

Example

A non-government school in educating students may be exercising functions of a public nature but as it is not doing so on behalf of the State it is not a public authority for the purposes of this Charter.

Note

See subsections (4) and (5) in relation to "on behalf of the State or a public authority".

- (d) Victoria Police; or
- (e) a Council within the meaning of the **Local Government Act 1989** and Councillors and members of Council staff within the meaning of that Act; or
- (f) a Minister; or
- (g) members of a Parliamentary Committee when the Committee is acting in an administrative capacity; or

- (h) an entity declared by the regulations to be a public authority for the purposes of this Charter—

but does not include—

- (i) Parliament or a person exercising functions in connection with proceedings in Parliament; or
(j) a court or tribunal except when it is acting in an administrative capacity; or

Note

Committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.

- (k) an entity declared by the regulations not to be a public authority for the purposes of this Charter.
(2) In determining if a function is of a public nature the factors that may be taken into account include—
(a) that the function is conferred on the entity by or under a statutory provision;

Example

The **Transport (Compliance and Miscellaneous) Act 1983** confers powers of arrest on an authorised officer under that Act.

Example to
s. 4(2)(a)
amended by
No. 6/2010
s. 203(1)
(Sch. 6 item 5)
(as amended
by No.
45/2010 s. 22).

- (b) that the function is connected to or generally identified with functions of government;

Example

Under the **Corrections Act 1986** a private company may have the function of providing correctional services (such as managing a prison), which is a function generally identified as being a function of government.

- (c) that the function is of a regulatory nature;
- (d) that the entity is publicly funded to perform the function;
- (e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.

Example

All the shares in the companies responsible for the retail supply of water within Melbourne are held by or on behalf of the State.

(3) To avoid doubt—

- (a) the factors listed in subsection (2) are not exhaustive of the factors that may be taken into account in determining if a function is of a public nature; and
 - (b) the fact that one or more of the factors set out in subsection (2) are present in relation to a function does not necessarily result in the function being of a public nature.
- (4) For the purposes of subsection (1)(c), an entity may be acting on behalf of the State or a public authority even if there is no agency relationship between the entity and the State or public authority.

- (5) For the purposes of subsection (1)(c), the fact that an entity is publicly funded to perform a function does not necessarily mean that it is exercising that function on behalf of the State or a public authority.

5 Human rights in this Charter in addition to other rights and freedoms

A right or freedom not included in this Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

6 Application

- (1) Only persons have human rights. All persons have the human rights set out in Part 2.

Note

Corporations do not have human rights.

- (2) This Charter applies to—

- (a) the Parliament, to the extent that the Parliament has functions under Divisions 1 and 2 of Part 3; and
- (b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3; and
- (c) public authorities, to the extent that they have functions under Division 4 of Part 3.

- (3) Subsection (2) does not take away from or limit—

- (a) any other function conferred by this Charter on an entity specified in subsection (2); or
- (b) any function conferred on any other entity by this Charter.

Charter of Human Rights and Responsibilities Act 2006
No. 43 of 2006
Part 1—Preliminary

s. 6

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- (4) This Charter binds the Crown in right of Victoria and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.
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PART 2—HUMAN RIGHTS

7 Human rights—what they are and when they may be limited

- (1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.
- (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
 - (a) the nature of the right; and
 - (b) the importance of the purpose of the limitation; and
 - (c) the nature and extent of the limitation; and
 - (d) the relationship between the limitation and its purpose; and
 - (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
- (3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

8 Recognition and equality before the law

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

9 Right to life

Every person has the right to life and has the right not to be arbitrarily deprived of life.

10 Protection from torture and cruel, inhuman or degrading treatment

A person must not be—

- (a) subjected to torture; or
- (b) treated or punished in a cruel, inhuman or degrading way; or
- (c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

11 Freedom from forced work

- (1) A person must not be held in slavery or servitude.
- (2) A person must not be made to perform forced or compulsory labour.
- (3) For the purposes of subsection (2) *forced or compulsory labour* does not include—
 - (a) work or service normally required of a person who is under detention because of a lawful court order or who, under a lawful court order, has been conditionally released from detention or ordered to perform work in the community; or
 - (b) work or service required because of an emergency threatening the Victorian community or a part of the Victorian community; or

(c) work or service that forms part of normal civil obligations.

(4) In this section *court order* includes an order made by a court of another jurisdiction.

12 Freedom of movement

Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

13 Privacy and reputation

A person has the right—

- (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
- (b) not to have his or her reputation unlawfully attacked.

14 Freedom of thought, conscience, religion and belief

- (1) Every person has the right to freedom of thought, conscience, religion and belief, including—
 - (a) the freedom to have or to adopt a religion or belief of his or her choice; and
 - (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
- (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

15 Freedom of expression

- (1) Every person has the right to hold an opinion without interference.
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—
 - (a) orally; or
 - (b) in writing; or
 - (c) in print; or
 - (d) by way of art; or
 - (e) in another medium chosen by him or her.
- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—
 - (a) to respect the rights and reputation of other persons; or
 - (b) for the protection of national security, public order, public health or public morality.

16 Peaceful assembly and freedom of association

- (1) Every person has the right of peaceful assembly.
- (2) Every person has the right to freedom of association with others, including the right to form and join trade unions.

17 Protection of families and children

- (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

- (2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

18 Taking part in public life

- (1) Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.
- (2) Every eligible person has the right, and is to have the opportunity, without discrimination—
- (a) to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors; and
 - (b) to have access, on general terms of equality, to the Victorian public service and public office.

19 Cultural rights

- (1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.
- (2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—
- (a) to enjoy their identity and culture; and
 - (b) to maintain and use their language; and
 - (c) to maintain their kinship ties; and
 - (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with

which they have a connection under traditional laws and customs.

20 Property rights

A person must not be deprived of his or her property other than in accordance with law.

21 Right to liberty and security of person

- (1) Every person has the right to liberty and security.
- (2) A person must not be subjected to arbitrary arrest or detention.
- (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.
- (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her.
- (5) A person who is arrested or detained on a criminal charge—
 - (a) must be promptly brought before a court; and
 - (b) has the right to be brought to trial without unreasonable delay; and
 - (c) must be released if paragraph (a) or (b) is not complied with.
- (6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to attend—
 - (a) for trial; and
 - (b) at any other stage of the judicial proceeding; and
 - (c) if appropriate, for execution of judgment.

S. 21(6)
amended by
No. 68/2009
s. 97(Sch.
item 18.2).

- (7) Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must—
 - (a) make a decision without delay; and
 - (b) order the release of the person if it finds that the detention is unlawful.
- (8) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.

22 Humane treatment when deprived of liberty

- (1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- (2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.
- (3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

23 Children in the criminal process

- (1) An accused child who is detained or a child detained without charge must be segregated from all detained adults.
- (2) An accused child must be brought to trial as quickly as possible.
- (3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

24 Fair hearing

- (1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (2) Despite subsection (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.

Note to
s. 24(2)
substituted by
No. 58/2013
s. 37.

Note

See Part 5 of the **Open Courts Act 2013**.

- (3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.

25 Rights in criminal proceedings

- (1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.
- (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—
 - (a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and
 - (b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and

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- (c) to be tried without unreasonable delay; and
 - (d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the **Legal Aid Act 1978**; and
 - (e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the **Legal Aid Act 1978**; and
 - (f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the **Legal Aid Act 1978**; and
 - (g) to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and
 - (h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and
 - (i) to have the free assistance of an interpreter if he or she cannot understand or speak English; and
 - (j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance; and
 - (k) not to be compelled to testify against himself or herself or to confess guilt.
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- (3) A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.
 - (4) Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.

26 Right not to be tried or punished more than once

A person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law.

27 Retrospective criminal laws

- (1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.
 - (2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.
 - (3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.
 - (4) Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.
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PART 3—APPLICATION OF HUMAN RIGHTS IN VICTORIA

Division 1—Scrutiny of new legislation

28 Statements of compatibility

- (1) A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.
- (2) A member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under subsection (1) to be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.

Note

The obligation in subsections (1) and (2) applies to Ministers introducing government Bills and members of Parliament introducing non-government Bills.

- (3) A statement of compatibility must state—
 - (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and
 - (b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.
- (4) A statement of compatibility made under this section is not binding on any court or tribunal.

29 No effect on Victorian law

A failure to comply with section 28 in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or of any other statutory provision.

30 Scrutiny of Acts and Regulations Committee

The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.

Note

The Scrutiny of Acts and Regulations Committee must also review all statutory rules and report to Parliament if it considers the statutory rule to be incompatible with human rights: see section 21 of the **Subordinate Legislation Act 1994**.

Division 2—Override declaration

31 Override by Parliament

- (1) Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.
- (2) If an override declaration is made in respect of an Act or a provision of an Act that declaration must be taken to extend to any subordinate instrument made under or for the purpose of that Act or provision.
- (3) A member of Parliament who introduces a Bill containing an override declaration, or another member acting on his or her behalf, must make a statement to the Legislative Council or the Legislative Assembly, as the case requires,

explaining the exceptional circumstances that justify the inclusion of the override declaration.

- (4) It is the intention of Parliament that an override declaration will only be made in exceptional circumstances.
- (5) A statement under subsection (3) must be made—
 - (a) during the second reading speech for the Bill that contains the override declaration; or
 - (b) after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill; or
 - (c) with the leave of the Legislative Council or the Legislative Assembly, as the case requires, at any time before the third reading of the Bill.
- (6) If an override declaration is made in respect of a statutory provision, then to the extent of the declaration this Charter has no application to that provision.

Note

As the Charter has no application to a statutory provision for which an override declaration has been made, the Supreme Court cannot make a declaration of inconsistent interpretation in respect of that statutory provision. Also, the requirement under section 32 to interpret that provision in a way that is compatible with human rights does not apply.

- (7) A provision of an Act containing an override declaration expires on the 5th anniversary of the day on which that provision comes into operation or on such earlier date as may be specified in that Act.
- (8) Parliament may, at any time, re-enact an override declaration, and the provisions of this section apply to any re-enacted declaration.

- (9) A failure to comply with subsection (3) or (5) in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or of any other statutory provision.

Division 3—Interpretation of laws

32 Interpretation

- (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
- (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
- (3) This section does not affect the validity of—
 - (a) an Act or provision of an Act that is incompatible with a human right; or
 - (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

33 Referral to Supreme Court

- (1) If, in a proceeding before a court or tribunal, a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter, that question may be referred to the Supreme Court if—
 - (a) a party has made an application for referral; and
 - (b) the court or tribunal considers that the question is appropriate for determination by the Supreme Court.

- (2) If a question has been referred to the Supreme Court under subsection (1), the court or tribunal referring the question must not—
 - (a) make a determination to which the question is relevant while the referral is pending; or
 - (b) proceed in a manner or make a determination that is inconsistent with the opinion of the Supreme Court on the question.
- (3) If a question is referred under subsection (1) by the Trial Division of the Supreme Court or by the County Court, the referral is to be made to the Court of Appeal.
- (4) Despite anything contained in any other Act, if a question arises of a kind referred to in subsection (1), that question may only be referred to the Supreme Court in accordance with this section.

S. 33(3)
amended by
No. 68/2009
s. 97(Sch.
item 18.3).

34 Attorney-General's right to intervene

- (1) The Attorney-General may intervene in, and may be joined as a party to, any proceeding before any court or tribunal in which a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter.
- (2) If the Attorney-General intervenes in a proceeding under this section, then, for the purpose of the institution and prosecution of an appeal from an order made in that proceeding, the Attorney-General may be taken to be a party to the proceeding.

35 Notice to Attorney-General and Commission

- (1) A party to a proceeding must give notice in the prescribed form to the Attorney-General and the Commission if—
 - (a) in the case of a Supreme Court or County Court proceeding, a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or
 - (b) in any case, a question is referred to the Supreme Court under section 33.
- (2) For the purpose of subsection (1), a notice is not required to be given to—
 - (a) the Attorney-General if the State is a party to the relevant proceeding; or
 - (b) the Commission if the Commission is a party to the relevant proceeding.

36 Declaration of inconsistent interpretation

- (1) This section applies if—
 - (a) in a Supreme Court proceeding a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or
 - (b) the Supreme Court has had a question referred to it under section 33; or
 - (c) an appeal before the Court of Appeal relates to a question of a kind referred to in paragraph (a).

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- (2) Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.
 - (3) If the Supreme Court is considering making a declaration of inconsistent interpretation, it must ensure that notice in the prescribed form of that fact is given to the Attorney-General and the Commission.
 - (4) The Supreme Court must not make a declaration of inconsistent interpretation unless the Court is satisfied that—
 - (a) notice in the prescribed form has been given to the Attorney-General and the Commission under subsection (3); and
 - (b) a reasonable opportunity has been given to the Attorney-General and the Commission to intervene in the proceeding or to make submissions in respect of the proposed declaration of inconsistent interpretation.
 - (5) A declaration of inconsistent interpretation does not—
 - (a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or
 - (b) create in any person any legal right or give rise to any civil cause of action.
 - (6) The Supreme Court must cause a copy of a declaration of inconsistent interpretation to be given to the Attorney-General—
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- (a) if the period provided for the lodging of an appeal in respect of the proceeding in which the declaration was made has ended without such an appeal having been lodged, within 7 days after the end of that period; or
- (b) if on appeal the declaration is upheld, within 7 days after any appeal has been finalised.

Example

If the Trial Division of the Supreme Court makes a declaration of inconsistent interpretation (based on a referral of a question from VCAT) and on appeal the Court of Appeal upholds the declaration, a copy of the declaration must be sent to the Attorney-General within 7 days after the Court of Appeal's decision.

- (7) The Attorney-General must, as soon as reasonably practicable, give a copy of a declaration of inconsistent interpretation received under subsection (6) to the Minister administering the statutory provision in respect of which the declaration was made, unless the relevant Minister is the Attorney-General.

37 Action on declaration of inconsistent interpretation

Within 6 months after receiving a declaration of inconsistent interpretation, the Minister administering the statutory provision in respect of which the declaration was made must—

- (a) prepare a written response to the declaration; and
- (b) cause a copy of the declaration and of his or her response to it to be—
 - (i) laid before each House of Parliament; and
 - (ii) published in the Government Gazette.

Division 4—Obligations on public authorities

38 Conduct of public authorities

- (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.

- (3) This section does not apply to an act or decision of a private nature.
- (4) Subsection (1) does not require a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.
- (5) In this section *religious body* means—
 - (a) a body established for a religious purpose; or
 - (b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

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 a 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 I 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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PART 4—VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

40 Intervention by Commission

- (1) The Commission may intervene in, and may be joined as a party to, any proceeding before any court or tribunal in which a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter.
- (2) If the Commission intervenes in a proceeding under this section, then, for the purpose of the institution and prosecution of an appeal from an order made in that proceeding, the Commission may be taken to be a party to the proceeding.

41 Functions of the Commission

The Commission has the following functions in relation to this Charter—

- (a) to present to the Attorney-General an annual report that examines—
 - (i) the operation of this Charter, including its interaction with other statutory provisions and the common law; and
 - (ii) all declarations of inconsistent interpretation made during the relevant year; and
 - (iii) all override declarations made during the relevant year; and
- (b) when requested by the Attorney-General, to review the effect of statutory provisions and the common law on human rights and report in writing to the Attorney-General on the results of the review; and

- (c) when requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights; and
- (d) to provide education about human rights and this Charter; and
- (e) to assist the Attorney-General in the review of this Charter under sections 44 and 45; and
- (f) to advise the Attorney-General on anything relevant to the operation of this Charter; and
- (g) any other function conferred on the Commission under this Charter or any other Act.

42 Powers

The Commission has power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions under this Charter.

43 Reports to be laid before Parliament

- (1) The Attorney-General must cause a copy of any report prepared by the Commission in accordance with section 41(a) or (b) (as amended under subsection (2), if applicable) to be laid before each House of Parliament on or before the 6th sitting day of that House after the Attorney-General has received the report.
- (2) The Attorney-General may amend a report received under section 41(a) or (b) if the Attorney-General considers it necessary to do so to prevent disclosure of—
 - (a) the identity of any person whose human rights have, or may have been, contravened; or

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- (b) the identity of any person who may have contravened another person's human rights;
or
 - (c) information that could, in the Attorney-General's opinion, harm the public interest.
- (3) If the Attorney-General amends the report in accordance with subsection (2), he or she must present a statement that the report has been amended when laying the report before Parliament in accordance with subsection (1).
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PART 5—GENERAL

44 Review of Charter after 4 years of operation

- (1) The Attorney-General must cause a review to be made of the first 4 years of operation of this Charter and must cause a copy of a report of the review to be laid before each House of Parliament on or before 1 October 2011.
- (2) A review under subsection (1) must include consideration as to whether—
 - (a) additional human rights should be included as human rights under this Charter, including but not limited to, rights under—
 - (i) the International Covenant on Economic, Social and Cultural Rights; and
 - (ii) the Convention on the Rights of the Child; and
 - (iii) the Convention on the Elimination of All Forms of Discrimination against Women; and
 - (b) the right to self-determination should be included in this Charter; and
 - (c) regular auditing of public authorities to assess compliance with human rights should be made mandatory; and
 - (d) further provision should be made in this Charter with respect to proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful because of this Charter.

45 Review of Charter after 8 years of operation

- (1) The Attorney-General must cause a review to be made of the 5th to 8th years of operation of this Charter and must cause a copy of a report of the review to be laid before each House of Parliament on or before 1 October 2015.
- (2) A report under subsection (1) must include a recommendation as to whether any further review of this Charter is necessary.

46 Regulations

- (1) The Governor in Council may make regulations for or with respect to any matter or thing required or permitted by this Charter to be prescribed or necessary to be prescribed to give effect to this Charter.
- (2) Without limiting subsection (1), the Governor in Council may make regulations for or with respect to—
 - (a) prescribing entities to be public authorities for the purposes of this Charter; and
 - (b) prescribing entities not to be public authorities for the purposes of this Charter; and
 - (c) prescribing entities not to be public authorities for the purposes of this Charter when exercising certain functions; and
 - (d) prescribing bodies that are authorised to accredit interpreters; and
 - (e) prescribing forms for the purposes of this Charter.

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- (3) A power conferred by this Charter to make regulations may be exercised—
- (a) either in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified case or class of case; and
 - (b) so as to make, as respects the cases in relation to which the power is exercised—
 - (i) the same provision for all cases in relation to which the power is exercised, or different provisions for different cases or classes of case, or different provisions for the same case or class of case for different purposes; or
 - (ii) any such provision either unconditionally or subject to any specified condition.
- (4) Regulations under this Charter may be made—
- (a) so as to apply at all times or at a specified time; and
 - (b) so as to require matters affected by the regulations to be—
 - (i) in accordance with specified standards or specified requirements; or
 - (ii) approved by or to the satisfaction of specified persons or bodies or specified classes of persons or bodies; or
 - (iii) as specified in both subparagraphs (i) and (ii); and
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- (c) so as to apply, adopt or incorporate any matter contained in any document whatsoever whether—
 - (i) wholly or partially or as amended by the regulations; or
 - (ii) as in force at a particular time or as in force from time to time; and
- (d) so as to confer a discretionary authority or impose a duty on specified persons or bodies or specified classes of persons or bodies; and
- (e) so as to provide in specified cases or classes of case for the exemption of persons or things or classes of persons or things from any of the provisions of the regulations, whether unconditionally or on specified conditions and either wholly or to such an extent as is specified.

* * * * *

S. 47
repealed by
No. 29/2011
s. 3(Sch. 1
item 8).

48 Savings provision

Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.

49 Transitional provisions

- (1) This Charter extends and applies to all Acts, whether passed before or after the commencement of Part 2, and to all subordinate instruments, whether made before or after that commencement.
- (2) This Charter does not affect any proceedings commenced or concluded before the commencement of Part 2.

Charter of Human Rights and Responsibilities Act 2006
No. 43 of 2006
Part 5—General

s. 49

S. 49(4)
inserted by
No. 68/2009
s. 97(Sch.
item 18.4).

-
- (3) Division 4 of Part 3 does not apply to any act or decision made by a public authority before the commencement of that Division.
- (4) Section 33(3) as amended by item 18.3 of the Schedule to the **Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009** applies to a question referred under section 33(1) on or after the commencement of that item.
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Charter of Human Rights and Responsibilities Act 2006
No. 43 of 2006

Sch.

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Sch.
repealed by
No. 29/2011
s. 3(Sch. 1
item 8).

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Charter of Human Rights and Responsibilities Act 2006
No. 43 of 2006

Endnotes

ENDNOTES

1. General Information

Minister's second reading speech—

Legislative Assembly: 4 May 2006

Legislative Council: 19 July 2006

The long title for the Bill for this Act was "to protect and promote human rights, to make consequential amendments to certain Acts and for other purposes."

The **Charter of Human Rights and Responsibilities Act 2006** was assented to on 25 July 2006 and came into operation as follows:

Sections 1–31, 40–49 and the Schedule on 1 January 2007: section 2(1);
sections 32–39 on 1 January 2008: section 2(2).

Charter of Human Rights and Responsibilities Act 2006
No. 43 of 2006

Endnotes

2. Table of Amendments

This Version incorporates amendments made to the **Charter of Human Rights and Responsibilities Act 2006** by Acts and subordinate instruments.

Coroners Act 2008, No. 77/2008

Assent Date: 11.12.08
Commencement Date: S. 129(Sch. 2 item 5) on 1.11.09: s. 2
Current State: This information relates only to the provision/s amending the **Charter of Human Rights and Responsibilities Act 2006**

Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009, No. 68/2009

Assent Date: 24.11.09
Commencement Date: S. 97(Sch. item 18) on 1.1.10: Government Gazette 10.12.09 p. 3215
Current State: This information relates only to the provision/s amending the **Charter of Human Rights and Responsibilities Act 2006**

Transport Integration Act 2010, No. 6/2010 (as amended by No. 45/2010)

Assent Date: 2.3.10
Commencement Date: S. 203(1)(Sch. 6 item 5) on 1.7.10: Special Gazette (No. 256) 30.6.10 p. 1
Current State: This information relates only to the provision/s amending the **Charter of Human Rights and Responsibilities Act 2006**

Equal Opportunity Act 2010, No. 16/2010 (as amended by No. 26/2011)

Assent Date: 27.4.10
Commencement Date: S. 209(Sch. item 1) on 1.8.11: s. 2(4)
Current State: This information relates only to the provision/s amending the **Charter of Human Rights and Responsibilities Act 2006**

Statute Law Revision Act 2011, No. 29/2011

Assent Date: 21.6.11
Commencement Date: S. 3(Sch. 1 item 8) on 22.6.11: s. 2(1)
Current State: This information relates only to the provision/s amending the **Charter of Human Rights and Responsibilities Act 2006**

Open Courts Act 2013, No. 58/2013

Assent Date: 22.10.13
Commencement Date: S. 37 on 1.12.13: s. 2(2)
Current State: This information relates only to the provision/s amending the **Charter of Human Rights and Responsibilities Act 2006**

Charter of Human Rights and Responsibilities Act 2006
No. 43 of 2006

Endnotes

**Public Administration Amendment (Public Sector Improvement) Act 2014,
No. 6/2014**

Assent Date: 11.2.14
Commencement Date: S. 14 on 1.4.14; Special Gazette (No. 65) 4.3.14
p. 1
Current State: This information relates only to the provision/s
amending the **Charter of Human Rights and
Responsibilities Act 2006**

**Victoria Police Amendment (Consequential and Other Matters) Act 2014,
No. 37/2014**

Assent Date: 3.6.14
Commencement Date: S. 10(Sch. item 15) on 1.7.14; Special Gazette
(No. 200) 24.6.14 p. 2
Current State: This information relates only to the provision/s
amending the **Charter of Human Rights and
Responsibilities Act 2006**

3. Explanatory Details

No entries at date of publication.



Human Rights (Parliamentary Scrutiny) Act 2011

Act No. 186 of 2011 as amended

This compilation was prepared on 10 October 2012
taking into account amendments up to Act No. 136 of 2012

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Parliamentary Counsel, Canberra

Contents

Part 1—Preliminary	1
1 Short title [see Note 1]	1
2 Commencement	1
3 Definitions	2
Part 2—Parliamentary Joint Committee on Human Rights	3
4 Parliamentary Joint Committee on Human Rights	3
5 Membership of the Committee	3
6 Powers and proceedings of the Committee	4
7 Functions of the Committee	4
Part 3—Statements of compatibility	5
8 Statements of compatibility in relation to Bills	5
9 Statements of compatibility in relation to certain legislative instruments	5
Part 4—Regulations	7
10 Regulations	7
Notes	9

An Act to establish a Parliamentary Joint Committee on Human Rights, and for related purposes

Part 1—Preliminary

1 Short title [see Note 1]

This Act may be cited as the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	7 December 2011
2. Parts 2, 3 and 4	The later of: (a) 1 January 2011; and (b) the 28th day after this Act receives the Royal Assent.	4 January 2012

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in Column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

Section 3

3 Definitions

(1) In this Act:

human rights means the rights and freedoms recognised or declared by the following international instruments:

- (a) the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40);
- (b) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5);
- (c) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);
- (d) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9);
- (e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 ([1989] ATS 21);
- (f) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4);
- (g) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12).

Note: In 2011, the text of an international agreement in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

member means a member of the Committee.

rule-maker has the same meaning as in the *Legislative Instruments Act 2003*.

the Committee means the Parliamentary Joint Committee on Human Rights for the time being constituted under this Act.

- (2) In the definition of **human rights** in subsection (1), the reference to the rights and freedoms recognised or declared by an international instrument is to be read as a reference to the rights and freedoms recognised or declared by the instrument as it applies to Australia.

Part 2—Parliamentary Joint Committee on Human Rights

4 Parliamentary Joint Committee on Human Rights

As soon as practicable after the commencement of the first session of each Parliament, a joint committee of members of the Parliament, to be known as the Parliamentary Joint Committee on Human Rights, is to be appointed according to the practice of the Parliament.

5 Membership of the Committee

- (1) The Committee is to consist of 10 members:
 - (a) 5 members of the Senate appointed by the Senate; and
 - (b) 5 members of the House of Representatives appointed by that House.
- (2) A member of the Parliament is not eligible for appointment as a member of the Committee if he or she is:
 - (a) a Minister; or
 - (b) the President of the Senate; or
 - (c) the Speaker of the House of Representatives; or
 - (d) the Deputy-President and Chair of Committees of the Senate; or
 - (e) the Deputy Speaker of the House of Representatives.
- (3) A member ceases to hold office:
 - (a) when the House of Representatives expires by effluxion of time or is dissolved; or
 - (b) if he or she becomes the holder of an office specified in any of the paragraphs of subsection (2); or
 - (c) if he or she ceases to be a member of the House of the Parliament by which he or she was appointed; or
 - (d) if he or she resigns his or her office as provided by subsection (4) or (5).

Section 6

- (4) A member appointed by the Senate may resign his or her office by writing signed by him or her and delivered to the President of the Senate.
- (5) A member appointed by the House of Representatives may resign his or her office by writing signed by him or her and delivered to the Speaker of that House.
- (6) Either House of the Parliament may appoint one of its members to fill a vacancy amongst the members of the Committee appointed by that House.

6 Powers and proceedings of the Committee

All matters relating to the powers and proceedings of the Committee are to be determined by resolution of both Houses of the Parliament.

7 Functions of the Committee

The Committee has the following functions:

- (a) to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- (b) to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue;
- (c) to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to both Houses of the Parliament on that matter.

Part 3—Statements of compatibility

8 Statements of compatibility in relation to Bills

- (1) A member of Parliament who proposes to introduce a Bill for an Act into a House of the Parliament must cause a statement of compatibility to be prepared in respect of that Bill.
- (2) A member of Parliament who introduces a Bill for an Act into a House of the Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under subsection (1) to be presented to the House.
- (3) A statement of compatibility must include an assessment of whether the Bill is compatible with human rights.
- (4) A statement of compatibility prepared under subsection (1) is not binding on any court or tribunal.
- (5) A failure to comply with this section in relation to a Bill that becomes an Act does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth.

9 Statements of compatibility in relation to certain legislative instruments

- (1) The rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the *Legislative Instruments Act 2003* applies must cause a statement of compatibility to be prepared in respect of that legislative instrument.

Note: The statement of compatibility must be included in the explanatory statement relating to the legislative instrument (see subsection 26(1A) of the *Legislative Instruments Act 2003*).
- (2) A statement of compatibility must include an assessment of whether the legislative instrument is compatible with human rights.
- (3) A statement of compatibility prepared under subsection (1) is not binding on any court or tribunal.

Section 9

- (4) A failure to comply with this section in relation to a legislative instrument does not affect the validity, operation or enforcement of the instrument or any other provision of a law of the Commonwealth.

Part 4—Regulations

10 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted to be prescribed by this Act; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Table of Acts**Notes to the *Human Rights (Parliamentary Scrutiny) Act 2011*****Note 1**

The *Human Rights (Parliamentary Scrutiny) Act 2011* as shown in this compilation comprises Act No. 186, 2011 amended as indicated in the Tables below:

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Human Rights (Parliamentary Scrutiny) Act 2011</i>	186, 2011	7 Dec 2011	Ss. 4–10: 4 Jan 2012 Remainder: Royal Assent	
<i>Legislative Instruments Amendment (Sunsetting Measures) Act 2012</i>	135, 2012	22 Sept 2012	Schedule 2: 23 Sept 2012	—
<i>Statute Law Revision Act 2012</i>	136, 2012	22 Sept 2012	Schedule 1 (item 67): Royal Assent	—

Table of Amendments

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected How affected

Part 2

S. 5..... am. No. 136, 2012

Part 3

Note to s. 9(1)..... am. No. 135, 2012

**FEDERAL COURT
SIMPLIFIED ACTION**

BETWEEN:

EDGAR SCHMIDT

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

CERTIFICATE CONCERNING CODE OF CONDUCT FOR EXPERT WITNESSES
(Federal Courts Rules, rule 52.2)

I, Janet Margaret McLean, having been named as an expert witness by the Defendant, the Attorney General of Canada, certify that I have read the *Code of Conduct for Expert Witnesses* set out in the schedule to the *Federal Courts Rules* and agree to be bound by it.



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