

The Victorian Charter of Human Rights and Responsibilities

The Victorian Charter of Human Rights and Responsibilities Act 2006 (the Victorian Charter) was enacted 16 years after the New Zealand Bill of Rights Act (NZBORA). Like the NZBORA and the United Kingdom's Human Rights Act 1998 (HRA), the Victorian Charter is an ordinary act of Parliament which seeks to preserve parliamentary sovereignty by limiting the courts' ability to strike down legislation. The Victorian Charter drew heavily upon the experience of New Zealand and the United Kingdom. The Victorian Charter expressly adopts some aspects of the NZBORA and the HRA (such as the interpretative rule), rejects other aspects (such as the ability to obtain damages for breach), but also includes some provisions that are quite different from either the NZBORA or the HRA.

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In considering the options for strengthening the NZBORA, it may be helpful to look to the experience of Victoria in relation to its somewhat more detailed act. However, a comparative analysis must consider the broader legal, constitutional and political framework in which the Victorian Charter operates, as well as the different administrative arrangements within government that are not necessarily apparent from the text.

Constitutional and legal environment

The Victorian Charter operates within a very different constitutional and legal framework to that of the NZBORA. This framework affects the operation of the Victoria Charter in a number of ways.

First, the Victorian Charter is legislation of the state of Victoria, and can therefore generally only apply to Victorian legislation and public officials. It cannot affect the interpretation of Commonwealth laws or the implementation of those laws by Commonwealth bodies.

Second, the Victorian Charter applies differently to the judicial branch

of government. Under the Victorian Charter, courts are expressly excluded from the definition of 'public authority', except when acting 'administratively'. In contrast, section 6 of the HRA expressly includes courts and tribunals in the definition of public authority and provides that it is unlawful for a public authority to act incompatibly with a human right. Section 3 of the NZBORA provides that the act applies to acts done by all three branches of government, as well as persons and bodies exercising public functions, powers and duties. The direct application of the NZBORA and the HRA to courts and tribunals means that courts and tribunals must themselves consider human rights and act compatibly with them, and renders decisions vulnerable to review or appeal where they fail to do so. It also potentially gives rise to a direct obligation on courts to consider and develop the common law in light of the statutory human rights.

Third, from the perspective of a New Zealand-qualified lawyer practicing in Australian public law, one of the most noticeable differences between the two legal cultures is the influence of the principle of separation of powers. In contrast to the position at the Commonwealth level, in the Australian states there is no strict requirement of separation of powers. Nevertheless, the principle operates much more strongly in the state legal system than it does in New Zealand. The principle has already had a marked impact upon the interpretation and operation of key provisions of the Victorian Charter.

It is clear that the boundaries between law-making (a legislative function) and interpreting legislation (a judicial function) was at the heart of the High Court's decision in *Momcilovic v The Queen*¹ to reject the approach adopted by the UK courts to the interpretative rule in the HRA and to adopt a more modest approach to the interpretative rule in section 32 of the Victorian Charter. Further, for three of the seven members of the High Court, the power of a court to make a declaration of inconsistent interpretation with no practical effect for the parties was not a judicial function and

was incompatible with the institutional integrity of the Supreme Court.

It is also likely that the principle is, at least in part, responsible for the courts' reluctance to engage in proportionality review, particularly when it comes to legislation. Currently, Victoria is in the same (or perhaps a worse) position than New Zealand was prior to *R v Hansen*.² The conflicting judgments of the High Court in *Momcilovic* mean that the role of the reasonable limits provision in section 7(2) in an assessment of compatibility under the interpretative rule is unclear.

Finally, any consideration of the Victorian Charter would also be incomplete without acknowledging the political environment within which

general to bring to the attention of Parliament any provision of a bill that appears to be inconsistent with any of the rights and freedoms contained in the NZBORA. Notably, the obligation is on the attorney-general, including in respect of non-government bills, and is only to identify inconsistencies with rights. As a matter of practice, the attorney-general is provided with legal advice on all bills by the Ministry of Justice (in respect of non-justice bills) and by the Crown Law Office (in respect of justice bills). With the exception of advice on bills in respect of which a section 7 report has been tabled, the legal advice is published online.³

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it operates. The present coalition government opposed the enactment of the Victorian Charter when it was in opposition. That controversy has continued, particularly in the context of conducting the statutorily mandated reviews of the charter. The Scrutiny of Acts and Regulations Committee completed the first such review in 2011. The majority of the committee favoured the retention of the provisions regarding scrutiny of legislation, and a number of significant amendments were recommended to improve this process. However, a majority also recommended the repeal of division 3 (interpretation of laws) and division 4 (obligations of public authorities).

Parliamentary scrutiny

One of the obvious differences between the provisions of the NZBORA and the Victorian Charter is in the obligations to report on proposed legislation. Section 7 of the NZBORA requires the attorney-

member of Parliament who proposes to introduce a bill into a house of Parliament to cause a reasoned statement of compatibility to be prepared in respect of the bill. The statement of compatibility is laid before the House before the member gives his or her second reading speech. The Scrutiny of Acts and Regulations Committee (a joint investigatory committee of Parliament) is required by section 30 of the Victorian Charter to consider any bill introduced into Parliament and to report to Parliament as to whether the bill is incompatible with human rights.

The requirement to provide a reasoned statement of compatibility in respect of all bills is unique to the two Australian jurisdictions with a statutory human rights instrument, Victoria and the Australian Capital Territory. It has the potential to improve the understanding of all members of Parliament as to the human rights implications of proposed legislation, and to increase parliamentary

debate of the human rights issues. This is more difficult to achieve in jurisdictions such as the UK or Canada, where there is either no obligation at all upon the incumbent government to identify human rights issues, or merely a requirement of certification that the proposed legislation is compatible with human rights.

In practice, the Victorian Charter has not featured prominently in parliamentary debates. However, there is a clear dialogue between the member introducing the bill and the Scrutiny of Acts and Regulations Committee. It is common for the committee to write to the minister introducing a government bill identifying further human rights issues or requesting more information

that culture was to build knowledge throughout government.

Section 28 of the Victorian Charter distributes the responsibility for legislative compatibility with human rights to all members of Parliament, rather than just the attorney-general. This decentralisation is reinforced and developed through the administrative arrangements that operate within government. The preparation and tabling of a statement of compatibility is the culmination of a series of administrative processes that are aimed at early identification of human rights issues and ensuring that proposed legislation is developed in a way that is compatible with rights.

In addition to the obligations to

the Human Rights Unit is consulted on statements of compatibility and human rights certificates, it does not prepare them. Departments are encouraged to prepare statements of compatibility and human rights certificates themselves. This is seen as an important aspect of building a culture of rights in which all public officials develop a knowledge and understanding of human rights, and consideration of human rights occurs at all stages of the decision-making processes of government.

There are noticeable benefits of this decentralised process. Rather than human rights being seen as an area of specialised knowledge, possessed only by a select few within the Department of Justice or the Victorian Government Solicitor's Office, all public servants are encouraged to develop a knowledge of human rights with particular regard to the implications for their policy area. Having legislation that is compatible with human rights is only the first step in ensuring human rights-compatible outcomes. Primary legislation may confer a power that, on its face, permits a wide discretion, some of which may be compatible with rights and some of which may not. Ensuring subordinate legislation and individual decision-making are compatible with human rights requires consideration of human rights implications at all levels of the decision-making process. Building knowledge of human rights within all areas of government is essential. This was recognised by the two-year delay in the full operation of the Victorian Charter, during which time human rights training was implemented government-wide and departments had an opportunity to develop internal policies and procedures to incorporate human rights considerations.

In practice, the extent to which government departments have built in-house capacity to prepare statements of compatibility and deal with human rights issues has been variable. However, those departments that encounter human rights issues on a regular, and often daily, basis have built up significant expertise. Those departments generally prepare statements of compatibility and human rights certificates themselves. Other

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regarding a particular issue, including a more detailed justification for an identified limit upon rights. In other cases the committee may identify issues and bring to the attention of Parliament the question of whether a particular limit upon rights is justified.

Reasoned statements of compatibility may also prove to be an important aspect of the dialogue with the courts. As part of the extrinsic material, identification in the statement of compatibility of whether and the extent to which the bill intends to limit rights may assist in the subsequent interpretation of the legislation. The statement of compatibility may also provide evidence of the reasons or justification for limiting the rights.

Decentralisation and building a culture of rights

In enacting the Victorian Charter, it was made clear that the expectation was that most of the work would occur within government, rather than the courts, and there was a stated intention to build a 'culture of rights'. Key to developing

report in respect of bills under section 28 of the Victorian Charter, a responsible minister is required to provide a human rights certificate in respect of legislative instruments and statutory rules.⁴ The human rights certificate must certify whether rights are limited and, if so, whether the limit is reasonable and justified. The Scrutiny of Acts and Regulations Committee is empowered to report to Parliament if the legislative instrument is incompatible with the human rights in the Victorian Charter.⁵

Section 38 of the Victorian Charter requires that public authorities not only act compatibly with rights, but also give proper consideration to relevant human rights when making decisions. In this context, an understanding of human rights is required of all public servants.

In contrast to the practice in New Zealand, neither the Department of Justice nor the Victorian Government Solicitor's Office are responsible for preparing statements of compatibility. The Victorian Department of Justice has a small Human Rights Unit. However, while

departments are more likely to engage lawyers to assist; but, even then, they tend to have greater engagement in the process than occurs in New Zealand, sometimes preparing a draft themselves.

Measuring the success of internal government processes is difficult, particularly where it involves the development of legislation, as much of the material is cabinet-in-confidence. The fact that the Victorian Charter is being considered and is influencing the development of legislation is evident from the work of the Victorian Law Reform Commission. Often, terms of reference will include an express requirement to consider the rights enshrined in the Victorian Charter. Reports of the commission have included a discussion of the charter. More recently, the commission acknowledged that the Victorian Charter proved to be a 'helpful guide' when designing new guardianship laws.

It is also possible to speculate on the influence of the Victorian Charter by comparing more recent Victorian legislation with that in other Australian jurisdictions. For example, the Serious Sex Offenders (Detention and Supervision) Act 2009 includes a range of safeguards and protections that are missing from similar legislation in other states and which reflect rights in the Victorian Charter.

Decentralisation comes with a number of risks. First, there is the risk of lack of consistency across government. That risk is increased in a jurisdiction such as Victoria, where external legal providers play a greater role in the provision of legal services than in New Zealand and the UK. In Victoria the Human Rights Unit within the Department of Justice plays an important role in ensuring consistency across government. Further, the attorney-general is given a significant role with respect to litigation involving the Victorian Charter. Notice is required to be given to the attorney-general where issues arise under the Victorian Charter in the county or supreme courts, and the attorney-general is given a right of intervention in any court in which issues under the Victorian Charter arise. This procedure has been criticised as

being a deterrent against litigants raising human rights issues, and it may also have contributed to a perception within the legal profession and judiciary that human rights issues are particularly complex. Nevertheless, the procedure has proven to be important to ensuring consistency and a whole-of-government approach to human rights issues, particularly in the early development of jurisprudence under the Victorian Charter.

Second, in a decentralised model such as that in Victoria, the role of the Scrutiny of Acts and Regulations Committee is critical to ensuring a high standard of scrutiny of legislation for human rights compatibility. The committee acts as an independent check on the assessment of

sections 28–30) and to its interpretation (section 32). The Victorian Charter also applies to the making of subordinate instruments, through the requirement to provide human rights certificates under the Subordinate Legislation Act 1994. Subordinate instruments are also subject to the interpretative rule in section 32 of the charter.⁶ However, unlike primary legislation, a subordinate instrument that is incompatible with human rights may result in invalidity, unless the instrument is empowered to be incompatible by the act under which it is made. A careful reading of section 32 of the Victorian Charter reveals an operation upon subordinate instruments similar to that under the NZBORA, according to the

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the internal legislative and policy officers. In Victoria the committee is sufficiently resourced to have a legal adviser. I can say from my own experience within government that public servants take the committee's scrutiny seriously. They are concerned to ensure that the statement of compatibility properly identifies and analyses the human rights issues and avoids a 'negative' report from the committee. The presence of the committee serves as a powerful disincentive against paying lip service to human rights or preparing inadequately reasoned statements of compatibility.

Express application to all levels of decision-making

The Victorian Charter is considerably more prescriptive than the NZBORA as to its application to the different levels of decision-making. As in New Zealand, the Victorian Charter applies to the enactment of primary legislation (through

New Zealand Court of Appeal decision in *Drew v Attorney-General*.⁷ The potential impact of the Victorian Charter on the validity of subordinate instruments does not seem to be well understood in Victoria and, like in New Zealand, the use of the interpretative rule to challenge the validity of subordinate instruments is rare.

The Victorian Charter expressly applies to acts and decisions of public authorities. Section 38 provides that it shall be unlawful for a public authority to act incompatibly with rights or, in making a decision, to fail to give proper consideration to relevant human rights. While public authority is broadly defined, the most notable exclusion from the definition is courts and tribunals, except when acting 'administratively'.

In contrast, the NZBORA depends upon the general application provision of section 3 to impose obligations on the executive and judicial branches of government. In contrast to the UK, there

have been relatively few cases in which the NZBORA has been used to review decisions made by the executive. We can only speculate as to the reasons for this, but one may be the absence of a clear or express provision as to how the NZBORA applies to decisions of the executive. The focus of much of the New Zealand jurisprudence and commentary appears to have been on the role of Parliament in protecting rights. However, having legislation that is compatible with rights is only the first step in ensuring rights-compatible outcomes. Human rights need to be considered at all levels of the decision-making process.

In Victoria, the obligation in section 38 to give proper consideration to relevant human rights has so far been interpreted in a way that addresses the concerns expressed by the House of Lords.

Exclusion of the courts

As discussed above, the reason courts were excluded from the definition of public authority is because of the constitutional issues that could arise if Victorian courts were bound to develop the common law by reference to the Victorian Charter. It is arguable that, in excluding the courts from the definition of public authority, the framers of the Victorian Charter 'threw the baby out with the bath water'. Not only has it meant that courts are not required to develop the common law; there is no obligation upon them to consider the human rights implications of their decisions, except in so far as this involves interpretation of legislation, or to act compatibly with rights.

There has been a marked reluctance on the part of Victorian courts to deal with human rights arguments. To a large extent this can be explained by the lack of clarity as to the operation of the interpretative rule in section 32 of the charter as a consequence of the multiple and conflicting judgments of the High Court in *Momcilovic*. However, the courts' reluctance to consider human

rights arguments has extended to the Court of Appeal expressing the view that 'ordinarily this court should not be expected to entertain Charter points on an interlocutory criminal appeal'.⁸

There are sound reasons why interlocutory appeals in criminal matters may be inappropriate for raising human rights arguments. Frequently, such appeals raise issues of fair hearing arising from a ruling during the course of a trial, such as the admissibility of evidence. The fairness of a hearing must be assessed in light of the conduct of the trial as a whole. Accordingly, an argument based on the right to a fair hearing in section 24

of the Victorian Charter is usually inapt for an interlocutory appeal. However, the Court of Appeal has also cited as reasons against considering human rights arguments on interlocutory appeals the complexity of human rights arguments and consequential delay in the criminal trial, and, even less convincingly, that the matter is capable of being decided in favour of the accused without resort to the Victorian Charter. Disruption and delay in the criminal trial are undoubtedly factors to be taken into account in determining whether leave should be granted to file an interlocutory appeal. They may also influence whether the court delivers a judgment determining all matters raised by the parties, or only those that are necessary to dispense with the appeal. However, the singling out of human rights arguments as being inappropriate for raising on an interlocutory appeal is problematic, not least because the failure to determine those issues may itself be incompatible with human rights, as the court would be requiring or permitting a trial to proceed in breach of human rights. Had the judiciary been included

in the definition of public authority (with an exception with respect to the common law), as is the case in the UK, it would be more difficult for the courts to avoid considering and determining human rights issues in this way, or more generally.

Proper consideration

The obligation upon public authorities to give 'proper consideration' to relevant human rights in making decisions is unique to Victoria and the Australian Capital Territory. The procedural obligation is consistent with other provisions of the Victorian Charter which seek to embed human rights within administrative law.⁹ This is in distinct contrast to the approach of the UK House of Lords, which has rejected process review under the HRA. As Baroness Hale stated in *Belfast City Council v Miss Behavin' Ltd*:

The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account.¹⁰

Tom Hickman is critical of the complete rejection of process review under the HRA, particularly given the importance of a procedural obligation to the development of a culture of rights (Hickman, 2010, ch.8). He argues that both commentators and the House of Lords overreached with their concerns that process review would lead to a 'new formalism' and be 'a recipe for judicialisation on an unprecedented scale',¹¹ and that 'a construction ... which requires ordinary citizens in local government to produce such formulaic incantations would make it ridiculous'.¹²

In Victoria, the obligation in section 38 to give proper consideration to relevant human rights has so far been interpreted in a way that addresses the concerns expressed by the House of Lords. In *Castles v Secretary to the*

Department of Justice,¹³ a prisoner sought declaratory relief to enable her to resume the IVF treatment she underwent prior to her incarceration. The judge recognised the potential for section 38 to apply to a wide range of decisions at all levels of government. In light of that, ‘proper consideration of human rights should not be a sophisticated legal exercise’:

Proper consideration need not involve formally identifying the ‘correct’ rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.¹⁴

Her Honour concluded that while ‘proper consideration’ entails that the public authority must do more than simply pay lip service to Victorian Charter rights and the terms of section 7, it does not require a comprehensive or detailed analysis:

While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person’s human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.¹⁵

In that case, the detailed manner in which the competing interests of Ms

Castles and the broader public interests were weighed up in briefings, together with the secretary’s own statement, was considered sufficient.

In *Patrick’s Case*,¹⁶ Justice Bell agreed with the comments of the court in *Castles* and reinforced the view that the consideration of human rights required by section 38 can be done in a variety of ways to suit the particular circumstances. Referring to UK authority, Bell noted that decision-makers ‘are not expected to approach the application of human rights like a judge “with textbooks on human rights at their elbows”’.¹⁷

In Victoria, another issue has arisen which raises concerns about the implications of the procedural obligation

On the other hand, the ability to review a decision for proper consideration of human rights may avoid the criticism commonly leveled against statutory bills of rights, namely that they involve unwarranted intrusion of the courts into the role of the executive by reviewing decisions on their merits. While I do not subscribe to the view that proportionality review amounts to merits review, it nevertheless involves greater scrutiny of decisions than permitted under *Wednesbury* unreasonableness. There may be occasions when it is more appropriate for a court to quash the decision, or to make a declaration that would have the effect of requiring the public authority to re-make its decision, giving proper

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upon public authorities. That is the question of appropriate remedies for breach of the obligation. Australian administrative law retains the concept of jurisdictional error that has largely been abandoned in New Zealand. At the risk of oversimplifying the position, jurisdictional error can render a decision invalid, the remedy for which would normally be to quash the decision. In the area of human rights, even breach of the substantive obligation to act compatibly with human rights will often result in declaratory relief only. Where the procedural obligation is not complied with but the ultimate outcome is compatible with human rights, it seems difficult to justify an approach that invalidates and quashes the decision. The Supreme Court has so far rejected the argument that a breach of section 38 of the Victorian Charter amounts to jurisdictional error, but that decision is on appeal.¹⁸

consideration to human rights, rather than for the court to determine what is the correct and human rights-compatible outcome.

In New Zealand, the question of the availability of process review under the NZBORA has yet to be fully considered by the courts. Arguably, it remains open to the New Zealand courts to permit some degree of process review under the NZBORA, perhaps following the Canadian approach¹⁹ rather than that of the UK.

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Substantive rights

The Victorian Charter includes a broader range of rights than the NZBORA. These include rights which go well beyond the

criminal law, including the right to equality (section 8), the right to privacy (section 13), the rights of families and children (section 17) and cultural rights (section 19). The consequence is that the Victorian Charter has not been limited to criminal matters and has not been branded with being a 'drink driver's charter' or anything similar. The fact that the Victorian Charter can only apply to state legislation, as noted above, means that some of the most controversial issues, such as anti-terrorism laws and treatment of asylum seekers, have not been affected by it. Rather, the cases in which the Victorian Charter has received the most judicial attention have included issues such as the treatment of persons with mental illness in the criminal justice system,²⁰ the rights of families and children in public housing,²¹ the rights of persons with disabilities in guardianship matters,²² the rights of persons involuntarily detained under mental health legislation,²³ and the rights of children in the care of the state.²⁴ The

inclusion of such rights ensure that the Victorian Charter is relevant to all Victorians, not just those who come into contact with the criminal justice system.

Conclusion

In many respects the open text of the NZBORA may not need amendment to strengthen its protection of human rights. It is open to government to strengthen administrative and parliamentary procedures, without amendment to the act. It is also open to the New Zealand courts to develop a form of process review and/or review for substantive compliance with rights, and to take a more active role in ensuring compliance with rights.

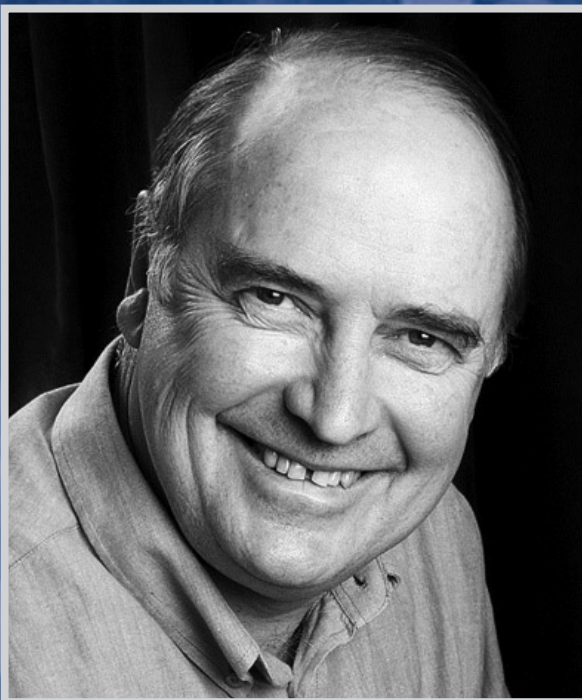
However, without incorporating new rights that are relevant to all New Zealanders, the NZBORA may continue to be seen as a drink-drivers' or criminals' charter. While Victoria's charter may be politically controversial, the fact that its most significant impacts have been in areas such as mental health and child

protection enables it to have much broader support within the community.

- 1 (2011) 245 CLR 1.
- 2 [2007] 3 NZLR 1.
- 3 <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>.
- 4 See ss.2A and 12D of the Subordinate Legislation Act 1994.
- 5 See s.25A of the Subordinate Legislation Act 1994.
- 6 The term 'statutory provision' in s.32 is defined in s.3 as including subordinate instruments.
- 7 [2002] 1 NZLR 58.
- 8 *The Queen v Chauok* [2013] VSCA 99 at [35], citing *Wells v R (No 2)* [2010] VSCA 294.
- 9 In particular, s.39 seems to contemplate that human rights arguments will largely be raised in judicial review proceedings, for which the same remedies will be available for a breach of rights.
- 10 [2007]1 WLR 1420 at [31].
- 11 *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2007]1 AC 100 at [31] per Lord Bingham.
- 12 *Belfast City Council v Miss Behavin' Ltd* [2007]1 WLR 1420 at [13] per Lord Hoffmann.
- 13 *Castles v Secretary to the Department of Justice* [2010] VSC 310.
- 14 *Ibid.* at [185].
- 15 *Ibid.* at [186].
- 16 *PJB v Melbourne Health (Patrick's Case)* [2011] VSC 327.
- 17 *Ibid.* at [312].
- 18 *Bare v Small* [2013] VSC 129.
- 19 *Dore v Barreau du Quebec* [2012] 1 SCR 12.
- 20 *Victorian Toll & Anor v Taha and Anor; State of Victoria v Brookes & Anor* [2013] VSCA 37.
- 21 *Director of Housing v Sudi* (2011) 33 VR 559.
- 22 *PJB v Melbourne Health; Patrick's Case* [2011] VSC 327.
- 23 *Kracke v Mental Health Review Board* [2009] VCAT 646; (2009) VAR 1.
- 24 *Re Beth* [2013] VSC 189.

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