

A CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES: APPLICATIONS AND IMPLICATIONS IN VICTORIA

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Introduction

On 2 May 2006, the Charter of Human Rights and Responsibilities Bill 2006 (Vic) ('Charter') was introduced to the Victorian Parliament. The Charter was passed by Parliament on 20 July 2006 and received Royal Assent on 25 July 2006.

The commencement of the Charter will occur in two stages. The provisions relating to the types of rights protected by the Charter and the scrutiny of new legislation will commence on 1 January 2007. However, the provisions relating to the interpretation of laws and obligations of public authorities will only come into operation on 1 January 2008. This will allow government departments to review existing laws, policies and procedures to determine compliance with the Charter.

The Charter is based on the civil and political rights stipulated under the *International Covenant on Civil and Political Rights* 1966 ('ICCPR'), but does not include other types of rights such as those contained in the *International Covenant on Economic Social and Cultural Rights* 1966.

The core purpose of the Charter is to protect and promote the rights defined in the Charter in the development of new and existing legislation and to increase transparency in the consideration of those rights in parliamentary procedures. This will be achieved by, for example:

- (1) requiring a Statement of Compatibility ('Statement') to be prepared and submitted with all bills introduced into parliament;
- (2) requiring that actions of public authorities are compatible with the rights protected under the Charter; and
- (3) requiring Victorian courts and tribunals to interpret statutes and statutory instruments in a manner that is compatible with rights.

Thus, the Charter is not intended solely as a guide for government departments, but encompasses public authorities, which are defined in the Act as including public officials, private entities with public nature functions, Victoria Police, local councils, Councillors and Council staff, Ministers and members of Parliamentary Committees.

Courts and tribunals are also defined as 'public authorities', but only when acting in an administrative capacity, for example, when hiring staff. When exercising their judicial function, the third element of the scheme of protection applies which requires courts and tribunals to interpret Victorian statutes and statutory instruments in a manner compatible with the defined rights.

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Although a unique legal instrument, the Charter has drawn much from overseas rights protection mechanisms. This article will first map out some of the salient features of rights protection in Canada, New Zealand and the United Kingdom. This provides a comparative framework to assess the implications of the Charter in Victoria and its substantive and procedural merits in promoting and protecting human rights in Victoria. The article will also briefly discuss the available legislative instruments in Australia that promote and protect human rights. The article will conclude with a discussion on the procedural requirements imposed by the Charter in policy and legislative development, the implications of the Charter in administrative decision making by public authorities, the remedies available under the Charter and the implications of the Charter in statutory interpretation by Victorian courts

Summary of overseas rights protection mechanisms

The make-up of the Victorian Charter is influenced by the rights protection models operating in Canada, New Zealand, South Africa and the United Kingdom as well as the *Human Rights Act 2004* (ACT) (the 'ACT Act'). In developing the Charter, the Human Rights Consultation Committee had specifically recommended that the Charter should not be modelled on the United States Bill of Rights in order to ensure continued Parliamentary sovereignty.

The *Canadian Charter of Human Rights and Freedoms 1982* primarily protects civil and political rights. However, the Charter also includes a measure of cultural rights such as equality of the English and French languages as well as existing treaty rights with indigenous peoples. The Canadian Charter is constitutionally enshrined, and can only be changed by amending the Canadian Constitution. Unlike the Victorian Charter, the Canadian Charter offers an individual a right of action against any breach of the Charter. The Courts also have primary responsibility for monitoring human rights and they do so by reviewing legislation and making declarations of invalidity if an Act breaches the Charter.

In New Zealand, rights protection occurs through the *New Zealand Bill of Rights Act 1990*. The Act protects civil and political rights but does not automatically override any inconsistent legislation. Breaches of the Act by government agencies can result in an award of compensation. When faced with questions of interpretation, the Act requires Courts to rely on any consistent legislation. Proposed Bills are also subject to scrutiny by the Attorney General, who is required to inform Parliament about any provision that may be inconsistent with the Act. The Attorney General is also required to review proposed legislation and regulations to ensure that they do not conflict with any rights set out in the Act.

Rights protection in the United Kingdom is governed by the *Human Rights Act 1998* (UK) ('UK Act'). The UK Act protects the civil and political rights as framed in the *European Convention on Human Rights* ('ECHR') and courts are required to interpret legislation in a manner that is compatible with the ECHR. However, the UK Act also preserves the validity of legislation that may be inconsistent with the ECHR, despite Courts having the power to declare as invalid, any subordinate laws. Under the UK Act, a Minister presenting a Bill to Parliament must inform Parliament by way of a statement, whether the proposed legislation is compatible with the ECHR. Furthermore, an individual may bring an action to enforce a particular right and seek 'just and appropriate remedies'. However, compensation for human rights breaches is only available if no other remedy is appropriate.

Rights protection in Australia

Commonwealth

Before discussing the features of the Charter and its implications for Victoria, it is useful to identify the existing rights protection mechanisms in Australia. Prior to the enactment of the Charter and ACT Act, there was some provision for the protection of rights in Australia on

both a national and state level. On a national level, the Australian Constitution provided (and continues to provide) the following rights protection:

- (a) a right to vote in federal elections (s 41);
- (b) any compulsory acquisition of property by the Commonwealth to take place on just terms (s.51(xxxi));
- (c) a right to a trial by jury for Commonwealth indictable offences (s 80);
- (d) a prohibition against the making of any law which establishes, imposes or prohibits any religion or imposes a religious test as part of the qualification for any office or public trust (s 116);
- (e) a prohibition against the imposition of any law that imposes a 'disability or discrimination' because of a person's state of residence (s 117); and
- (f) a right of review, in the High Court, of certain decisions of the Commonwealth or an officer of the Commonwealth (s 75(v)).

In addition, the following domestic legislation draws on the ICCPR and other similar international treaties:

- (a) *Racial Discrimination Act 1975* (Cth);
- (b) *Sex Discrimination Act 1984* (Cth);
- (c) *Disability Discrimination Act 1992* (Cth); and
- (d) *Age Discrimination Act 2004* (Cth).

The operation of these Acts is overseen by the Commonwealth Human Rights and Equal Opportunity Commission ('HREOC') which has investigatory and reporting powers in relation to any purported breach. HREOC is also responsible for the examination of federal legislation for consistency with particular international human rights standards, including the ICCPR, and must report to the Federal Attorney-General who in turn, is required to report to Parliament. However, the Federal Government is not required to take any step to remedy any inconsistencies.

The *Privacy Act 1988* (Cth) and the *Freedom of Information Act 1982* (Cth) also provides some indirect rights protections.

Rights protection in the Australian Capital Territory ("ACT")

Prior to the enactment of the Victorian Charter, the ACT was the only Australian state or territory that had enacted specific rights protection legislation. The ACT Act, which resulted from extensive community consultation and came into operation on 1 July 2004 was therefore, a landmark event for rights protection in Australia.

The ACT Act promotes and protects civil and political rights, and can only be changed by an Act of Parliament. The Act requires Courts to interpret laws consistently with the Act. Unlike in Victoria, individuals do not have a right of action against government agencies or private individuals for breaches of a particular right, and there is no right to compensation for such breaches. In the ACT, the Attorney-General must undertake a review of proposed legislation and regulations for compatibility with the rights set out in the Act. Finally, when laws are introduced into Parliament, the Attorney-General is required to submit a compatibility statement highlighting the consistencies with rights protected by the Act.

Rights protection in Victoria

Whilst the Victorian Constitution does not refer to specific rights, it nonetheless provides some safeguards against rights abuse, for example, a right of access to information in the possession of Ministers and agencies, subject to exceptions (s 94H). Interestingly, whilst the

Constitution recognises Aboriginal people as the original custodians of the land on which the colony of Victoria was established (s.1A), at the same time, it states that the section is not intended to create any legal right or give rise to any civil cause of action or affect in any way the interpretation of the Constitution or of any other law in force in Victoria.

Prior to the Victorian Charter, the *Equal Opportunity Act 1996* (Vic) was the primary rights legislation in Victoria. The aim of the Act was to promote recognition and acceptance of the right to equality and opportunity and eliminate discrimination, and its operation was overseen by the Victorian Equal Opportunity Commission ('VEOC'). The VEOC could undertake conciliation and, if unsuccessful, refer matters to the Equal Opportunity Tribunal.

Other Victorian legislation that offered some form of rights protection include the:

- (a) *Information Privacy Act 2000* (Vic);
- (b) *Freedom of Information Act 1982* (Vic);
- (c) *Evidence Act 1958* (Vic); and
- (d) *Crimes Act 1958* (Vic).

At the same time, the Victorian Scrutiny of Acts and Regulations Committee ('SARC') was also responsible for the scrutiny of bills introduced into Parliament and reported to Parliament on whether the proposed law is likely to unduly breach rights or freedoms, for example, whether it:

- (a) trespassed unduly upon rights or freedoms;
- (b) made rights, freedoms or obligations dependent upon sufficiently defined administrative powers; and
- (c) made rights, freedoms or obligations dependent upon non-reviewable administrative decisions or unduly required or authorised acts or practices that adversely effected personal privacy.

The SARC is an all party committee of both Houses of the Victorian Parliament. In considering whether a provision unduly trespassed on rights or freedoms, the SARC was guided primarily by a number of common law rights and freedoms, such as the privilege against self-incrimination.

The Charter and its implications for Victoria

The Charter is divided into 5 parts as follows:

- (a) Part 1 includes the definition of 'public authority';
- (b) Part 2 defines the rights protected by the Charter (although significantly, s 7 provides that the rights are not absolute, and need to be balanced against each other and other competing public interests);
- (c) Part 3 consists of four elements as follows:
 - (i) the scrutiny of new legislation by Parliament;
 - (ii) instances when Parliament can 'override' the Charter in exceptional circumstances;
 - (iii) the interpretation of laws by courts and tribunals; and
 - (iv) obligations on public authorities;
- (d) Part 4 sets out the functions of the Victorian Equal Opportunity and Human Rights Commission (including a reporting function), which replaces the VEOC; and
- (e) Part 5 includes provisions relating to the review of the operation of the Charter.

As with the ACT, the Victorian Charter is not constitutionally entrenched and, therefore, may be amended or repealed as with any other piece of legislation. Furthermore, because it is

not constitutionally entrenched, the Courts do not have the power to make a finding on the validity of a particular legislation. The power of courts will be explored further in this article.

Statement of Compatibility and Human Rights Impact Statement

The Charter aims to increase transparency in legislative and policy proposals by requiring the preparation of Statements of Compatibility and Human Rights Impact Statements that set out compatibility with the rights protected by the Charter.

Pursuant to Part 3 of the Charter, Members of Parliament proposing to introduce a Bill are required to prepare a 'Statement of Compatibility' setting out the compatibility of the Bill with the Charter.¹ The Statement of Compatibility is intended to ensure that Ministers assume responsibility for the potential human rights impact of the proposed legislation. According to the Charter, the Statement must include the purpose of the proposed Bill, its effect upon any of the rights set out in the Charter, any limitations that may be placed upon such rights (and the importance of this limitation as well as the nature and extent of the limitation), the relation between the limitation and its purpose and whether there are any less restrictive means to achieve the purpose. This requirement is somewhat more stringent than the requirement under s 37 of the ACT Act, as it requires the relevant Minister to not only explain whether the bill is consistent, but also explain the nature and extent of any incompatibility.

Statements of Compatibility are not binding on courts or tribunals.² Furthermore, a failure to comply with the Statement does not affect the validity, operation or enforcement of the relevant legislation.³

Importantly, the Charter anticipates a regime through which Parliament can issue an override declaration, so that the Charter does not apply to the interpretation or application of that legislation in 'exceptional circumstances'.⁴ Exceptional circumstances may include threats to national security or a state of emergency.⁵

Part 3 of the Charter also requires a Human Rights Impact Statement to be prepared and included in Cabinet submissions in relation to policy proposals. The requirements of the Human Rights Impact Statement are similar to those of Statements of Compatibility. For example, the preparation of both types of statements require a consideration of whether a limit on a human right is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

There is extensive jurisprudence from overseas jurisdictions, particularly the UK Act, upon which government departments could draw on in preparing Statements. Importantly however, decisions of compatibility will not purely turn on available jurisprudence, but will also require an assessment of broader social considerations.

Obligations of public authorities

As outlined previously, 'public authority' is defined in the Charter as including Victoria Police, local councils and councillors, Ministers and members of parliamentary committees, as well as Courts when acting in an administrative capacity.⁶ However, the Charter is also directed at private sector organisations acting on behalf of the government and performing public functions.⁷

The Charter makes it unlawful for a public authority to act in a way that is incompatible with or to fail to give proper consideration to a right protected by the Charter.⁸ The intention is that the obligation to act compatibly with human rights should apply broadly to government and to bodies exercising functions of a public nature. Moreover, the Charter obliges public authorities to give proper consideration to relevant human rights when making decisions.⁹

Importantly, obligations on public authorities are only limited to obligations of a public nature.¹⁰ It is anticipated that much of the judicial interpretation of the Charter would centre on what constitutes a function of a public nature and when such a function is being exercised on behalf of the State or a public authority. As commentators such as Evans have pointed out, ultimately an analysis of what constitutes ‘the functions of government’ would largely be a contested political question about the role of government and the State in contemporary society.¹¹

In accordance with the Charter, a failure to act in a manner that is compatible with human rights would in certain circumstances result in the public authority acting *ultra vires*. For example, in the United Kingdom, where a public authority fails to act in compliance with human rights, courts have struck down such acts as *ultra vires*.¹²

Furthermore, ‘proper consideration’ would require public authorities to give real and genuine consideration to human rights. An assessment of ‘proper consideration’ may result in judges embarking on considerations of ‘proportionality’ in administrative decision making that may affect human rights.

Remedies

The Victorian Charter does not create an independent cause of action.¹³ Instead, s 39 allows a person to seek relief or remedy for a breach of a right protected by the Charter only if that person is entitled to seek relief or remedy due to some other unlawful act of a public authority.¹⁴ Furthermore, if the breach is proved, the Charter automatically excludes any award of damages. However, if a public authority breaches a statutory function or, for example, commits a tort, s 39 would not exclude the right to seek compensation for the tort. The Charter therefore does not give any direct effect to the rights protected under the Charter. Justice John W Perry of the Supreme Court South Australia identifies this as a limitation of the Charter, stating that Victorian courts will lack the ability which exists in the United Kingdom to give ‘direct and positive effect to the human rights which the Victorian legislation purports to protect,’¹⁵ thus limiting judicial activism with regards to rights promotion in Victoria.

Importantly however, common law developments regarding relevant and irrelevant consideration in administrative decision making may become a fertile ground for judicial review of the obligations of public authorities under the Charter.¹⁶ Arguably therefore, an applicant could seek judicial review of a decision of a public authority on the ground that it failed to give due consideration to the rights contained in the Charter in exercising its functions.

Finally, the Charter provides a mechanism for the inquiry or investigation by the Ombudsman of any administrative action that may be incompatible with the human rights protected under the Charter.

Role of the Courts in statutory interpretation

The Charter will also require Courts to interpret legislation in a way that is compatible with human rights, thus giving effect to human rights.¹⁷ Although Courts cannot strike down legislation for incompatibility, they can declare that certain laws are incompatible with the Charter (‘Declaration’). In making a Declaration, the Courts are required to refer to international law, including determinations of foreign and national courts and tribunals relevant to a particular provision, when assessing the compatibility of the legislation with the Charter.¹⁸ Courts are required to have regard to the purpose of the legislation and to

interpret the legislation in a way that is not only consistent with the Charter but also with its purpose.

According to the Explanatory Memorandum, the reference to statutory purpose under s 32(1) of the Charter is to ensure that 'courts do not strain the interpretation of legislation so as to displace statement's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation'.¹⁹

Importantly, Australian courts have interpreted statutes in a manner that favours a construction which accords with the rules of international law, including international human rights law. As early as in 1908, the High Court of Australia held that:

Every statute is to be so interpreted and applied as far as its language admits so as not to be inconsistent with the comity of nations or with the established rules of international law.²⁰

In *Minister for Immigration and Ethnic Affairs v Teoh*²¹, the High Court determined that where the language of the legislation was susceptible of a construction which was consistent with the terms of the international instrument, and its obligations, then that construction should prevail.²² Such precedents, although not directly applicable in the current context, may serve as persuasive judicial pronouncements in the interpretation of legislation in a manner which is consistent with the Charter.

Conclusion

The measure of success of the Charter would to a large extent, depend on the extent to which its effect is incorporated by the public service in the development of legislative and policy proposals. Its perceived aim, to monitor legislative action, can only be effective if implemented by government departments. This would require extensive training to institutionalise the effect of the Charter including the training of public authorities of the effects of the Charter on their daily operations.

Critics of the Charter argue that its effect is limited in so far as it provides no remedies or causes of action for those whose rights are affected. Nevertheless, it remains that the Charter is a major step in the enforcement of human rights in Victoria. The Charter will be instrumental in developing a rights culture in Victoria. It will also ensure transparency in government decision making by enabling decisions of public authorities open to scrutiny in determining compliance with human rights.

Endnotes

- 1 Section 28, Charter
- 2 Section 28(4), Charter
- 3 Section 29, Charter
- 4 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill (2006) (Vic),21
- 5 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill (2006) (Vic), 22
- 6 Section 4, Charter
- 7 Section 4(2), Charter
- 8 Section 38, Charter
- 9 Section 38(2), Charter
- 10 Section 38(3), Charter
- 11 Dr Simon Evans, 'The Victorian Charter of Rights and Responsibilities and the ACT Human Rights Act: Four Key Differences and their implications for Victoria' (2006) a paper presented at the Australian Bills of Rights: The ACT and Beyond Conference, Australian National University, 21 June 2006, p.10
- 12 Department of Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act (2006)*; www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf
- 13 Section 39(3), Charter

- 14 Department of Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006) 18; www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf
- 15 Justice JW Perry, 'International Human Rights and Domestic law and Advocacy' (2006) a paper presented at a Human Rights Legal Resource Centre Seminar, Melbourne, 7 August 2006, p 12
- 16 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24
- 17 Section 32, Charter
- 18 Explanatory Memorandum, 23
- 19 Explanatory Memorandum, 22
- 20 *Jumbunna Coalmine NL v Victorian Coal Miners Association* (1908) 6 CLR 309 per O'Conner J, cited in Justice JW Perry, 'International Human Rights and Domestic law and Advocacy' (2006) a paper presented at a Human Rights Legal Resource Centre Seminar, Melbourne, 7 August 2006, p 2
- 21 (1994) 183 CLR 273
- 22 *ibid*, per Mason J and Deane J, 287