

# What difference will the Charter of Rights and Responsibilities make to the Victorian Public Service?

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Thank you for the opportunity to speak here today.

In my remarks I will focus the impact of the proposed Charter of Rights and Responsibilities on the policy process and the legislative process. In particular I will draw attention to some key differences between the proposed Victorian Charter of Human Rights and Responsibilities and the Human Rights Acts in the ACT and the United Kingdom.<sup>2</sup>

There are indeed quite a number of differences between the two Australian Charters. Some I will not be talking about in detail today. These include:

- The greater clarity provided in Victoria concerning the extent to which the Charter applies to government<sup>3</sup>
- A more expansive provision defining the circumstances in which rights can be limited<sup>4</sup>

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<sup>1</sup> I gratefully acknowledge the support of the Australian Research Council through a Discovery Project grant for research on Australian Parliaments and the Protection of Human Rights.

<sup>2</sup> Respectively, Charter of Human Rights and Responsibilities Bill 2006 (Vic); *Human Rights Act 2004* (ACT); *Human Rights Act 1998* (UK).

<sup>3</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) ss 6(2) and (4); cf *Human Rights Act 2004* (ACT) s 6.

<sup>4</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 7; cf *Human Rights Act 2004* (ACT) s 28.

- A specific limitation clause for freedom of expression<sup>5</sup>
- The specific recognition of Aboriginal cultural rights<sup>6</sup>
- Broader rights to assistance with communication in criminal legal proceedings, not limited to a right to an interpreter<sup>7</sup>
- The protection of property rights.<sup>8</sup>

These provisions have the potential to give rise to a somewhat different human rights jurisprudence in Victoria compared to the ACT.

There is also a group of provisions that give effect to the Victorian Government's opposition to damages under the Charter and its commitment to parliamentary sovereignty:

- The exclusion of a right to compensation for wrongful conviction and unlawful arrest or detention<sup>9</sup>
- The override provision<sup>10</sup>
- And finally, a cluster of provisions that (rather problematically) limit the scope of some rights by reference to existing legislation, taking the rights issues raised by that legislation out of the scope of the Charter. These include the right to vote which is limited to every eligible person (rather than every citizen);<sup>11</sup> the power to exclude media or public from court or tribunal hearings

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<sup>5</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 15(3); cf *Human Rights Act 2004* (ACT) s 16

<sup>6</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 19(2); cf *Human Rights Act 2004* (ACT) s 27.

<sup>7</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 25(2)(i), (j); cf *Human Rights Act 2004* (ACT) s 22(2)(h)

<sup>8</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 20

<sup>9</sup> cf *Human Rights Act 2004* (ACT) s 18(7).

<sup>10</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 31

<sup>11</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 18(2); cf *Human Rights Act 2004* (ACT) s 17.

where authorised by another law;<sup>12</sup> and the right to legal aid which is qualified by reference to the Legal Aid Act's eligibility criteria.<sup>13</sup>

The full significance of these differences is not likely to be felt for some time.

Instead I will talk about the more immediate implications of *Human Rights in the Policy and Legislative Processes*, focussing on statements of compatibility and impact statements, and *Human Rights in Administration*, focussing on the interpretation of legislation and remedies.

The Charter can present human rights issues for policy makers and administrators across government. However, the experience in other jurisdictions suggest that some issues are likely to arise particularly frequently. These include issues relating to:

- (a) evidential and procedural provisions, including those relating to burdens of proof and presumptions of regularity<sup>14</sup>
- (b) retrospective legislation
- (c) the adequacy of provisions for review of administrative decisions
- (d) search and seizure provisions
- (e) eviction from government housing and public land
- (f) conditions in prisons and psychiatric institutions
- (g) discrimination

## (2) Human Rights in the Policy and Legislative Processes

No one pretends that human rights are ignored in the existing policy and legislative processes. As one of the parliamentarians interviewed in Dr Carolyn Evans and my ongoing research project on Australian Legislatures and the Protection of Human Rights said, no Minister wants to do the wrong thing (or perhaps – no Minister wants to get *caught* doing the wrong thing); bureaucrats and advisers usually pick up potential human rights problems; and when there are issues they are often because new/untrained officers are involved in drafting subordinate legislation. The Charter provides an opportunity to provide some structure to the existing *ad hoc* consideration of human rights in the policy and legislative process.

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<sup>12</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 24(2); cf *Human Rights Act 2004* (ACT) s 21(2).

<sup>13</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 25(2)(d); cf *Human Rights Act 2004* (ACT) s22(2)(f).

<sup>14</sup> Mark Sneddon made the point about presumptions of regularity in his talk at Clayton Utz.

## (a) Statements of Compatibility

Section 28 of the Charter requires

- Members of Parliament who propose to introduce a Bill into either House to cause a ‘statement of compatibility’ for that Bill to be prepared;<sup>15</sup> and
- Members of Parliament who introduce a Bill to lay the statement of compatibility before the House before the second reading speech.<sup>16</sup>

The statement of compatibility must either state that (in the member’s opinion) the Bill is compatible with the human rights in the Charter or that (again in the member’s opinion) any part of the Bill is incompatible with human rights.<sup>17</sup> In the first case, the statement must identify how the Bill is compatible with human rights; in the second case, the statement must identify ‘the nature and extent of the incompatibility’. (This requirement is rather more stringent than the ACT requirement in that it requires the member to explain how the Bill is consistent, not just whether it is consistent, and in that it requires the member to explain the nature and extent of any incompatibility, not just ‘how [the Bill] is not consistent with human rights’.<sup>18</sup>)

The purpose of a statement of compatibility is twofold. First, it ensures that Ministers (and other members introducing Bills) take responsibility for the human rights impact of their legislation. Secondly, it provides information to the Parliament that can help inform its deliberations on the legislation. Statements of compatibility are not binding on courts or tribunals.<sup>19</sup>

Officers preparing statements of compatibility for Ministers will need to consider two issues. First, the form and content of statements of compatibility. And, secondly, what approach is used to determine whether any part of a Bill is incompatible with human rights.

The Human Rights Consultation Committee recommended that statements of compatibility “should address the same matters as would be required in respect of a Human Rights Impact Statement”.<sup>20</sup> That would be an appropriate starting point. It

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<sup>15</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 28(1); cf *Human Rights Act 2004* (ACT) s 37.

<sup>16</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 28(2); *Human Rights Act 2004* (ACT) s 37.

<sup>17</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 28(3).

<sup>18</sup> *Human Rights Act 2004* (ACT) s 37(3).

<sup>19</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 28(4).

<sup>20</sup> Human Rights Consultation Committee, *Rights, Responsibilities and Respect: Report of the Human Rights Consultation Committee* (2005) 73.

would also be appropriate to follow the approach of proposed amendments to the *Subordinate Legislation Act 1994* (Vic) that require ‘human rights certificate’ in relation to most statutory rules.<sup>21</sup> That certificate must state whether (in the Minister’s opinion) the proposed statutory rule limits human rights and if it does:<sup>22</sup>

- (i) the nature of the human right limited; and
- (ii) the importance of the purpose of the limitation; and
- (iii) the nature and extent of the limitation; and
- (iv) the relationship between the limitation and its purpose; and
- (v) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

This format follows the analysis required by section 7 in determining 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.<sup>23</sup> If a right is limited in a way that is consistent with section 7, the Bill is compatible with human rights. The statement of compatibility should outline the basis of the Minister’s section 7 analysis.

Clearly, more is required than an unreasoned statement of the mould usually adopted in the ACT and formerly adopted in the United Kingdom. That went something like this:

In accordance with section 37 of the Human Rights Act 2004 I have examined the Civil Law (Property) Bill 2005. In my opinion the Bill, as presented to the Legislative Assembly, is consistent with the Human Rights Act 2004.

In the United Kingdom, reasoned statements of compatibility now appear in the Explanatory Notes on Bills. The Revised Guidance for Departments states:

The Notes should describe, in general terms, the most significant Convention issues thought to arise on the Bill, together with the Minister's conclusions on compatibility. In some cases, it may be sufficient simply to state that an issue has been considered, and that a particular conclusion has been reached ... . In other cases, Departments may refer to the policy justification for what is proposed, which will be central to any assessment of whether ... a possible interference with [a right] is justified ... . Departments are not expected to list every human rights point which could be taken on the Bill, or to cite case-law

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<sup>21</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) Sch 1 Cl 7.1

<sup>22</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) Sch 1 Cl 7.1

<sup>23</sup> See Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 7(2).

supporting the Minister's conclusion on compatibility. Legal advice should not be disclosed.<sup>24</sup>

This approach seems preferable to the New Zealand approach of publishing the legal advice on which the Attorney-General relies in determining the consistency of Bills with human rights.<sup>25</sup> Obviously, officers will seek legal advice in preparing statements of compatibility. The Charter is a legal instrument and there is an extensive jurisprudence (for now at least mostly from overseas) that is relevant to determining what it means and requires. Nonetheless judgements of compatibility also turn in part on empirical questions that jurisprudence cannot resolve – the nature and extent of the social problem that the legislation addresses; the likely effectiveness of the legislation in addressing that problem; the likely impact of the legislation on human rights in the course of addressing that problem. Jurisprudence is indispensable in identifying and isolating the rights issues. But it cannot provide the evidence necessary to resolve the ultimate questions about whether the rights impact is justified.

There is another danger of over-legalisation. Canadian scholars have argued that Canadian governments

- have taken an overly deferential approach to the Supreme Court's approach to human rights<sup>26</sup>
- have failed to assert the Parliament's role in determining the meaning of human rights and the limits on rights that are justified<sup>27</sup> and
- have failed to bring forward legislation that *might* be found to violate the Charter<sup>28</sup>

There are limits of course. As in the UK, a statement of compatibility should not be made just because there are valid arguments that could be made against a challenge if the Minister is of the view that these arguments would ultimately not succeed.

### **(b) Human Rights Impact Statements**

Statements of compatibility must be produced at quite a late point in the policy process and only in relation to legislative proposals.

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<sup>24</sup> Department of Constitutional Affairs, *Section 19 Statements: Revised Guidance for Departments* <<http://www.dca.gov.uk/hract/guidance/guide-updated.htm>> at 16 June 2006.

<sup>25</sup> See Ministry of Justice, *Advice provided by the Ministry of Justice and the Crown Law Office to the Attorney-General on the consistency of Bills with the Bill of Rights Act 1990* <<http://www.justice.govt.nz/bill-of-rights/index.html>> at 16 June 2006.

<sup>26</sup> See Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (2002) 43.

<sup>27</sup> See Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (2002) 17.

<sup>28</sup> Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (2002) 222.

The Human Rights Consultation Committee had proposed that:

“For legislative changes and policy and other decisions, the responsible Minister should ensure that a Human Rights Impact Statement is included in Cabinet submissions. The requirement for and details of such a Statement should be set out in the Cabinet Handbook. The Statement should include:

- (a) a statement of the purpose of the Bill, regulation, policy or proposal;
- (b) a statement of its effect upon any of the human rights in the Charter; and
- (c) a statement of any limitation placed upon any human right in the Charter by the Bill, policy or proposal, the importance and purpose of this limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether there is any less restrictive means to achieve the purpose.”<sup>29</sup>

Assuming that such Human Rights Impact Statements are backed up by appropriate analysis, such a requirement would ensure that the human rights impact of legislation is integrated into the policy process and provide the analytical foundations for Statements of Compatibility. It would parallel the existing Regulatory Impact Statement process and the mooted Family Impact Statement process.

There are risks, however, many of which are already apparent in the Regulatory Impact Statement process:<sup>30</sup>

- There is a risk of an inappropriate use of cost-benefit analysis. Human Rights impact assessment requires a less quantitative approach than regulatory impact assessment (even assuming that quantitative approaches are desirable or anything less than arbitrary in the regulatory impact assessment context).
- There is a risk that human rights impact statements will be prepared as an after-thought rather than as an integrated part of the policy development process.
- There must be an ongoing audit of the quality of HRISs, as there is for RISs.
- Human rights impact statements need to be prepared (and summarised in statements of compatibility) in ways that do not overload parliamentarians with too much information.

### **(3) Human Rights in Administration**

Administration of legislation will be affected in at least four ways by the Charter.

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<sup>29</sup> Human Rights Consultation Committee, *Rights, Responsibilities and Respect: Report of the Human Rights Consultation Committee* (2005) 71.

<sup>30</sup> For a fuller treatment of HRISs, see Simon Evans, ‘Improving Human Rights Analysis In The Legislative And Policy Processes’ (2005) [2006] 29 *Melbourne University Law Review* 665-703.

- (a) “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.”<sup>31</sup>
- (b) Subordinate legislation that is not compatible with human rights may be invalid if the incompatibility is not authorised by the primary legislation.
- (c) “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”.<sup>32</sup>
- (d) Remedies may be available where a public authority acts in a way that is unlawful because of this provision.<sup>33</sup>

**(a) Interpretation of legislation**

The requirement to interpret legislation “in a way that is compatible with human rights” applies to everyone who works with legislation.<sup>34</sup> It applies to anyone who interprets and applies legislation, not just the courts. It may require reconsideration of existing understanding of old legislation.

However the requirement is limited. Unlike the UK Human Rights Act, the interpretive mandate under the Victorian Charter is subject to the rider that the human rights sensitive interpretation be “consistent[] with [the] purpose [of the legislation being interpreted]”<sup>35</sup>.

It is impossible to tell yet how far this interpretive mandate extends. The EM states “The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament’s intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.”<sup>36</sup>

But the purpose and object of legislation can be identified at several different levels of abstraction. At one level of abstraction, the purpose of legislation is to achieve exactly what it says, according to their plain and natural meaning. This would give the most

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<sup>31</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 32; cf *Human Rights Act 2004* (ACT) s 30

<sup>32</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 38.

<sup>33</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 39(1).

<sup>34</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 32; cf *Human Rights Act 2004* (ACT) s 30.

<sup>35</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 32.

<sup>36</sup> Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

limited scope to the interpretive provision. At another higher level of abstraction, the purpose of legislation is to address some social problem or social mischief – this is the level of abstraction commonly identified in purpose or objects clauses. It is the level of abstraction at which courts operate when giving a ‘purposive’ interpretation to legislation.

I would suggest that this is the level of abstraction at which interpreters of legislation should approach their interpretive role under the Charter. Interpreters therefore should seek a human rights consistent interpretation that is also consistent with the mischief that the legislation seeks to redress.

It should not be necessary that legislation is ambiguous before it is possible to seek a human rights compatible interpretation. The power is a significant and primary one. As in the UK, declarations of inconsistent interpretation should be a fall back that are used only when a consistent interpretation is not possible.

This does not mean that the interpreters, including courts, can re-write legislation. The power remains a power to interpret legislation and not a power to legislate. So interpreters, especially courts, cannot choose between “several ways of making a provision [human rights]-compliant” – such a choice “involve[s] issues calling for legislative deliberation” and would “require courts to make decisions for which they are not equipped”.<sup>37</sup> Courts ought not “adopt a meaning inconsistent with a fundamental feature of legislation” or “go [against] the grain of the legislation” or depart from “the underlying thrust of the legislation”.<sup>38</sup> A court “can read in and read down; it can supply missing words” and change the meaning of the legislation, so long as it remains faithful to “the fundamental features of the legislative scheme”.<sup>39</sup> however, we may find that Victorian courts are unwilling to go so far as one UK judge and accept that they “can do considerable violence to the language and stretch it almost (but not quite) to breaking point.”<sup>40</sup>

In practice what might this mean? The United Kingdom interpretive provision has been used:

- to expand the range of ‘exceptional circumstances’ in which a sentencing discretion existed<sup>41</sup>
- to replace a blanket exclusion of prior sexual history evidence with a discretion to admit such evidence where it was relevant to the issue of consent and its exclusion would threaten the right to a fair trial<sup>42</sup>

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<sup>37</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 572.

<sup>38</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 572.

<sup>39</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 585.

<sup>40</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 585.

<sup>41</sup> *R v Offen* [2001] 1 WLR 253

- to replace a legal burden of proof with an evidential burden of proof<sup>43</sup>
- to interpret a provision in the Rent Act relating to a person who was living with a tenant “as his or her wife or husband” as including same-sex partners;<sup>44</sup> (though in another case it was not possible to interpret “widow” in revenue legislation as covering surviving spouses more generally<sup>45</sup>)

There are few cases in the ACT. The most significant – *SI bhnf CC v KS bhnf IS*<sup>46</sup> – is quite unclear in its application of the interpretive provision and goes further attempting a human rights compatible interpretation than any of the parties suggested was possible. Others suggest that government lawyers and instructors will need to be ready to explain to courts and tribunals why the limitations on rights effected by legislation are justified: eg *Pappas v Noble*.<sup>47</sup>

We will have to wait to see how cautiously Victorian courts treat the proviso in their interpretive mandate. The experience both in the ACT and the UK suggests that new interpretations of existing legislation will be relatively infrequent and commonly focussed on broadening the range of criteria relevant to statutory discretions, particularly those involved in the administration of justice.

### **(b) Invalidity of subordinate legislation**

Delegated legislation and statutory rules will not be invalid simply because they are not compatible with human rights. However, it will sometimes be possible to argue that a provision in primary legislation that purportedly authorises delegated legislation must be interpreted narrowly (because of section 32) so that it does not authorise delegated legislation that is inconsistent with human rights. Then the delegated legislation will be invalid on the basis that it is not in fact authorised by the primary legislation.

### **(c) The obligation to comply with human rights**

There is a general obligation for public authorities (including public service employees, police, councils and Ministers) to act in a way that is compatible with human rights.<sup>48</sup> Moreover, there is a general obligation on public authorities in making

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<sup>42</sup> *R v A (No 2)* [2002] 1 AC 45.

<sup>43</sup> *R v Lambert* [2002] QB 1112; *R v Carass* [2002] 1 WLR 1714.

<sup>44</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

<sup>45</sup> *R. (on the application of Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718.

<sup>46</sup> [2005] ACTSC 125.

<sup>47</sup> [2006] ACTSC 39.

<sup>48</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 38(1).

a decision “to give proper consideration to ... relevant human rights”.<sup>49</sup> (Of course, if a law prevents the public authority from acting differently or making a different decision, these obligations do not apply.<sup>50</sup>)

It is therefore vitally important that agencies identify powers, discretions and practices that impinge upon human rights and develop strategies for bringing them into human rights compliance and managing their risk in advance of the commencement of the relevant provisions of the Charter on 1 January 2008.

This obligation is a good deal clearer than the position in the ACT and the range of its application is somewhat clearer than in the UK. It remains to be seen how widely the obligation will reach into the “private” contracted-out sphere through the definition of public authority. However, the obligation does not extend to the courts. For constitutional reasons, the Charter cannot be used to develop the common law.

#### **(d) Remedies**

Of course, the obligation to comply with human rights would not be of much comfort to members of the public if there were not some mechanism for seeking redress when it is breached. Indeed, the ICCPR – the key international instrument on which the Charter is based – obliges States Parties to provide effective remedies for non-compliance with the rights that it protects.<sup>51</sup>

The government signalled from the outset its opposition to a Charter that would lead to increased litigation and an obligation on government to pay damages. It preferred an approach that focussed on education and conciliation. The message from the consultations was that unless a Charter clearly articulated the remedies that it made available, the Courts would be likely to imply a right to remedies and (as in New Zealand) that set of remedies may not accord with the government’s preferences.

It is surprising then that the Charter does not confer a complaints handling or conciliation function on the Human Rights Commissioner (an additional title for the Equal Opportunity Commissioner rather than a new substantive office).<sup>52</sup>

The remedy provision itself is relatively clear, once its provisions are unpacked:

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<sup>49</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 38(1).

<sup>50</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 38(2).

<sup>51</sup> *The International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 2(3), (entered into force 23 March 1976).

<sup>52</sup> The conciliation mechanism under the *Equal Opportunity Act 1995* (Vic) is available only where a complaint is made under that Act. Complaints can only be made in relation to contraventions of Parts 3, 5 and 6 of the EO Act: s104. While this mechanism, as with all the existing functions of the Equal Opportunity Commission, is to continue unmodified, there is no provision for the conciliation mechanism to deal with complaints based on the Charter.

(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.<sup>53</sup>

(3) A person is not entitled to be awarded any damages because of a breach of this Charter.<sup>54</sup>

(4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.<sup>55</sup>

What is clear is that:

- A person may seek a declaration that the conduct of a public authority breaches section 38 (the obligation to comply with human rights)<sup>56</sup>
- A person may seek judicial review of a decision on the basis that the decision-maker failed to give proper consideration to a relevant human right<sup>57</sup>
- In addition, where a rule or law attaches consequences to the fact that government conduct is unlawful, those consequences can attach to conduct that is made unlawful by the Charter. For example (fleshing out one of the examples given in the Explanatory Memorandum),<sup>58</sup> if evidence is obtained as a result of unlawful or improper conduct, there is a discretion to exclude that evidence. At present, the kinds of conduct that trigger that discretion include tortious conduct (eg trespass) or improper pressure. The Charter will expand the kinds of conduct that trigger the discretion to include breaches of the right to privacy (eg by way of covert surveillance not amounting to a tort) or breaches of the rights to security of the home (eg by way of an overly intrusive execution of a search warrant).
- There is an important exception however. The common law will sometimes make damages available for breaches of statutory obligations. Section 39(3) ensures that a breach of the Charter will *not* trigger any entitlement to damages. This provision probably also prevents payment of exemplary or punitive damages on the basis that otherwise wrongful conduct is also a breach

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<sup>53</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 39(1).

<sup>54</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 39(3).

<sup>55</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 39(4).

<sup>56</sup> See Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 39(2).

<sup>57</sup> See Charter of Human Rights and Responsibilities Bill 2006 (Vic) ss 39(1) and (2).

<sup>58</sup> Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28.

of the Charter. (However, if the same conduct is independently unlawful and compensable, the Charter does not take away that right to damages.)

Clearly, the mere fact that conduct is a breach of the Charter will not establish a liability in damages – there is to be no freestanding action sounding in damages for breach of the Charter, no tort of ‘breach of human rights’.

So there will be no damages for breach of a detainee’s human rights if a prison or mental health institution fails to respect the detainee’s right to liberty and security of the person and freedom from arbitrary arrest or detention.

But if the result of the breach of human rights is that the prison or mental health institution acts outside the scope of its authorising statute (interpreted in light of the Charter), it may commit a tort (eg battery, assault, false imprisonment). Section 39 can hardly be taken to have excluded the right to seek compensation for those torts. Section 39(4) can be regarded as preserving precisely these rights.

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Many of the applications of the Charter remain unclear. However, as you already know, they have the potential to affect policy making and administrative processes in a thorough-going – if not quite radical – way. I trust that this short talk has illuminated some of these possible implications.