



## Charter of Human Rights Newsletter

### Remedies and Transitional Provisions

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## Introduction

Divisions 3 and 4 of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) will commence operation on 1 January 2008. Division 3 relates to the interpretation of laws, which requires Victorian Courts to interpret all statutory provisions in a way that is compatible with human rights. Division 4 of the Charter requires public authorities to comply with the Charter. In this newsletter, we canvass some of the issues facing public authorities when Divisions 3 and 4 commence operation on 1 January 2008. We also consider the remedies that are available under the Charter in respect of actions of public authorities.

Section 38 of the Charter makes it unlawful for a public authority to act in a way that is incompatible with a human right, or in making a decision, fail to give proper consideration to a relevant human right.

## What is a Public Authority?

Section 4(1) of the Charter defines a "public authority" as follows:

- (a) a public official within the meaning of the *Public Administration Act 2004*; or
- (b) an entity established by a statutory provision that has functions of a public nature; or

The *Charter of Human Rights and Responsibilities 2006* (the Charter) commenced operation on 1 January 2007. The remaining provisions of the Charter, divisions 3 and 4 of part 3, will commence operation on 1 January 2008.

These provisions impart important obligations on public authorities to act compatibly with the Charter, and for Courts to interpret legislation in accordance with the rights contained under the Charter. A remedies provision will also come into operation for any unlawful actions under the Charter.

Our series of Charter newsletters aims to provide simple and informative material to help you navigate the Charter and address issues that arise. This fifth issue briefly considers the important features of divisions 3 and 4 of part 3 of the Charter.

**John Cain**

Victorian Government Solicitor

- (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

- (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 the Charter.

Parliament, persons exercising functions in connection with proceedings in Parliament, courts and tribunals except when they are acting in an administrative capacity do not fall within the definition of a 'public authority' under the Charter.

Section 4(2) of the Charter considers the relevant factors for determining whether a 'function of a public nature' as follows:

- (a) that the function is conferred on the entity by or under a statutory provision;
- (b) that the function is connected to or generally identified with functions 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 functions is a company (within the meaning of the Corporations Act) all of the shares which are held by or on behalf of the State.

These factors are not exhaustive and the fact that one or more of these factors are present in relation to a function does not make it a function of a public nature. Further, the fact that an entity is publicly funded does not mean that it is exercising that function on behalf of the State or a public authority.

Some public authorities, such as those contemplated under s 4(1) (c) are bound by the Charter only when they are exercising functions of a public nature carried out on behalf of the State or in turn, on behalf of another public authority. These authorities could include private individuals or corporations that are only bound by the Charter if and when they exercise public activities on behalf of the State. We intend to canvass the implications of the Charter for government when entering into private sector contracts in a separate newsletter in the new year.

## Remedies

The Charter sets out a mechanism for seeking redress when human rights under the Charter are breached. Accordingly, the Charter introduces a 'remedies' provision, in line with the *International Covenant on Civil and Political Rights* (the ICCPR), the key international instrument upon which the Charter is based. The ICCPR obliges State parties to provide effective remedies for non-compliance with the rights that it protects.

When the 'remedies' provision of the Charter is unpacked, the remedies that are available under s39 are relatively clear:

1. there is no freestanding claim to a remedy under the Charter;
2. the right to damages for breach of the Charter alone is specifically excluded;
3. if there is a pre-existing right that allows a person to seek a remedy or relief for unlawful conduct, then unlawful conduct under the Charter can constitute unlawfulness for this purpose;
4. the Charter does not 'affect any right that a person has, otherwise than because of the Charter, to seek any relief or remedy in respect of an act or decision of a public authority', including judicial review.

Although damages for breaches of statutory obligations are available in common law, s39(3) of the Charter ensures that a breach of the Charter will not trigger any entitlement to

damages. This provision arguably prevents payment of exemplary or punitive damages on the basis of wrongful conduct that otherwise is also a breach of the Charter. However, if the same conduct is independently unlawful and compensable, the Charter does not take away the right to damages.

## Judicial Review

The effect of ss 38 and 39 of the Charter is that judicial review of a decision of a public authority (if it is otherwise amenable to judicial review) could be sought on two new grounds:

- (a) acting incompatibly with a human right, or
- (b) failing to give “proper consideration” to a “relevant” human right.

### Acting incompatibly with a human right

A court’s assessment of whether a public authority has acted incompatibly with a human right does not mean the courts must engage in a full merits review. However, it is likely to involve greater scrutiny of the decision or action than might previously have been the case.

A determination of whether a public authority has acted incompatibly with a human right will involve consideration of whether the action or decision limits a human right and, if so, whether that limit is justified taking into account all relevant factors under s 7(2) of the Charter. This involves what is referred to in other jurisdictions as a ‘proportionality’ test. It is well recognised that this test involves greater scrutiny of the reasonableness of the decision than occurs under a ‘Wednesbury unreasonableness’ test. In practice, when a decision is challenged for incompatibility with a human right, careful consideration will need to be given to the evidence to be called. That evidence will need to address the factors set out in s 7(2) of the Charter.

### Proper consideration of a relevant right

A combination of ss 38 and 39 of the Charter requires decision makers to give “proper

consideration” to a relevant human right, and a failure to give such consideration renders the action of the public authority unlawful.

The expression “proper consideration” in the judicial review context has not previously featured in Australia in relation to the common law ground of failure to consider a relevant/irrelevant consideration in administrative decision making.

It is not clear whether “proper” consideration is a purely procedural requirement, an assessment of which could involve looking at whether the public authority turned its mind to the human right and considered whether it would be appropriate to limit it having regard to the factors in s 7(2). Under this approach, a decision may be unlawful under the Charter even if the public authority has not in fact acted incompatibly with the right.

Alternatively “proper” consideration may also involve some substantive content. Under this approach some assessment would be required of whether the public authority’s decision is in fact incompatible with the right.

We intend to canvass these issues in more detail in a forthcoming newsletter in the new year.

## Transitional Provisions

From 1 January 2008 the Charter will come into full force. This means that:

1. From 1 January 2008 all public authorities must act compatibly with the Charter and, in making decisions, give proper consideration to any relevant human rights (s 38).
2. All statutory provisions must be interpreted compatibly with human rights, so far as it is possible to do so consistently with the purpose of the provision (s 32). If this is not possible, the Supreme Court may make a declaration of inconsistent interpretation (s 36).

The transitional provisions in s 49 make clear that the obligations on public authorities do not

apply to any act or decision made before 1 January 2008 (s49(3)).

However, the Charter does have some retrospective effect. The requirement to interpret legislation compatibly with human rights applies to all legislation, irrespective of when it was passed. The new interpretive rule in s 32 means that from 1 January 2008 a legislative provision may be given a very different interpretation from that prior to the Charter. In New Zealand the courts have indicated that under the interpretive rule in the New Zealand Bill of Rights Act the courts could completely reverse a century-old interpretation of a statute (*Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439), although such a result has never in fact occurred in New Zealand.

However, in the United Kingdom, using what is arguably a stronger interpretive provision, the House of Lords did not follow an interpretation of a statute given by the House of Lords only three years earlier (*Ghaidan v Godin-Mendoza* [2004] 2 AC 557).

Section 49(2) expressly provides that the Charter cannot affect any proceedings commenced or concluded before 1 January 2007, but the Charter is silent as to how proceedings may be affected if they are commenced after that date. Limitation periods mean that many proceedings may well be issued after 1 January 2007, relating to matters that occurred many years ago, long before the Charter was passed or even contemplated. Could the courts apply the interpretive rule in s 32 of the Charter to change the interpretation of a statute and apply it to actions that occurred prior to the commencement of the Charter? We think this is unlikely, particularly if it were to alter interests that vested or accrued before the Charter came into force. The general principle against retrospectivity still applies. Unless a statute expressly states otherwise, it does not have retrospective effect. Section 49 does not state that the Charter applies to all proceedings commenced after 1 January 2007, merely that it cannot affect any proceedings commenced before that date.

A similar issue arose in the United Kingdom under the Human Rights Act 1998. As Lord Nichols said in *Wilson v First County Trust Ltd* (No 2) [2003] 3 WLR 568:

in general the principle of interpretation set out in section 3(1) does not apply to causes of action accruing before the section came into force. The principle does not apply because to apply it in such cases, and thereby change the interpretation and effect of existing legislation, might well produce an unfair result for one party or the other. The Human Rights Act was not intended to have this effect.

### For further information

We have human rights specialists with expert knowledge in all the relevant jurisdictions, including the United Kingdom, New Zealand, Canada and South Africa. Our expertise in human rights law, public law litigation and statutory interpretation and our excellence in government services places us in a unique position to strategically help our clients proactively meet the challenges presented by the Charter and ensure compliance.

For further information or legal advice on the Charter, contact:

**John Cain** on 8684 0400  
Victorian Government Solicitor

**James Ruddle** on 8684 0470  
Deputy Victorian Government Solicitor

**Joanna Davidson** on 8684 0899  
Special Counsel (Human Rights)

**Alison O'Brien** on 8684 0416  
Managing Principal Solicitor

**Udara Jayasinghe** on 8684 0441  
Principal Solicitor