

# The Impact of the Charter of Rights on Corporations

Paper for the LIV Conference on the Victorian Charter of Rights. 18 May 2007

**Author: Rachel Nicolson, Allens Arthur Robinson**

## 1. The Victorian Charter of Human Rights and Corporations – Some Broad Themes

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The *Charter of Human Rights and Responsibilities (Vic)* (the **Charter**) was enacted at a time of unprecedented debate at the international level on the application of human rights law to the operation of corporations. This debate continues to swell, with advocates for the direct application of human rights law to private actors challenging the traditional doctrinal view that human rights obligations appropriately lie with the State, which possesses responsibility for ensuring its private actors perform in accordance with those obligations.

The evolving application of the Charter by all arms of the Victorian state as well as by those private sector players on whom the Charter places direct and indirect obligations will be informed and influenced by this broader international human rights debate.

The new rules of statutory interpretation introduced by the Charter that require courts and tribunals to interpret legislation to give effect to human rights may well see these judicial bodies directly referencing international law developments in respect of corporate human rights obligations, in their shaping and reshaping of statutory provisions.

The extent to which the Charter's obligation on "public authorities" to act compatibly with human rights and to give proper consideration to relevant human rights in decision making will penetrate the private sector will depend to a significant extent on governmental and judicial interpretation of what constitutes performing 'functions of a public nature' for the purposes of the Charter. Academic and legal commentary on these provisions of the Charter, and the experience of other jurisdictions, such as the United Kingdom, in grappling with this definition of 'functional public authority' brings into sharp relief the ever expanding responsibility for core state activities that is assumed by the private sector. It is this fact that has begged the question at the international level whether traditional views of human rights law are becoming, if they are not already, outmoded.

This somewhat uncertain status of corporations under the Charter particularly has ramifications for those corporations whose operations dovetail with those of the State. These issues play out, for instance, in the area of government procurement and contracting. The Charter will, however, also impact on those corporations whose functions are clearly not public in nature, where their operations are otherwise regulated by the State.

It seems inevitable that development of Victorian law post enactment of the Charter, as well as review of the Charter's provisions in four and eight years time, will to some extent reflect and may even have a role in shaping this international debate on application of human rights law to the private sphere.

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## 2. The Definition and Application of Human Rights in the *Charter* – Some Preliminary Issues

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Before embarking on an a discussion of the interplay between international human rights law, corporations and the key provisions of the Charter, I make the following comments on two threshold issues concerning the operation of the Charter as it pertains to corporations.

The first concerns those 'human rights' contained in the Charter. The definition of 'human rights' found at s3 of the Charter and the rights in Part 2 of the Charter to which this definition refers expressly limit the rights that are the subject of the Charter to a select set of civil and political rights. The Explanatory Memorandum to the Bill reinforces that the rights chosen to be the subject of the Charter primarily derive from the *International Covenant on Civil and Political Rights*.<sup>1</sup> The Report of the Human Rights Consultation Committee which preceded enactment of the Bill, in recommending that the Charter rights be limited in this way, stated that this recommendation was based on their response to community views on this issue.<sup>2</sup>

Although subject to review in four years time, and not meant to abrogate or limit any rights or freedoms recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and the law of the Commonwealth)<sup>3</sup> this limitation will have some impact on the relationship between the Charter and the private sector. It is a well accepted fact of life, and one that is increasingly difficult for human rights law to ignore, that the private sector has direct bearing on the realisation of economic, social and cultural rights in Australia and overseas.

The second preliminary point I make is in respect of the application of the Charter as outlined at s6, specifically s6(1) which determines that only natural persons have human rights. This section expressly carves out the availability of Charter rights to corporations.

While this provision may seem unnecessary, it provides certainty to an issue that has manifested in unforeseen utilisation of human rights law by corporations in other jurisdictions where corporations are not expressly denied access to domestically legislated rights. In these jurisdictions, corporations have utilised human rights remedies for their own interests, often to the detriment of the interests of individuals or community group.

For instance, in Allens Arthur Robinson's recent *Brief on Corporations and Human Rights in the Asia Pacific Region* to the UN Special Representative on Business and Human Rights, our research found that this had occurred in New Zealand, and also in Papua New Guinea where corporations have consistently asserted their constitutional rights, and have successfully relied upon the right to freedom, the right to protection of the law and the right

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<sup>1</sup> Charter of Human Rights and Responsibilities Bill 2006. Explanatory Memorandum. p1.

<sup>2</sup> Department of Justice. *Rights, Responsibilities and Respect*. The Report of the Human Rights Constitution Committee Department of Justice, November 2005. Piii.

<sup>3</sup> s5, the Charter.

to freedom of expression.<sup>4</sup> Also, in Canada and the United States, courts have found that the right of free speech extends to commercial free speech.<sup>5</sup>

By providing certainty on corporate access to the rights it seeks to protect, the Charter reinforces the view that human rights are founded in the notion of human dignity; and that there are numerous other legal mechanisms that can be utilised to provide adequate protections for corporate activity.<sup>6</sup>

### **3. Interpretation of Laws – The Role of International Law in Determining Corporate Human Rights Obligations under the Charter**

A key aspect of the Charter are its interpretative provisions found at Part 3 Division 3. These provisions provide new, express rules on interpretation of Victorian statutory provisions, with the object being to ensure that courts and tribunals interpret Victorian legislation to give effect to human rights. S32(2) provides that in doing so, courts and tribunals may refer to international and relevant domestic human rights law. In this way, the Charter opens the door for courts to consider human rights law and academic discussion that is currently informing the international human rights debate on the direct application of human rights obligations to corporations.

As a result, these interpretative provisions have potential implications in respect of the application of Charter rights to corporations. First, it may be that, by referring to international and parallel domestic human rights law, Victorian courts and tribunals opt for a narrow interpretation of the human rights content of statutory provisions that apply directly to those corporations that are not public authorities for the purposes of the Charter. Second, and perhaps more likely, the express obligation the Charter imposes on courts and tribunals to interpret statutory provisions in a manner that is compatible with human rights, may well result in a broader application of human rights law to corporations in the Victorian jurisdiction than is currently the case under key international human rights instruments or under other comparable jurisdictions.

#### **3.1 Interpretation of Victorian Law Compatible with Charter Rights**

Part 3 Division 3 of the Charter introduces new express rules of interpretation in respect of Victorian legislation.

Section 32(1) requires that courts and tribunals interpret all statutory provisions in a way that is compatible with human rights, as far as it is possible to do so consistently with the purpose of the statutory provision. Section 32(2) permits courts and tribunals to consider

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<sup>4</sup> Allens Arthur Robinson. Brief on Corporations and Human Rights in the Asia Pacific Region. Prepared for the United Nations Special Representative of the Secretary-General for Business and Human Rights. August 2006. Paragraph 595. See also *The State v NTN Pty Ltd and NBN Limited* [1992] PNGLR 1 (Right to Freedom); *Koai Keke v PNG Colour Laboratories* [1992] PNGLR 265 (Protection of the Law).

see for instance *Ford v Quebec (Attorney General)* (1988) 2 S.C.R 712; *Thompson v Western States Medical Centre* 01-344, decided on April 29, 2002

<sup>6</sup> See for instance submission to Human Rights Consultation Committee by Professor Neave and Professor Ziscak. Report of the Human Rights Consultation Committee. N(v2)P52.

international law and judgments of domestic, foreign and international courts and tribunals relevant to a human right in reading and giving effect to any Victorian statutory provision. According to the Explanatory Memorandum to the Bill, Parliament intended that this subclause would operate as a guide for courts and tribunals in interpreting the meaning and scope of the human rights in Part 2 of the Charter. The Explanatory Memorandum identifies traditional sources of international law, namely international conventions, international customary law, the general principles of law and judicial decisions of civilised nations, and commentary of acknowledged academics as relevant sources of law to be taken into account by the Victorian judiciary and tribunals pursuant to s32(2). The Explanatory Memorandum goes on to state that:

Decisions of the International Court of Justice, European Court of Justice, Inter American Court of Human Rights and United Nations Treaty monitoring bodies including the Human Rights Committee, will be particularly relevant.

Since enactment of the Charter, numerous legal and academic commentators have stated that its interpretative provisions have the potential to significantly change the substantive content of statutory rights or duties. In order to understand the potential impact of s32(2) and the window it provides to consideration of international human rights law regarding corporations, a general understanding of the current status of international, regional and parallel domestic human rights law as it applies to private actors, is required.

### **3.2 Human Rights Law and Corporations - The Great Debate**

In July 2005, then United Nations Secretary General, Kofi Annan appointed a United Nations Special Representative on Business and Human Rights, Professor John Ruggie. This appointment followed a two year long stalemate in the progression of an initiative of the UN Sub-Commission on the Protection and Promotion of Human Rights, namely the draft Norms of Trans-national Corporations. These Norms were approved by the Sub-Commission on 13 August 2003 and outlined human rights standards to be adopted by and applied directly to corporations. As to be expected, the draft Norms escalated the issues of direct application of human rights objections to corporations to a loud international debate. On one side, many members of civil society and the international legal community considered that the Norms should be realised as a formal international instrument of law that applied human rights law obligations directly to corporations and provide an avenue of redress for victims of human rights violations. On the other side, many in the corporate sector and international law traditionalists argued against what they considered to be this radical shift in international law paradigms.

Ostensibly, the United Nations Special Representative was appointed to resolve this stalemate and to undertake detailed examination of existing human rights law obligations of corporations under international and domestic law. He was also tasked with examining those human rights standards by which corporations do, or should, operate.

In his interim report to the Human Rights Council in April 2006, the UN Special Representative noted that globalisation has, amongst other things, imposed costs on people and communities, including corporate related human rights abuses.<sup>7</sup>

Following a further 12 months of extensive consultation and research under his mandate, in his first full report to the Human Rights Council on 9 February 2007, Professor Ruggie stated that:

Long standing doctrinal arguments over whether corporations could be the 'subject' of international law, which impeded conceptual thinking about the attribution of direct legal responsibility to corporations, are yielding to new realities. Corporations increasingly are recognised as 'participants' at the international level, with the capacity to bear some rights and duties under international law.<sup>8</sup>

The main findings of his report were that :

- International law firmly establishes that states have a duty to protect against non-state human rights abuses within their jurisdiction, and that this duty extends to protection against abuses by business entities. Beyond the national territory, the duty scope will vary depending on the state's degree of control<sup>9</sup>.
- The UN human rights treaty bodies and regional human rights systems affirm the state duty to protect against non-state abuse and establish similar correlative state requirements to regulate and adjudicate corporate acts<sup>10</sup>.
- Corporate responsibility and accountability for international crimes is the key area in which the debate between corporations being the 'subjects of international law' as opposed to having indirect legal responsibility under international law is evolving. For instance, incorporation of the International Criminal Court Statute has seen, in many jurisdictions, the extension of responsibility for international crimes to corporations under domestic law.
  - This is certainly the case under Australia's *Criminal Code (Cth)*, part 2.5 of which extends liability for all offences within the Criminal Code to corporations. Following Australia's ratification of the ICC Statute, the Criminal Code was amended to include the crimes of genocide, crimes against humanity and war crimes.
- In contrast to international crime, corporate responsibility for other human rights violations is 'subject to far greater existential debate'<sup>11</sup>. On this point, the UN Special Representative drew on research undertaken by Allens Arthur Robinson

<sup>7</sup> E/CN.4/2006/97 paragraphs 20 to 30.

<sup>8</sup> A/HRC/4/035. 9 February 2007. Paragraph 20.

<sup>9</sup> A/HRC/4/035 paragraph 10.

<sup>10</sup> Ibid paragraph 16.

<sup>11</sup> A/HRC/4/35 paragraph 33.

which showed that at the national level, there is enormous diversity in the scope and content of corporate human rights obligations.<sup>12</sup>

- With respect to interpretation of international human rights instruments, the UN Special Representative's research showed that the traditional view remained dominant - that they only impose indirect responsibilities on corporations, via state obligations.
- There was also growing evidence of a less traditional view, that these instruments already imposed direct legal responsibilities on corporations, but merely lack direct accountability mechanisms in respect of those obligations. For instance, the United Nations Sub-Committee on the Promotion and Protection of Human Rights, explaining that its proposed Norms 'reflect' and 'restate' existing international law, attributed the entire spectrum of state duties under the treaties to respect, protect, promote and fulfil rights to corporations within their 'spheres of influence'.
- In his search for evidence of direct corporate legal responsibilities under the international Bill of rights (the United Nation universal declaration of human rights and the two Covenants), the other core UN human rights treaties and the core ILO conventions, the UN Special Representative concluded:

In short, the treaties do not address direct corporate legal responsibilities explicitly, while the treaty bodies' commentaries on the subject are ambiguous. However, the increased attention the committees are devoting to the need to prevent corporate abuse acknowledges that businesses are capable of both breaching human rights and contributing to their protection.
- The UN Special Representative noted the growing number of soft law mechanisms that draw on human rights law in providing the standards of operation for corporations, for instance the ILO Tripartite Declaration of Principles Concerning Multi-National Enterprises and Social Policy, and the OECD Guidelines for Multi-National Enterprises.<sup>13</sup>
- He concludes that the fact that human rights law does not consistently govern corporate activity leaves large protection gaps for victims as well as uncertainty for companies.

### 3.3 Human Rights Law, Corporations and the Charter

The extent to which this body of international, regional and parallel domestic human rights law is drawn upon by Victorian courts and tribunals in their interpretation of Victorian laws can will remain to be seen. As stated above, it may be that the limits in application of international human rights law to corporations impacts on the extent to which judicial interpretation of statutory provisions as they apply to corporations are considered to have a human rights content.

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<sup>12</sup> See Allens Arthur Robinson. Brief on Corporations and Human Rights in the Asia Pacific Region. August 2006.

<sup>13</sup> A/HRC/4/035 paragraph 47 and 48.

It seems more likely, however, that the Charter's express requirement for Victorian statutory provisions to be interpreted in a way that is compatible with human rights will result in the Victorian private sector being subject to a broader range of human rights related obligations than is current envisaged by the international bill of rights, UN human rights treaty bodies and regional human rights systems.

#### **4. Corporations and the obligations of "public authorities" under the Charter**

From a private sector perspective, another key aspect of the Charter is its provisions on public authorities contained at Part 3 Division 4.

The degree to which the human rights obligations that the Charter places on "public authorities" will penetrate the private sector, will, to a large extent, turn on government and judicial interpretation of the definition of 'public authority' under the Charter. The extent to which commentators on the Charter have highlighted a lack of clarity in respect of this definition and the degree to which jurisdictions like the United Kingdom have grappled with the application of this definition to private actors, is reflective of the current international law debate on whether human rights law should apply directly to the private sector or only indirectly to this sector, via the States' duty to protect.

In its enactment of the Charter the Victorian government ostensibly has opted for the traditional vertical application of human rights law to corporations by state regulation. There is provision in the Charter for flexibility, however, in an effort to provide rights protection and recourse to those persons that suffer violations of rights in circumstances where public services are delivered by private actors.

##### **4.1 The Charter - defining a 'public authority'**

S38 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, to fail to give proper consideration to a relevant human right.

The meaning of public authority, for the purposes of the Charter, is defined at s4, sub-clause 1 of which contains a definition which encompasses two types of 'public authorities': Core public authorities, bound by the Charter generally, and 'functional public authorities' who are only bound when they are exercising functions of a public nature on behalf of the State or a public authority.

It is the definition of functional public authority, contained at s4(1)(c) that provides the greatest scope for application of the human rights obligations of "public authorities" to the private sector.

S4(1)(c) states that for the purposes of the Charter, a public authority includes:

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).

For the purposes of this sub-section, an entity may be acting on behalf of the State or public authority even if there is no agency relationship between the entity and the State or

public authority<sup>14</sup>; and the fact that an entity is publicly funded to perform a function does not necessarily mean that it is exercising that function on behalf of the State or a public authority.<sup>15</sup>

The Explanatory Memorandum to the Bill states that the inclusion of s4(1)(c), extending the obligations of the Charter to "functional public authorities":

reflects the reality that modern governments utilise diverse organisational arrangements to manage and deliver government services. The Charter applies to 'downstream' entities, when they are performing functions of a public nature on behalf of another public authority.

This was also reflected in the report of the Human Rights Consultation Committee which stated:

Modern governance is complex and often interacts with the private sector, (including for-profit companies as well as not for profit or community based organisations). Capturing all modern governance arrangements in the public sector with a simple definition creates some challenges.<sup>16</sup>

S4(2) contains a list of factors that may be taken into account in determining if a function is of a public nature for the purposes of s4(1)(c). These include:

- (a) that the function is conferred on the entity by or under a statutory provision (with the example of the *Transport Act 1983* conferring powers of arrest on an authorised officer under that Act);

The Explanatory Memorandum to the Bill notes that functions conferred on an entity by or under a statutory provision need to be distinguished from situations in which the private sector is subject to statutory licensing arrangements which regulate their private businesses, such as private fishing business operating under licence.<sup>17</sup>

- (b) that the function is connected to or generally identified with functions of government (with the example that under the *Corrections Act 1986* a private company may have the function of providing correctional services such as managing a prison);

In respect of the example of a private company managing a prison, the Explanatory Memorandum states that this was chosen as an example because this function has its origin in governmental responsibilities and is being performed in the broader public interest.<sup>18</sup>

- (c) that the function is of a regulatory nature;
- (d) that the entity is publicly funded to perform the function;

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<sup>14</sup> s4(1)(4) of the Charter.

<sup>15</sup> s4(5) of the Charter.

<sup>16</sup> The report of the Human Rights Consultation Committee p 54.

<sup>17</sup> Explanatory memorandum p 5.

<sup>18</sup> Explanatory Memorandum p5.

- (e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State (with the example given that all the shares in the companies responsible for the retail supply of water within Melbourne are held by or on behalf of the State).

S4(3) provides that the factors listed in s4(2) are not exhaustive of the factors that may be relevant to the question of whether a body is performing a public function. In a particular case, other factors may be equally or more important in determining the nature of the function. Similarly, the subclause provides that the fact that one or more of the factors exist in relation to a function, does not necessarily mean that the function is one of a public nature. According to the Explanatory Memorandum, the degree of government regulation and control of the functions being performed are relevant factors to consider when interpreting the meaning of the expression 'on behalf of the State or a public authority' contained in s4(1)(e).<sup>19</sup>

#### 4.2 'Functional "public authorities"' – the UK experience

The Explanatory Memorandum states that the list of factors at s4(2) that may be taken into account in determining if a function is of a public nature were distilled from juris prudence and commentary relating to like provisions in the UK *Human Rights Act* 1998 and the New Zealand *Bill of Rights Act* 1990.

They are intended to guide courts and tribunals on the meaning of functions of a public nature.

That the definition of 'public authority' contained in the Charter is somewhat more prescriptive than its equivalent provisions in the UK *Human Rights Act* reflects the findings of the UK Joint Committee on Human Rights following its 2003/2004 inquiry into the meaning of public authority under the *Human Rights Act* 1998. It was the intention of the UK Parliament that section 6, defining "public authorities" as including 'functional "public authorities"', would catch a broad range of bodies performing public functions and delivering public services. Unfortunately, however, the lower courts in the United Kingdom have adopted a definition of functional public authority that relies on how enmeshed the authority is with the institutions of government for that authority to qualify as a public authority for the purposes of the Act. The UK Joint Committee on Human Rights concluded that

there is a fundamental problem not with the design of the law, but with its inconsistent and restricted application by the courts.<sup>20</sup>

In its March 2007 report on the meaning of 'public authority' under the *Human Rights Act*, this same Committee concluded that case law since 2004 had not developed beyond the institutional approach taken by the Court of Appeal in the *Leonard Cheshire* case<sup>21</sup>. The restrictive interpretation of functional public authority in this case requires the authority to

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<sup>19</sup> Explanatory Memorandum p6.

<sup>20</sup> Joint Committee on Human Rights 'The Meaning of Public Authority Under the Human Rights Act' House of Lords and House of Commons, HL Paper 39, HC3827's report of Session 2003 to '04.

<sup>21</sup> [2002] EWCA CIV366

have its structures and work closely linked with the delegating or contracting out State body, or for it to be exercising powers of a public nature directly assigned to it by statute, or for it to be exercising coercive powers devolved from the State. The Court of Appeal held that Leonard Cheshire, a private care home run by a charitable organisation, was not sufficiently 'enmeshed' in the activities of the local authority commissioning its services to be considered a public authority for the purposes of the *Human Rights Act*.

This contrasts with the leading authority on "public authorities" in the House of Lords, *Aston Cantlow v Wallbank* [2003] 3 WLR 283 where the House of Lords stressed that it was the nature of the function being performed that should determine whether a body was a functional public authority.

In early 2007, two Court of Appeal cases again considered the definition of public authority. The government intervened in both with the aim of ensuring that the meaning of public authority was given a wide interpretation. In both cases, the government argued that 'functional' "public authorities" under s6(3)(e) should include private providers providing care to the elderly on behalf of a local authority. In both cases, the Court of Appeal refused to adopt a wider interpretation of public authority, or 'public function' without further guidance from the House of Lords.<sup>22</sup> Both cases are currently listed for appeal in the House of Lords.

The UK Joint Committee on Human Rights has concluded that this restrictive interpretation of the meaning of public authority has provided uncertainty for service users in respect of the availability of remedies for human rights violations and uncertainty for service providers in respect of their obligations under the statute; limited human rights protection for certain vulnerable groups, and undermined reliance on the government's view of whether a private sector service provider is a public authority for the purposes of the statute, when this view is not reflected in decisions of the courts.<sup>23</sup>

The Joint Committee on Human Rights considers that this has had a significant impact on the creation of a human rights culture within the UK.<sup>24</sup>

#### **4.3 Implications for 'Functional Public Authority' Corporations – Procurement and Contracting**

As noted above, any ambiguity that exists in respect of whether a corporation is performing 'functions of a public nature' creates uncertainty for corporations as to the extent of their obligations under the Charter.

The Charter notes that a private actor can be a public authority for the purposes of the Act if it has had public obligations delegated to it by contract.<sup>25</sup> In this vein, government contracts for private sector delivery of what are generally considered to be public services

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<sup>22</sup> *Johnson & Ors v London Borough of Havering* [2007] EWCA CIV 26; *WL v (1) Birmingham City Council (2) Southern Cross Healthcare & Ors* [2007] EWCA CIV 27.

<sup>23</sup> Paragraph 66.

<sup>24</sup> House of Lords House of Commons Joint Committee on Human Rights. *The Meaning of Public Authority Under the Human Rights Act*. March report of Session 2006-07. 19 March 2007. Paragraph 109.

<sup>25</sup> S4(1)(c) of the Charter.

provide a mechanism for addressing this potential uncertainty. The Victorian government has already sought to avail itself of this mechanism, by requiring some private sector service providers to contractually acknowledge that they are 'public authorities' for the purposes of the Charter.

As stated by the Human Rights Consultation Committee,

It is already a common feature of government contracts and funding arrangements that organisations be required to act lawfully in regard to occupational health and safety, equal opportunity and similar obligations. Requiring compliance with human rights standards would be a natural progression in this process of ensuring the best possible outcome for the people of Victoria, irrespective of which organisation is carrying out the public or government functions.

While this may provide certainty for service users as well as service providers, it has some significant consequences for the contracting corporation. Importantly, this approach requires corporations to act in accordance with Charter rights in line with their (albeit uncertain) statutory obligation to do so as a "functional public authority", as well as imposing on these corporations a contractual obligation to do so.

The latter contractual obligation gives rise to potential relief under the Charter that would not otherwise be available at statute. S39 of the Charter outlines the legal proceedings that may be brought in relation to an unlawful act or decision of a public authority. S39(1) provides that if a person has a right to seek relief or a remedy otherwise than because of the Charter, founded on the unlawfulness of some conduct by a public authority, then any unlawfulness generated by the Charter (as set out in clause 38) may be a further ground in the cause of action. This clause does not create any new or independent right to relief or a remedy if there is nothing more than a breach of a right protected under the Charter. The clause also does not confer any entitlement to an award of damages arising from nothing more than a breach of a right protected by the Charter nor are any damages to be awarded referable to the breach of a right protected under the Charter. This is expressly reinforced by s39(3). According to the Explanatory Memorandum:

This concerns Parliament's intention that the Charter does not create any independent cause of action nor any independent form of relief.

However, in the event that a corporation contracts to acknowledge that it is a public authority for the purposes of the Charter, it is possible that a claim for damages under contract for a breach of Charter rights could be brought. This remedy would not be available if the corporation was only subject to its statutory obligations, were it to be found a 'functional public authority'.

This presents some concern for corporations and for government. The former are faced with potentially liability for relief in damages for breach of Charter rights that was not envisaged by Parliament. The latter is under an obligation to inform an organisation providing public services of its obligations under the Charter and contract is an expedient way to do so. This is particularly the case when the position of such organisations is not well established at law.

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#### **4.4 Implications for corporations that are not 'functional public authorities' - Decisions of 'public authorities'**

Another way in which the Charter will indirectly impact on the private sector is by the decision making processes of public authorities. The obligation on public authorities to make decisions giving proper consideration to relevant human rights will extend in influence to those corporations who are not considered either core or functional public authorities under the Charter, but whose operations are subject to decisions of a public authority. For instance, any public authority that is responsible for statutory leases or licensing arrangements will be required to make the decision to grant the lease or licence giving proper consideration to relevant human rights contained in the Charter.

While this does not mean that the corporate lessee or licensee is subject to the direct obligations on public authorities contained in the Charter, it does mean that it is in the interests of corporations that rely on such decisions of public authorities to ensure that their projects, activities and operations align with the rights in the Charter. In this way, such a corporation avoids the possibility of a public authority decision maker deciding against the interests of the corporation to ensure they comply with their obligations under the Charter.

This is perhaps another example of where the impact of Charter on the private sector extends beyond the current general application of human rights law to the private sphere.

#### **5. Conclusion – What Does This Mean for Corporations, Human Rights and the Charter?**

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The Charter presents a wonderful opportunity to establish a human rights culture in the State of Victoria. The degree to which that human rights culture permeates across and through Victorian society will depend, to a large extent, on the way in which the Charter is utilised and applied – including in relation to the private sector.

The key provisions of the Charter concerning interpretation of laws and obligations on public authorities, provide substantial scope for ensuring that modern forms of government service delivery, such as public private partnerships and privatisation and regulation of former public assets, do not fall through the net that it is hoped the Charter will provide for all Victorians.

In fact, these provisions of the Charter may be interpreted as going beyond the bounds of the more traditional legal view of human rights obligations being solely those of the state, with corporations merely a legal person subject to the state's regulation. Indeed, it may be that the Victorian Charter in some small way assists international human rights law in making its paradigm shift from the public to the private sphere, as it currently appears poised to do.