



Charter of Human Rights Newsletter

March 2007

Issue 3

Introduction

The purpose of the Charter is to protect and promote the human rights of the people of Victoria. It is intended to improve policy development by government by providing principles to govern the exercise of power in the context of public administration.

One of the ways this purpose is achieved by the Charter is by requiring that all legislation passed by the Victorian Parliament is assessed for compatibility with the Charter. The Charter also enables the Scrutiny of Acts and Regulations Committee (SARC) to report on incompatibility. SARC must also review all statutory rules and report to Parliament if it considers the statutory rule to be incompatible with the Charter rights.

This newsletter will provide you with information about these new requirements because they are processes with which all policy and legislative officers across government will need to become familiar.

We suggest that because these processes are new and unfamiliar, it is important that, if assistance is required by departmental officers, it is sought at an early stage. In particular, we emphasise the need to consult with either the Human Rights Unit or this office if your proposal or Bill raises a significant human rights issue or if you are unsure of how to prepare the materials required by the new process. You should do so well before a Charter impact statement or a statement of compatibility is due to be provided to Cabinet, or tabled in Parliament.

The *Charter of Human Rights and Responsibilities 2006 (the Charter)* came into operation on 1 January 2007 with the exception of Divisions 3 and 4 of Part 3, which commence on 1 January 2008.

To help you navigate the Charter, VGSO will be providing a series of newsletters.

Together with the Department of Justice (**Human Rights Unit**), we will identify what we believe to be the most relevant considerations in the implementation of the Charter and provide you with simple and informative material to help you address these issues.

This third newsletter discusses statements of compatibility and other processes that now need to be followed in preparing legislation and operational and other non-legislative policies to ensure compatibility with the human rights in the Charter.

John Cain

Victorian Government Solicitor

Processes required at Cabinet stage

All policy proposals, discussion papers, strategies and operational guidelines provided to Cabinet should include an assessment of the impact (if any) of the proposal on the human rights protected by the Charter. If the proposal is at an early stage of development, it may not be possible to provide a thorough

human rights analysis. If this is the case, potential impacts should be noted.

Cabinet submissions for Approval-in-Principle of legislative proposals must also include an overview of human rights impacts. This analysis should include a discussion of the human rights issues likely to be raised by the proposal and whether the proposal can be developed in a manner that is compatible with the Charter.

At the Bill-at-Cabinet stage, Bills introduced by the Government and presented to Cabinet for approval, prior to being introduced to Parliament, must be accompanied by a statement of compatibility. The recommendations in the Cabinet submission must include a recommendation that Cabinet note the statement of compatibility.

Statements of compatibility

A statement of compatibility sets out whether, in the opinion of the member of Parliament who introduces a Bill, the Bill is compatible or incompatible with the human rights set out in the Charter.

From 1 January 2007, all Bills introduced into Parliament must be accompanied by a statement of compatibility in both Houses. The statement must include reasons which demonstrate how a Bill is compatible or which otherwise explain the nature and extent of how the Bill is incompatible. If a Bill is amended and the amendments raise Charter rights issues, the statement of compatibility must be updated before the Bill is introduced into the next House. A statement of compatibility must be tabled in the House of Parliament into which the Bill is introduced before the second reading speech.

To date, twenty statements of compatibility have been tabled in the Victorian Parliament in relation to the following Bills:

- Control of Weapons Amendment (Penalties) Bill 2006
- Drugs, Poisons and Controlled Substances Amendment (Repeal of Part X) Bill 2007
- Gambling and Racing Legislation Amendment (Sports Betting) Bill 2007
- Gambling Regulation Amendment (Review Panel) Bill 2007
- Howard Florey Institute of Experimental Physiology and Medicine (Repeal) 2007
- Infertility Treatment Amendment Bill 2007
- Interpretation of Legislation Amendment Bill 2006
- Legal Profession Amendment Bill 2007
- Livestock Disease Control Amendment Bill 2007
- Major Events (Aerial Advertising) Bill 2007
- Murray-Darling Basin Amendment Bill 2006
- Nuclear Activities (Prohibitions) Amendment (Plebiscite) Bill 2007
- Parliamentary Legislation Amendment Bill 2007
- Pay-roll Tax Amendment (Bushfire and Emergency Service) Bill 2007
- Prahran Mechanics' Institute Amendment Bill 2007
- Public Prosecutions Amendment Bill 2006
- Road Legislation Amendment Bill 2007
- Statute Law Repeals Bill 2006

- Victims of Crimes Assistance Amendment Bill 2007
- Water Amendment (Critical Water Infrastructure Projects) Bill 2006

All of the statements of compatibility assert that the proposed Bill is compatible with the Charter.¹

Who is responsible for preparing a statement of compatibility?

Under the Charter, responsibility for the preparation and tabling of a statement of compatibility lies with the member of Parliament who introduces the Bill into the House of Parliament. A statement of compatibility must be tabled in each House. The responsible member of Parliament may request that another member table the statement on his or her behalf.

On a practical level, however, it will be the departmental officer responsible for developing the legislative proposal who will assess how the Charter is relevant to the proposal. This is because he or she is the best person to understand the details of the proposal and how it may engage with the human rights under the Charter.

The relevant department will also be responsible for copying the signed statement for the Whip to distribute to the House and for providing an electronic copy for Hansard.

Once tabled, the statements of compatibility will be automatically incorporated into Hansard.

Preparing a statement of compatibility

The Charter of Human Rights and Responsibilities: Guidelines for Policy and Legislative Officers (the Charter Guidelines) provide assistance to policy and legislative officers in preparing a statement of compatibility.

A template statement of compatibility has been prepared that you should use. Ask your Cabinet Liaison Officer for more information if you do not have a copy of the template.

The template requires, as a first step, an 'overview' of the Bill to be provided which sets out the general purpose of the Bill as well as the reasons why it is considered important that the proposed legislation is introduced.

It then requires, as a second step, that you state the 'human rights issues' which arise in the Bill. This is the central part of the statement of compatibility.

Under this heading, each of the Charter rights which are engaged by the Bill and each of the clauses in the Bill which impact upon those rights must be identified. To do this, it is important to consider methodically each of the Charter rights as well as each of the provisions of the Bill.

If you have identified clauses of the Bill which interact with a Charter right, you will need to analyse carefully whether the right is affected and whether its operation is restricted in any way. The fact that a right is restricted by a clause in the Bill does not automatically render it incompatible with the Charter. Section 7(2) of the Charter allows for the limitation of rights if it can be shown that such a limitation is 'reasonable' and 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.

In considering whether the limitation of a right can be justified, the Charter directs you to look at the following factors:

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and

- any less restrictive means reasonably available to achieve the purpose that limitation seeks to achieve.

This analysis must be included in the statement of compatibility, and the Minister must indicate at the end of the analysis, whether he or she considers the Bill to be compatible with the Charter despite any limitations. For an example of a statement of compatibility which contains a discussion of where a right is limited but considered to be a reasonable limitation on the freedom of expression, having applied the balancing test in section 7 of the Charter, see the statement of compatibility which accompanies the *Major Events (Aerial Advertising) Bill 2007*.

Human rights certificates – subordinate legislation

The requirement for subordinate legislation to comply with the Charter is twofold: first, to ensure that the rights protected and promoted by the Charter are also protected in subordinate legislation; and second, if a statutory rule does not comply with the Charter, there is a possibility that it may fall outside the scope of the authorising Act (which has to comply with the Charter).

SARC is required, under section 30 of the Charter, to consider the compatibility of regulations with the Charter, and report to Parliament where it considers a statutory rule to be incompatible with the Charter. In making this decision, SARC will refer to the human rights certificate which the responsible Minister (again, likely to be departmental officers) will need to prepare, pursuant to section 12A of the *Subordinate Legislation Act 1994*.

The human rights certificate differs from the statement of compatibility in that it does not require the Minister to come to a decision about whether the proposed rules are compatible with the Charter. Instead, if there

is any right which is limited under the proposed rules, the Minister must describe in the human rights certificate:

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and
- any less restrictive means reasonably available to achieve the purpose that limitation seeks to achieve.

If SARC decides, on the basis of this information, that the proposed regulations are incompatible with the Charter, it will report this to Parliament.

There are limited circumstances where a human rights certificate will not need to be prepared, and these are contained in section 12A(3) of the *Subordinate Legislation Act 1994*.

Incompatibility

In circumstances where a Bill or a provision of a Bill is incompatible with the Charter, the member introducing the Bill will still need to provide a reasoned statement of compatibility and indicate why he or she nonetheless wishes to proceed with the Bill. The Charter will continue to apply to the Act. This means that the requirement that the Act be interpreted consistently with human rights (to the extent that this is possible) continues, as does the possibility, at a future point, that the Supreme Court will determine that it cannot be interpreted consistently with human rights.

Override declarations

In exceptional circumstances, however, Parliament may override the Charter through the use of an express declaration in the relevant Act (see section 31 of the Charter).

Section 31 is intended to operate when Parliament seeks to introduce new legislation and exceptional circumstances exist which require Parliament to depart from the requirements of the Charter in a specified manner and for a fixed period of time.

Examples of exceptional circumstances include threats to national security or a state of emergency which threatens the safety, security and welfare of Victorians.

If an override declaration is made in relation to an Act or provision of an Act, it will extend to any subordinate instrument made under or for the purpose of that Act.

The member of Parliament responsible for introducing a Bill containing an override declaration must make a statement to the Legislative Assembly or the Legislative Council explaining the exceptional circumstances that justify the inclusion of the override declaration. This must occur when the Bill is introduced into the first House of Parliament and again when it is introduced into the second House. The statement must be made during the second reading speech or after, but not less than 24 hours after notice is given of the intention to make the statement, and before the third reading of the Bill. It may also be made with the leave of the Legislative Assembly or Legislative Council at any time before the third reading of the Bill.

The effect of an override declaration is that, to the extent of the declaration, the Charter will not apply to the Act or provision of the Act for which the declaration is made.

A statement of compatibility may not be required to be prepared with respect to Bills for which an override declaration is intended to be made. However, if the override declaration is to apply to a particular clause or clauses of a Bill, a statement of compatibility will certainly need to be prepared for the balance of the Bill.

Further information

The Victorian Government Solicitor's Office (VGSO) has established a Human Rights Practice Group to provide advice and assistance with Charter matters. The group is convened by solicitor Ully Merkel, who is currently seconded to the Department of Justice, Human Rights Unit.

The VGSO is in a unique position to advise government departments and statutory authorities on the application and implications of the Charter to their operational practices.

For further information or legal advice on any issues raised in this newsletter, contact Ully Merkel on 8684 0497, James Ruddle, Deputy Victorian Government Solicitor on 8684 0470 or John Cain, Victorian Government Solicitor on 8684 0400.

¹ The statement of compatibility for each of these Bills can be accessed at: <http://www.dms.dpc.vic.gov.au/>

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