

Charter of Human Rights Newsletter

February 2007
Issue 2

Human rights in criminal and civil proceedings

The first case seeking to rely on the Charter was recently heard in the Supreme Court of Victoria.¹ While the applicant was ultimately unsuccessful in seeking an adjournment of his trial until his lawyer of choice was available to represent him, the proceeding draws attention to the Charter rights relevant to criminal proceedings. These rights include:

- the right to liberty and security of person – s 21 (in particular, ss 21(5) and (6) provide that a person arrested or detained on a criminal charge must be promptly brought before a court, must be brought to trial without reasonably delay);
- children in the criminal process – s 23;
- the right to a fair hearing – s 24;
- the rights of persons in criminal proceedings including the right to be presumed innocent, minimum guarantees, rights of a child defendant/accused and the right to review of conviction and sentence – s 25;
- the right not to be tried or punished more than once – s 26; and
- protection from retrospective criminal laws – s 27.

These human rights, while now codified in Victorian law, are not new. They have long been protected by numerous legal practices and rules that have evolved under the common law. As

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 Human Rights Unit of the Department of Justice, 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 second newsletter introduces the human rights under the Charter that apply to criminal and civil proceedings. It is particularly relevant to those agencies involved in prosecutions.

John Cain
Victorian Government Solicitor

such, they do not reflect a radical change in how criminal proceedings are conducted in Victoria. For example, the right to a fair trial in both criminal and civil proceedings has been recognised as a general common law right since *Magna Carta* in 1215.

Each of these rights is subject to s 7 of the Charter, which provides that the human rights in the Charter may be limited if the limitation is reasonable and demonstrably justifiable within the meaning of that section. Factors to be taken into

consideration are set out to assist both the courts and government in deciding when a reasonable limitation is permissible.

Right to liberty and security of person – s 21

Section 21 provides that every person has the right to liberty and security. In the context of a person who is arrested or detained on a criminal charge, s 21(5) provides that the accused person must be promptly brought before a court and has the right to be brought to trial without unreasonable delay. If these two requirements are not met, the accused must be released in accordance with s 21(5).

Section 21(6) provides that a person awaiting trial must not be automatically detained in custody and may be released subject to a guarantee to appear for trial (ie released on bail).

Children in the criminal process – s 23

Section 23 requires that an accused child who is detained or a child detained without charge must be segregated from all detained adults and must be brought to trial as quickly as possible. This section also requires that a child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.

Right to a fair hearing – s 24

Section 24 provides for the right to a fair and public hearing at all stages in either a civil or criminal proceeding and before a court or a tribunal. The Charter states that the right extends to a fair hearing before a 'competent, independent and impartial' court or tribunal. What constitutes a fair hearing will depend on the circumstances of the proceedings.

The right to a fair hearing is likely to require adherence to the rules of natural justice (procedural fairness). Those rules require that a person whose interests are to be affected by a decision receives a fair and unbiased hearing before a decision is made and that before a person's rights or interests may be adversely affected, he or she is given proper notice, and an appropriate opportunity to be heard.

Rights of persons in criminal proceedings – s 25

Section 25 sets out rights of persons in criminal proceedings. As already mentioned, a number of these rights, such as the right to be presumed innocent (s 25(1)), are already entrenched aspects of the criminal justice system.

Section 25(2) provides for minimum guarantees for an accused person that relate to the right to a fair hearing under s 24 including, the right:

- to be informed of a charge promptly and in detail so that an accused can answer and defend a charge (s 25(2)(a));
- to adequate time to prepare a defence and facilities to communicate with a lawyer (s 25(2)(b));
- to be tried without unreasonable delay to ensure that evidence against an accused can be tested in a timely manner (s 25(2)(c));
- for an accused to be tried in person and provided with the opportunity to defend himself or herself in person or through their chosen lawyer (s 25(2)(d));
- to be informed and provided with legal aid if the accused does not already have legal assistance and is eligible (s 25(2)(e) and (f));
- to call witnesses on behalf of an accused and to cross examine witnesses called by the prosecution (s 25(2)(g) and (h));
- to an oral interpreter (s 25(2)(i));
- to free assistance of assistants and technology for persons with communication or speech difficulties (s 25(2)(j)); and
- to be free from compulsory self-incrimination, including the right to silence (s 25(2)(k)).

These minimum guarantees must be provided to all persons charged with a criminal offence equally and without discrimination.

The relevant factors in determining what constitutes unreasonable delay under s 25(2)(c) were discussed by the Canadian Supreme Court in *R v Morin*.² Those factors include the length of the delay, the actions of the accused and the Crown limits on institutional resources and potential prejudice to the accused.

In a recent case in the Supreme Court of Victoria, Mr Carl Williams sought an adjournment of over six months of a trial on the basis that s 25(2)(d) of the Charter meant that the trial should be delayed until his lawyer of choice was available to represent him.

Justice King of the Supreme Court held that:

- the Charter had no relevance to the application due to the fact that the proceedings in Mr Williams' case were commenced prior to the commencement of the Charter;
- in any event, the right of an accused to their lawyer of choice is not absolute and must be balanced against other competing public interests, such as the need for an accused and witnesses to give their evidence promptly enough for them to recall events clearly; and
- it is for the courts to keep control of when a matter is heard, not counsel for the Crown or an accused.

Her Honour also stated that even if the Charter had been operative, her decision would have been the same: while the courts do all they can to accommodate counsel of choice for the accused, it is not open to an accused to choose a counsel who is unavailable to represent them for a lengthy period of time, thereby requiring the court to delay proceedings which are capable of being heard.

Right not to be tried or punished more than once – s 26

The right not to be tried or punished more than once is more commonly known as the 'double jeopardy' rule. This legal principle has long existed under the common law. This safeguard also relates to the right to a fair hearing and prevents a person being subject to repeated criminal proceedings for the same or similar offence. This rule does not apply to civil proceedings nor does it

apply until a person has exhausted all relevant appeals and has been finally convicted or acquitted.

Protection from retrospective criminal laws – s 27

The key issues in relation to these protections under s 27 are that criminal law penalties must not be applied retrospectively and a greater penalty than what applied at the time of the offence must not be imposed.

Implications for Government

It is especially important that agencies working in the area of criminal law and prosecutions are aware of these rights and ensure that they comply with the requirements imposed by those rights, where relevant. Such agencies include Victoria Police, the Office of Public Prosecutions and the many statutory authorities and departmental officers involved in enforcing and prosecuting offences under Victorian legislation.

Overseas court decisions demonstrate that prosecutorial agencies should not cause any unnecessary delay in criminal proceedings and that every practicable effort should be made to ensure a proceeding is conducted in a timely manner. Where delay is unavoidable, agencies should ensure that it is not through unjustified actions and that every effort is made to keep any prejudice to the accused to a minimum.

In a civil context, courts and tribunals, including professional disciplinary boards and review bodies, also have duties under s 24 of the Charter. Consequently, government agencies involved in civil proceedings in courts and tribunals need to be attentive to the standards imposed by s 24 in conducting their cases.

Human Rights Lecture - The Treatment of Prisoners

The Human Rights Unit of the Department of Justice presents a seminar on the treatment of prisoners by Sir Nigel Rodley, leading international human rights expert and author of the book, *The Treatment of Prisoners under International Law*.

Date: Friday 23 February 2007, 2.30-4pm
Venue: Treasury Theatre, Ground Level,
1 Macarthur St, Melbourne
Cost: Free (Afternoon tea to follow seminar)

Sir Nigel Rodley has been an Expert Member of the UN Human Rights Committee since 2001 and was elected to the International Commission of Jurists in 2003. Previously he was the Founding Head of the Legal and Intergovernmental Organisations Office at Amnesty International from 1973 to 1990. From 1993 to 2001 he was the UN Special Rapporteur on Torture. He was knighted in 1998 for his services to human rights and international law.

Register with Peggy Aresti on 8684 0859 or email peggy.aresti@justice.vic.gov.au by 19 February 2007. Support and assistance with accessibility, including Auslan interpreters can be made available at this event. When confirming your attendance please tell us if you require these or other supports.

New Victorian Equal Opportunity and Human Rights Commission

As of 1 January 2007, the former Equal Opportunity Commission Victoria is to be known as the Victorian Equal Opportunity and Human Rights Commission.

The Commission's name change reflects the additional responsibilities it has assumed under the Charter, including assessing compliance by State and local governments with the Charter and reporting on the operation of the Charter in relation to new legislation and the Courts.

Human rights conference

The Commission is hosting a human rights conference on 27 February 2007 which will include:

- Presentations from overseas guest speakers: Sir Nigel Rodley (UK), Dr Sima Samar (Afghanistan) and Major Michael Mori (USA);

- Two conference streams on 'Charting Human Rights: Applying Principles to Practice' and 'Reality Check: Human Rights for All Victorians'; and
- A full day youth forum to discuss the practical applications of the Charter for young people.

The conference is aimed at people working in the public sector, local government, legal profession and community and welfare organisations.

For further information about the Commission and its forthcoming conference, telephone 9281 7111 or visit www.humanrightscommission.vic.gov.au.

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 Uly 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 Uly Merkel on 8684 0497, James Ruddle, Deputy Victorian Government Solicitor on 8684 0470 or John Cain, Victorian Government Solicitor on 8684 0400.

¹ *R v Williams* [2007] VSC 2R.

² *R v Morin* [1992] 1 SCR 771.