

## The Charter of Human Rights and Responsibilities Act 2006

Will you be ready?

August 2006

**The Charter of Human Rights and Responsibilities Act 2006 was assented to on 25 July 2006. The first part of the Charter will come into operation on 1 January 2007. The impact of Charter is likely to be far reaching. All new legislation and policies must be considered against the Charter. In addition it will be 'unlawful' to not follow the Charter and there will be important issues to be decided by the courts.**

The Victorian community will need to be familiar with the Charter and its implications. This includes legislators, the public sector, organisations carrying out functions on behalf of the State, councils and indeed any person affected by the operation of Victorian legislation.

### Historical perspective

A central theme of English constitutional history is that power is entrusted to the State on the basis that the rights and liberties of the people will be respected.<sup>1</sup>

The Bill of Rights of 1688 guaranteed free elections to Parliament and prohibited excessive bail, excessive fines and cruel and unusual punishments.<sup>2</sup> Among the other rights recognised by the common law and enjoyed by the people were the right to be informed of reasons for arrest, the right to a fair trial and the right to be presumed innocent until proven guilty.<sup>3</sup>

Without detracting from their importance, early declarations of the rights of citizens were the product of different eras. At times their language and the sentiments expressed are archaic. The relevance of the Bill of Rights is further undermined when it lays the foundations for securing the 'established religion'.

### Overseas and domestic comparisons

The Charter is an ordinary Act of Parliament. It will fall short of the United States Bill of Rights, which is a part of the Constitution. It is similar to those already in force in the Australian Capital Territory (ACT), the United Kingdom and New Zealand.

The *Human Rights Act 2004* (ACT) came into force on 1 July 2004. To date there have been only a limited number of cases before the courts in the ACT under this Act.

The biggest impact of the legislation in the ACT has reportedly been on influencing the formulation of government policy and new legislation.

A recent press report notes that when architects began designing the ACT's first prison they hit an unexpected hurdle in the form of the Human Rights Act. This guaranteed prisoners the right to privacy from prison guards and as a result the plans had to be redrawn.<sup>4</sup> Again it is reported that proposals to ban headscarves in government schools have been quickly rejected.<sup>5</sup>

### Common law developments

Even before the passage of the Charter, at common law, international law and agreements relating to human rights were relevant. In April 2006 President Maxwell of the Victorian Court of Appeal emphasised that:

- » The Court will encourage practitioners to develop human rights-based arguments where relevant to a question in the proceeding.
- » Practitioners should be alert to the availability of such arguments, and should not be hesitant to advance them where relevant.
- » Since the development of an Australian jurisprudence drawing on international human rights law is in its early stages, further progress will necessarily involve judges and practitioners working together to develop a common expertise.<sup>6</sup>

McHugh J has held that 'as far as the language of a statute permits, it should be interpreted and applied in conformity with the established rules of international law' and further the legislature should not be taken to 'legislate in violation of the rules of international law existing when the legislation was enacted'.<sup>7</sup> However, if a statute is inconsistent with an international right (as it was in the case before McHugh J), the statute prevails and that is an end to the matter.

<sup>1</sup> *Prerogatives of the Crown*, Joseph Chitty, (1820) at page 7 where the author notes that although the Crown has certain prerogatives, boundaries and restraints are 'wisely interwoven into the texture of the Constitution'.

<sup>2</sup> Other fundamental protections against excessive or unlawful state power are to be found in the Magna Carta (1215) and the Habeas Corpus Act (1641).

<sup>3</sup> Dr Mark Cooray 'The Common Law and Human Rights'.

<sup>4</sup> *Australian Financial Review*, 28 July 2006, page 57. Note that this conclusion may be open to some debate or at least qualification. Certainly in Victoria the Human Rights set out in the Charter are not absolute and must be balanced against other considerations, such as the need to run the prison. See section 7(2) of the Charter.

<sup>5</sup> *Australian Financial Review*, 28 July 2006, page 57.

<sup>6</sup> *Women's Hospital v Medical Practitioners Board of Victoria* [2006]VSCA 85., paragraph 71.

<sup>7</sup> *Al-Kateb v. Godwin* (2004)189 CLR 51, paragraph 64.

## The Victorian Charter of Human Rights

The purpose of the Charter is to promote a 'dialogue between the three arms of Government – the Parliament, the executive and the courts'.<sup>8</sup>

Legislation cannot be struck down because of the Charter.

### *When will the provisions of the Charter commence?*

The Charter commences operation on 1 January 2007. However certain central provisions will not commence until 1 January 2008. These provisions are those relating to interpretation of laws<sup>9</sup> and obligations on public authorities<sup>10</sup>.

### *To whom will the Charter apply?*

The Charter potentially affects the interpretation of any Victorian legislation. Thus it may affect any person or company to whom the legislation applies.

The Charter will directly apply to 'public authorities', making it 'unlawful' for the authority to 'act in a way which is incompatible with a Human Right or, in making a decision, to fail to give proper consideration to a relevant Human Right'.<sup>11</sup>

Many organisations and individuals fall within the definition of public authority<sup>12</sup>. Some are expressly covered, for example:

- » the public service<sup>13</sup>
- » Victoria Police<sup>14</sup>
- » Councils under the *Local Government Act 1989*.<sup>15</sup>

The application of the Charter to other entities will require careful consideration in many cases. The Charter applies to entities established by statute and with functions of a public nature.<sup>16</sup>

In addition the Charter will apply to an entity undertaking functions of a public nature when exercising those powers on behalf of the State or another public authority (whether under contract or otherwise).<sup>17</sup> This provision may cover companies running prisons for the State, companies providing rail

services under contract to the State and public hospitals funded or partly funded by the State. Some educational institutions will be covered. State schools will be covered but not private schools.<sup>18</sup>

Application to Universities and TAFE colleges is less clear and will depend on funding arrangements and whether the institutional is incorporated by a State statute.

### *What are the Human Rights protected under the Charter?*

The Charter seeks to protect and promote certain Human Rights. The rights are generally of a civil and political nature. It may be that the Government will extend the protections at a future time to further economic, social and cultural rights.<sup>19</sup>

The International Covenant on Civil and Political Rights has been used as the starting point in developing the rights set out in the Charter. Useful commentary on this Covenant can be found on the website of the Office of the High Commissioner for Human Rights (<http://www.ohchr.org/english/bodies/hrc/comments.htm>).

The Human Rights are:

- » Recognition and equality before the law
- » The right to life
- » Protection from torture and cruel, inhuman or degrading treatment
- » Freedom from forced work
- » Freedom of movement
- » Privacy and reputation
- » Freedom of thought, conscience, religion and belief
- » Freedom of expression
- » Peaceful assembly and freedom of association
- » Protection of families and children
- » The right to take part in public life
- » The protection of certain cultural rights
- » The protection of property rights
- » Right to liberty and security of person
- » Humane treatment when deprived of liberty
- » The rights of children in the criminal process
- » The right to a fair hearing
- » The protection of certain rights in the criminal process

<sup>8</sup> Second Reading Speech by Attorney-General, 4 May 2006, page 2.

<sup>9</sup> Division 3 of Part 3 deals with interpretation of laws. Section 32 is a key provision dealing with relevance of Human Rights and international agreements in interpretation legislation. This is dealt with below.

<sup>10</sup> Division 4 of Part 3.

<sup>11</sup> Section 38 of the Charter.

<sup>13</sup> Section 4(1)(a) of the Charter.

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

<sup>15</sup> Section 4(1)(e) of the Charter.

<sup>16</sup> Section 4(1)(a) and (b) of the Charter.

<sup>17</sup> Section 4(1)(c) of the Charter. See also Section 4(2) which deals with the factors to take into account when determining if a body is exercising functions of a public nature.

<sup>18</sup> This is an example in the note to section 4(1)(c) of the Charter which states that private schools are not exercising functions "on behalf of the State".

<sup>19</sup> Second Reading Speech by Attorney-General, page 2.

- » The right not to be tried or punished more than once for the same crime
- » Protection from retrospective criminal laws.

Each of these rights is defined in some detail in Part 2 of the Charter. The cultural rights protected are worthy of particular mention. Persons of a particular cultural, religious, racial or linguistic background must not be denied the right to enjoy their culture, declare or practise their religion or use their language.<sup>20</sup>

Aboriginal people must not be denied the right to enjoy their identify and culture, maintain and use their language, their kinship ties and their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

#### *Preparation of new legislation*

A Member of Parliament who introduces a Bill must present a 'statement of compatibility' to the Parliament.<sup>21</sup> Failure to do so does not affect subsequent legislation.<sup>22</sup> Parliament can override the Charter but will have to do so expressly.<sup>23</sup>

#### *Will the interpretation of legislation be affected?*

Important changes are made to the interpretation of Victorian legislation. Key provisions are:

- » 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>24</sup>
- » International law and judgments of domestic, foreign and international courts and tribunals may be considered in interpreting a statutory provision.<sup>25</sup>

#### *The conduct of litigation*

Notice must be given to the Attorney-General where a question of law arises in a case before a court or tribunal relating to the application of the Charter or a Human Right. The Attorney-General may intervene in the case. A question may be referred to the Supreme Court.<sup>26</sup>

#### *Where a statutory provision is inconsistent with the Charter*

If, in the opinion of the Supreme Court, a statutory provision cannot be interpreted consistently with a Human Right, the Court may make a declaration to that effect (a declaration of incompatibility).<sup>27</sup> The declaration is then sent to the Attorney-General who in turn provides a copy to the relevant Minister.<sup>28</sup>

#### *What is the consequence if the Charter is breached?*

As stated above it will be unlawful for a public authority to act in a way which is incompatible with a Human Right or, in making a decision, fail to give proper consideration to a relevant Human Right.<sup>29</sup> There are some exceptions to this, for example, where the public authority 'could not reasonably have acted differently'.<sup>30</sup>

The Attorney-General has said that where action is 'unlawful' under the Charter, this will not be the basis of a new cause of action or of an award of damages. The government's intention is to focus on 'practical outcomes rather than monetary compensation'.<sup>31</sup>

However, where independently of the Charter, a person 'may seek any relief or remedy in respect of an act or decision of a public authority' on the ground that it was unlawful, the person may also seek relief on a ground of unlawfulness arising under the Charter.<sup>32</sup> The scope of this provision will require clarification by the courts. Examples where plaintiffs may seek to rely on the provision are:

- » A prisoner bringing an action for breach of duty of care may argue that his or her Human Rights have also been breached and seek to add that to the cause of action.
- » A person bringing an action for racial discrimination may seek to add a breach of a Human Right arising under the Charter.

Again, where a decision maker does not give proper consideration to a Human Right, this may entitle a person to have the decision set aside on the grounds of invalidity. The Court may then order that the matter be remitted to the decision maker for a further decision to be made according to law.

An applicant may also seek an injunction to restrain unlawful conduct, or proposed conduct, by a public authority.

<sup>20</sup> Section 19(1) of the Charter.

<sup>21</sup> Section 28 of the Charter.

<sup>22</sup> Section 29 of the Charter.

<sup>23</sup> Section 31 of the Charter.

<sup>24</sup> Section 32(1) of the Charter.

<sup>25</sup> Section 32(2) of the Charter.

<sup>26</sup> Section 33-35 of the Charter.

<sup>27</sup> Section 36(2) of the Charter.

<sup>28</sup> Section 36(6) and (7) of the Charter.

<sup>29</sup> Section 38(1) of the Charter.

<sup>30</sup> Section 38(2) of the Charter.

<sup>31</sup> Section 39(3) of the Charter, see also the Second Reading Speech by Attorney-General, page 8.

<sup>32</sup> Section 39(1) of the Charter.

## What are the implications?

It will be important for legal reasons and to protect the reputation of an organisation to comply with the Charter. Some general suggestions are:

- » Clients should ascertain if they are 'public authorities'.
- » Even if they are not public authorities, they should consider if Victorian legislation applies to their operations and if so, whether the interpretation of that legislation will be affected by the Charter.
- » If an organisation's rights or obligations are likely to be affected, they should of course ensure compliance with the Charter. This may require a review of present procedures and also educating staff who make decisions as to the requirements of the Charter.
- » Clients may wish to consider if Corporate Responsibility Programs and other Corporate

statements should be amended in light of the Charter.

- » Where government clients have contracted out functions to private operators, they should review their contracts and determine if the private operators will in turn be 'public authorities' under the Charter which must comply with the Charter.
- » Private clients should consider if they are 'public authorities' under the Charter, and if so, review their operations.
- » Lawyers advising clients should become familiar with the Charter and relevant international law and agreements.
- » Clients should instruct their lawyers regarding the need to comply with the Charter, for example, the need for notice to the Attorney-General where an issue arises under the Charter.



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