

# Charter of Human Rights Newsletter

January 2007  
Issue 1

*Welcome to our first Charter of Human Rights newsletter.*

*This newsletter is published in consultation with the Human Rights Unit of the Department of Justice.*

*We have put in place a Human Rights Practice Group convened by Ms Ullly Merkel, who is currently seconded to the DOJ Human Rights Unit.*

## Obligations commencing 1 January 2007

The *Charter of Human Rights and Responsibilities Act 2006* came into operation on 1 January 2007 (except Divisions 3 and 4 of Part 3). Pursuant to s 28, new legislation when introduced into Parliament needs to be accompanied by a 'statement of compatibility' prepared by the relevant Minister that identifies any impacts on human rights. New regulations need a 'human rights certificate', unless exempted (see s 12A of the *Subordinate Legislation Act 1994*).

- The new Charter of Human Rights commenced in January 2007.
- To help you navigate the new Act, VGSO will be providing a series of Human Rights Charter newsletters.
- Together with the Human Rights Unit of the Department of Justice, we will identify what we believe to be the most relevant implementation issues and provide you with simple and informative material to help you address these.
- This first newsletter covers the question of 'What is a Public Authority?'
- If you have any questions please contact Ms Ullly Merkel.

## Training

The DOJ Human Rights Unit has been running training sessions for legislation and legal policy officers. Further training will continue in 2007.

## Future Obligations

Divisions 3 and 4 of Part 3 will not commence until 1 January 2008. Division 3 relates to the interpretation of laws. If possible all statutory provisions must be interpreted in a way that is compatible with human rights. Division 4 ensures that public authorities will be bound to comply with the Charter when making decisions or developing new legislation.

## Ombudsman Powers

Whilst the obligations on public authorities do not commence until 1 January 2008, an amendment to the *Ombudsman Act 1973* came into operation on 1 January 2007. This amendment allows the Ombudsman to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter.

## Public Authorities

Public authorities will need to check their policies and procedures comply with the Charter in advance of the commencement of their main Charter obligations as set out in Division 4 of Part 3 on 1 January 2008. The first step is to ascertain whether a person or body is covered by the Charter's definition of a public authority.

## What is a Public Authority?

Public authority is defined pursuant to s 4 of the Act. Section 4 is as follows:

(1) *For the purposes of this Charter a public authority is –*

- (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*
  - (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 this Charter –*
- but does not include –*
- (i) *Parliament or a person exercising functions in connection with proceedings in Parliament; or*
  - (j) *a court or tribunal except when it is acting in an administrative capacity; or*
  - (k) *an entity declared by the regulations not to be a public authority for the purposes of this Charter.*

- (2) *In determining if a function is of a public nature the factors that may be taken into account include –*
- (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 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.*
- (3) *To avoid doubt –*
- (a) *the factors listed in sub-section (2) are not exhaustive of the factors that may be taken into account in determining if a function is of a public nature; and*
  - (b) *the fact that one or more of the factors in sub-section (2) are present in relation to a function does not necessarily result in the function being of a public nature.*
- (4) *For the purposes of sub-section (1)(c), an entity may be acting on behalf of the State or a public authority even if there is no agency relationship between the entity and the State or public authority.*
- (5) *For the purposes of sub-section (1)(c), 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.*

Whether a person or other entity is a ‘public authority’ under the Charter will sometimes be a difficult legal and factual question. Regulations may be made to resolve the issue for certain bodies. Some public authorities are bound by the Charter in relation to all their activities because they are a part of the structure of government. These public authorities are identified in s 4(1)(a), (b), (d)-(g). They are bound in relation to all their activities because all their functions will be of a public nature. In contrast, some public authorities are bound by the Charter only when they are exercising certain functions, being functions of a public nature carried out on behalf of the State or, in turn, on behalf of another public authority. These public authorities are identified in s 4(1)(c). They may be private individuals or bodies and they are only bound by the Charter when and because they exercise public activities.

## Public Authority Checklist

Here is a checklist on what is a ‘public authority’?

1. Does the entity fit the description of ‘public authority’ under s 4(1)(a), (b), (d)-(g)? If it fits the description it is captured by the Charter and obliged to act compatibly with human rights.
2. If no, does the entity have functions of a public nature (perhaps amongst other functions)? In answering this question one must consider the matters listed in s 4(2). If the answer

- is yes, that is, the entity has functions of a public nature, then the question is 'Is the entity a statutory body established by a statutory provision'?
3. If the answer to that question is yes, that is, the entity has functions of a public nature and is a statutory body, then it is a public authority and obliged to act compatibly with human rights. However, if the entity has functions of a public nature but is not a statutory body then a further question is whether the entity is exercising those functions on behalf of the State or a public authority.
  4. If the answer to that question is yes, that is, the entity is exercising functions of a public nature on behalf of the State or a public authority, then it is a public authority and is obliged to act compatibly with human rights when it is exercising those functions on behalf of the State or a public authority.
  5. If the answer is no, that is, the entity does have functions of a public nature but is not exercising them on behalf of the State or a public authority, then it is not a public authority for the purposes of the Charter.

#### Quick links

Human Rights Law Resource Centre

<http://www.hrlrc.org.au/>

The Australian National University

<http://acthra.anu.edu.au/>

Interights

<http://www.interights.org/>

UN Human Rights Treaties

<http://www.bayefsky.com/>

VGSO Seminar Papers

Human Rights Parts 1 and 2

<http://www.vgso.vic.gov.au/seminar.htm>

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Whether a person or entity is a public authority is sometimes a difficult legal and factual question. If you require any assistance please do not hesitate to contact Uily Merkel on 8684 0497, James Ruddle, Deputy Victorian Government Solicitor on 8684 0470 or John Cain, Victorian Government Solicitor on 8684 0400.

John Cain  
Victorian Government Solicitor