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# Impacts and Implications of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*

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# Purpose and Overview

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- Founded on principle that ‘human rights are essential in a democratic and inclusive society that respects the **rule of law, human dignity, equality and freedom**’
    - Cf Conor Gearty, *Principles of Human Rights Adjudication* (2004): UK HRA raised in between 20-50% of superior court cases but generally only *engaged* in cases which raise principles of **civil liberty, legality and human dignity**
  - Aims to ‘protect and promote human rights’ by ensuring they inform decision-making processes across all levels and arms of government
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# Dialogical Mechanisms

- Establishes 8 mechanisms to institutionalise human rights ‘dialogue’:
    - ❑ Statement of Compatibility
    - ❑ SARC
    - ❑ Obligations of public authorities
    - ❑ Statutory interpretation
    - ❑ Use and relevance of human rights jurisprudence
    - ❑ Declarations of Inconsistent Interpretation
    - ❑ Response to Declarations
    - ❑ VEOHRC
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# Human Rights in the Charter



- 'Modelled' on *ICCPR* rights:

**F** reedom: movement, assembly & association, forced work, expression, thought & religion, liberty & security, **fair hearing**

**R** espect: **life**, protection of families and children, cultural rights, property

**E** quality: **non-discrimination**, equal recognition, participation

**D** ignity: **torture & cruel treatment**, humane treatment in detention, **privacy & reputation**

# Interpreting Rights in the Charter



- Must be interpreted and applied so as to make them ‘real and effective’, not ‘theoretical and illusory’
    - Eg, right to fair hearing subsumes right of access to courts: *Kijewska v Poland* [2007] ECHR 73002/01
  
  - May impose both positive and negative obligations
    - Eg, right to life may require steps to protect life: *Savage v South Essex Partnership NHS Foundation Trust* [2007] EWCA Civ 1375
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# Interpreting Rights in the Charter (2)



## ■ Charter is a 'living tree'

- Eg, corporal punishment now amounts to cruel treatment:  
*Tyrer v United Kingdom* (1978) 2 EHRR 1

## ■ Meaning of 'arbitrary' and 'lawful'

- 'Arbitrary' – incorporates consideration of proportionality, inappropriateness and injustice:  
*A v Australia*, HRC, Communication No 560/1993; *Van Alphen v The Netherlands*, HRC, Communication No 305/1988
- 'Lawful' – requires that the law be 'discernable', 'adequately accessible' and 'sufficiently foreseeable':  
*R (on the application of Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12

# Limitations on Human Rights



- Rights may be subject to limitations that are:
    - Reasonable
    - Demonstrably justified
    - Consistent with free and democratic society
    - Take into account all relevant factors
      - Nature of right (**status under int'l law?**)
      - Purpose of limitation (**legitimate aim**)
      - Nature and extent of limitation (**proportionality**)
      - Relationship between limitation and purpose (**adapted**)
      - Any less restrictive means (**minimal impairment**): s 7(2)
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# The Charter and Parliament



- Development and scrutiny of legislation
    - Statements of Compatibility (s 28)
      - Whether and how legislation is compatible
    - Scrutiny of Acts and Regs Committee (s 30)
      - Must consider any Bill and report as to compatibility
  - Override declarations (s 31)
    - *Charter* does not apply
    - Only in 'exceptional circumstances' and for 5 years
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# The Charter and 'Public Authorities'



- What is a 'public authority'? (s 4)
    - 'Core' public authorities (s 4(1))
    - 'Functional' public authorities (s 4(2)): see *YL v Birmingham City Council & Ors* [2007] UKHL 27
  
  - Obligations of public authorities (s 38)
    - Must give 'proper consideration' to human rights in decision-making processes
      - Real, genuine and proportionate consideration
    - Must act compatibly with human rights
      - Act includes failure to act
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# The Charter and Courts

- All legislation, so far as possible consistent with statutory purpose, must be interpreted compatibly with human rights (s 32(1))
    - New, overarching principle of statutory interpretation: see, *Ghaidan v Goden-Mendoza* [2004] AC 557
      - May displace previous case law and interpretations
      - No requirement of ambiguity or presumptive incompatibility
      - Ordinary meaning of words may be displaced
      - May permit 'reading in' or 'reading down' provision
    - Does not affect validity of legislation (s 32(3)(a)) but may affect validity of subordinate legislation where incompatibility is not 'empowered' by principal Act (s 32(3)(b))
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# The Charter and Courts

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- Relevance of international and comparative human rights law and jurisprudence (s 32(2))
    - Eg, Human Rights Committee, ECtHR, Canada, NZ, UK
  - Declarations of Inconsistent Interpretation (s 36)
    - Remedy of last resort where human rights compatible interpretation not possible
    - Made by Supreme Court or Court of Appeal
    - Does not affect validity of legislation
    - Responsible Minister must table Declaration and response within 6 months (s 37)
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# The Charter and the Private Sector



- Direct impact

- Private companies performing functions of a public nature may have procedural and substantive obligations of public authorities (s 38)
- Contracts with public authorities may include human rights obligations

- Indirect impacts

- Nature and scope of statutory duties, if any, and legislative framework for operations (eg, *Planning and Environment Act, Health Act*) may be reinterpreted to ensure compatibility (s 32(1))



# Legal Proceedings – Remedies



- No new or freestanding cause of action (s 39(1))
  - No right to damages (s 39(3))
  - If there is a pre-existing right to remedy or relief for unlawful conduct, then person may also seek that relief or remedy for unlawfulness under the Charter (s 39(1))
  - Existing rights, remedies and causes of action unaffected (s 39(4))
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# Legal Proceedings – Judicial Review



- Judicial review available for ‘failure to give proper consideration to a relevant human right’ (ss 38 and 39(2))
    - Requires real, genuine and proportionate consideration (ie, s 7(2) limitations analysis)
      - The doctrine...may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions...It may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations: *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532
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# UK Lessons: Impact Areas

- Judicial review patterns under UK HRA (descending order by volume in post-permission cases):

<b>Case Category</b>	<b>% Cases raising HRA</b>
Immigration / asylum	45
Housing / homelessness	32
Prison	55
Education	22
Disciplinary proceedings	20
Mental health	100

- Source: Public Law Project, *The Impact of the Human Rights Act on Judicial Review* (2003)

- Use of articles in post-permission cases citing UK HRA (inc homelessness, education, prisons, mental health, police, community care)
    - Art 8 (right to respect for privacy and family life) – 46 %
    - Art 6 (right to a fair hearing) – 44 %
    - Art 5 (right to liberty and security of person) – 23 %
    - Art 14 (prohibition on discrimination) – 14 %
    - Art 3 (freedom from torture and cruel treatment) – 13 %
    - Art 2 (right to life) – 10 %
  
  - Source: Public Law Project, *The Impact of the Human Rights Act on Judicial Review* (2003)
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# UK Lessons: Litigation

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- No discernable increase in volume, costs or length of litigation
  - Considered in 35% of House of Lords Cases and ‘substantially affected result’ in about 10%
  - Cases reached a ‘peak’ in 2001-02 and are now about 1/2 that
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## UK Lessons: Litigation (2)

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- HRA appears to have focused and stimulated NGO and CLC litigation activity, esp as TPIs
  - Reference to HRA by practitioners and judges often cursory and unsophisticated, reflecting need for more extensive and effective legal professional and judicial education
  - Enhanced dialogue between UK and other human rights courts
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# UK Lessons: Policy and Service Delivery



- Human rights are common sense and can improve lives
- Improved legislative and executive transparency and accountability
- Improved framework for design and delivery of public services. Awareness-raising, education and capacity building around human rights can empower people and result in:
  - Better public service outcomes
  - Improved levels of consumer satisfaction
  - More flexible, individualised and responsive policies and practices
- Core principles of FREDA can trigger new thinking and help decision-makers ‘see seemingly intractable problems in a new light’

# Key Resources



- [www.hrlrc.org.au](http://www.hrlrc.org.au)
    - Guide to the Charter
    - Searchable Database of Charter Case Law
    - Articles, Materials and Commentary
    - Monthly E-Bulletin
  
  - [www.justice.vic.gov.au](http://www.justice.vic.gov.au)
  
  - Evans & Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT HRA* (LexisNexis, 2008)
  
  - Pound & Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Thomson, 2008)
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