

**THE CHARTER OF HUMAN RIGHTS-
VICTORIA JOINS THE WORLD**

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A seminar presented by Counsel of Gordon & Jackson's List

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**HUMAN DIGNITY, EQUALITY and FREEDOM,
THE NEW TOUCHSTONE IN DECISION-MAKING**

Anne Sheehan

Gordon and Jackson seminar

3 April 2008

HUMAN DIGNITY, EQUALITY and FREEDOM, THE NEW TOUCHSTONE IN DECISION-MAKING

The *Charter of Human Rights and Responsibilities Act 2006* (“the Charter”), sees Victoria join, Canada, UK, New Zealand, South Africa and the European community in mandating for the recognition of human rights in a contemporary legislative form.

Whilst Australia has ratified international covenants and enacted equal opportunity legislation, the absence of an overarching human rights legal instrument has left those rights open to be overridden, and has left the jurisprudence in Australia with respect to human rights underdeveloped. The ACT led the way with the *Human Rights Act 2004*, Tasmania and Western Australia are in consultation and if the Federal parliament proceeds with a similar instrument, consideration of human rights issues will be a daily occurrence in all Courts with respect to all legislation.

This paper is intended to be of practical assistance to practitioners in relation to civil matters, whether they are advising public authorities, within the extended meaning of that definition, or whether they are advocating for persons affected by the decisions of those public authorities. The central message is that human rights must be considered in all decision-making, not as an after-thought, but as a critical issue—does this decision reflect human dignity, equality and freedom? The jurisprudence of human rights is difficult; the concepts of proportionality, interpretation obligations that promote both human rights and the intention of parliament, remedies which require legal inventiveness are all challenges that practitioners face when dealing with the Charter. Those challenges should not overshadow the position that because of the Charter no decision maker can ignore human rights in dealing with Victorian statutory provisions.

Three Essential References

The Human Rights Law Resource Centre is an invaluable source of information on the Charter. Its website includes a case-law search facility on all sections of the Charter, a handbook on the Charter, and regular bulletins and casenotes:

http://www.hrlrc.org.au/html/s01_home/home.asp

Australian Bills of Rights by Carolyn Evans and Simon Evans (LexisNexis Butterworths 2008) examines in tandem the Charter and the ACT Human Rights Act, and provides a comprehensive section on international law and comparative law. It summarises in Tables the Human Rights Treaties ratified by Australia, and United Nations Declarations on Human Rights.

An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities by Alistair Pound and Kylie Evans (Thomson Lawbook 2008), includes a chapter by Professor George Williams on the development of the Charter, and as its name indicates provides notes on each section of the Charter. Amongst the handy references as a Table of Comparable International Human Rights Law Provisions (the Charter is not identical to any other Human Rights instrument, and reference via section to other instruments is essential), the Second Reading Speech and the Regulations that have been proclaimed to date.

Three Sections of the Charter

The Human Rights requirement in Statutory Interpretation

32. Interpretation

(1) 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.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

(3) This section does not affect the validity of-

(a) an Act or provision of an Act that is incompatible

with a human right; or

(b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

The change to the rules of statutory interpretation is fundamental. It applies to all statutory provisions, and it requires that those provisions must be interpreted in a way that is compatible with human rights. It does not require ambiguity in the statutory provision for human rights to be considered. There is a "purpose test", that is the human rights compatible interpretation can only go so far as it is possible to do so consistently with the statute's purpose, and the validity of an Act is not affected. The promotion of human rights by making it the starting point of all statutory interpretation exercises incorporates human rights into everything.

Section 7. Human rights-what they are and when they may be limited

(1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

All human rights under the Charter are subject to the s 7 limitations. The principle of proportionality as expressed in s 7(2) is modelled on Canadian Charter s 1, New Zealand Bill of Rights Act 1990, s 5 and the South African *Bill of Rights* s 36 with the list of relevant factors in s 7(2) (a)-(e) being derived from South African s 36. The principle of proportionality has been incorporated into the UK although it is not expressly stated in the Human Right Act. The intensity of review has been described as not a shift to a merits

review, but is distinct from traditional grounds of review, *R (Daly) v Home Secretary* [2001] 2 AC 532 per Lord Steyn at [27]-[28].

The Human Rights obligations on public authorities

38. Conduct of public authorities

(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

(2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

Example Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.

(3) This section does not apply to an act or decision of a private nature.

(4) Subsection (1) does not require a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.

(5) In this section religious body means-

- (a) a body established for a religious purpose; or
- (b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

Unlawfulness being the consequence of a public authority acting in a way incompatible with a human right comes from the UK Human Rights Act, s 6(1). In addition it is also unlawful when making a decision not to give proper consideration to a relevant human right. The new norm of conduct for public authorities assumes an awareness of human rights in all contexts.

Two other fundamental changes which are not discussed in this paper are that Parliament must prepare a statement of compatibility with respect to new legislation¹ and the Supreme Court can make a declaration that a statutory provision cannot be interpreted consistently with a human right².

Two Cases

The two cases discussed are chosen to illustrate principle and practical application. The jurisprudence is difficult as any intersection of rights, policy and power inevitably will be. The outcomes that have been achieved in international jurisprudence have in some cases lead to significant changes to statutory provisions whilst maintaining the legal sovereignty of Parliament. It is a balancing act like no other.

***Ghaidan v Godin-Mendoza* [2004] UKHL 30**

Mr Godin-Mendoza, after the death of his partner with whom he had been living in a stable and monogamous homosexual relationship, was the Defendant in an action for possession of the flat brought by the landlord Mr Ghaidan. At first instance in the West London County Court, Mr Godin-Mendoza did not succeed to the tenancy of the flat as the surviving spouse, he succeeded in the Court of Appeal, and Mr Ghaidan appealed to the House of Lords.

¹ s 28

² s 36

On the death of a protected tenant his or her surviving spouse if then living in the house becomes a statutory tenant by succession. In 2001 the House of Lords found that the expression "as his or her wife or husband" did not include persons in a same-sex relationship. In 2004 the House of Lords revisited the question as a consequence of the *Human Rights Act 1998*.

The separate judgements of the House of Lords are frequently quoted with respect to the interpretative principle and proportionality. There have also become seminal in considering discrimination per se, and in effect the rationale of the protection of human rights.

"Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced" Per Lord Nicholls at [9].

" The state's duty under article 14 to secure that those rights and freedoms are enjoyed without discrimination based on such suspect grounds, is fundamental to the scheme of the Convention as a whole. It would be a poor human rights instrument indeed if it obliged the state to respect the homes or private lives of one group of people but not the homes or private lives of another.

Such a guarantee of equal treatment is also essential to democracy. Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. The essence of the Convention...is respect for human dignity and human freedom...it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not." per Baroness Hale of Richmond at [131]-[132].

As to the extent of the interpretative principle:

It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning..

From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.

s 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting s 3 was that, to an extent bounded only by what is 'possible' a court can modify the meaning, and hence the effect, of primary and secondary legislation. Parliament cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve...words implied must "go with the grain of the legislation"

The Rent Act is unambiguous. But the social policy underlying the 1988 extension of security of tenure to the survivor of couple living together as husband and wife is equally applicable to the survivor of homosexual couples. Per Lord Nicholls of Birkenhead at [29]-[35]

"What excludes such provisions from the scope of section 3(1) is not any mere matter of the linguistic form in which Parliament has chosen to express the obligation. Rather, they are excluded because the entire substance of the provision, what it requires the public authority to do, is incompatible with the Convention. The only cure is to change the provision and that is a matter for Parliament and not for the courts: they, like everyone else, are bound by the provision. So from section 6(2) (a) and (b) one can tell that, however powerful the obligation in section 3(1), it does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen. And, of course, in considering what constitutes the substance of the provision or provisions under consideration, it is necessary to have regard to their place in the overall scheme of the legislation as enacted by Parliament". Per Lord Rodger of Earlsferry at [110].

It is noteworthy that this was litigation between 2 private individuals, a landlord and tenant. No public authority was involved. It was the interpretative obligation that brought human rights into play, the "horizontal effect". As the Charter only includes individuals, not corporations, the horizontal effect of the interpretative principle will have wide ranging application.

***Morrow v Zhang* 2008 ABQB 98**

This decision is worthy of discussion because it illustrates the detailed step-by-step approach required at first instance. Much expert evidence was given and the judgement sets out in detail both that evidence and the balancing exercises engaged in throughout the analysis. It is notable that despite being unsuccessful on the grounds of the physical or

psychological integrity of the Plaintiffs as an aspect of their right to life, the Plaintiffs were successful in establishing that the scheme demeaned them, by comparison to others injured in motor vehicle accidents, that is the Canadian Charter s 15 discussion relates directly to the Charter s 8(2), "Every person has the right to enjoy his or her human rights without discrimination", however the definition of "discrimination" in Canada is not restricted as it is in Victoria. Having found a breach of Human Rights the *Oakes*³ test was then applied and the regulation could not be justified. The *Oakes* test is broadly the criteria in the Charter s7 (2).

It is a decision of Court of Queen's Bench of Alberta, Canada, Associate Chief Justice Wittmann. Two Plaintiffs injured in separate motor vehicle accident challenged the constitutionality of the *Minor Injury Regulation* which imposes a \$4,000 cap on non-pecuniary damages with respect to "Minor Injuries". It also imposes a medical care model, an election with respect to which must be made within 10 days of the accident. CJ Wittmann first assessed the damages the Plaintiffs would have been awarded in the absence of the cap. He assessed Ms Morrow at \$20,000 and Ms Pedersen at \$15,000. .

1. The decision with respect to s 7 of the Canadian Charter.

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

Held: The \$4,000 cap cannot in isolation lead to a restriction of the physical or psychological integrity of the Plaintiffs. S 7 does not protect purely economic interests. The sole fact that a right will lead to a damage award which will not cover or only partly cover legal representation is certainly not sufficient to conclude that there was a denial of access to justice.

2. The decision with respect to s 15 of the Canadian Charter.

The appropriate comparator group is accident victims who suffer injuries other than Minor Injuries.

[205] "The evidence before me suggests strongly that Minor Injury victims, particularly those suffering from a whiplash associated disorder, are subjected to stereotyping and prejudice. In sum, they are often viewed as malingerers who exaggerate their injuries or their effects in an effort to gain financially."...[217] I agree

³ R v Oakes [1986] 1 SCR 103 at 138-140

that there is no evidence suggesting that the Crown was intentionally acting in furtherance of the stereotype. It is relevant to the inquiry of whether a reasonable person in the claimant's position would conclude that the distinction harmed his or her dignity, but it is not determinative.

[222] citing Gosselin " A law that is closely tailored to the reality of the affected group is unlikely to discriminate within the meaning of s 15 (1). By contrast, a law that imposes restriction or denies benefits on account of presumed or unjustly attributed characteristics is likely to deny essential human worth and to be discriminatory. Both purpose and effect are relevant here, insofar as they would affect the perception of a reasonable person in the claimant's position."

[225] Legislation that prevents Minor Injury victims from obtaining a fair assessment of adequate non-pecuniary damages cannot be said to correspond with their needs. In fact, the MIR is more likely to frustrate the needs of the claimant group in its efforts to obtain appropriate solace and a reasonable substitute for lost amenities, and thereby make their lives more bearable, that it is to satisfy those needs or circumstances."

[232] " In my view, the Minor Injury regulation sacrifices the dignity of Minor Injury victims at the altar of reducing insurance premiums. Specifically, the message is that their pain is not as worthy of conventional non-pecuniary damages because of the nature of their injuries, despite that their injuries may be more painful and enduring than other types of injuries."

[257] In my view, a reasonable person in the circumstances of the claimant group, would conclude that the distinction created by the cap is demeaning to the dignity of those in the claimant group. Specifically, the reduced recognition that these individuals receive for their pain and suffering would not be overcome by the awareness of benefits provided under the Other Regulations."

Conclusion

[266] "having assessed the cap against the four contextual factors set out in Law, I am of the view that a reasonable and dispassionate person, fully apprised of all of the circumstances and possessed of similar attributes as the claimant would conclude that the MIR is demeaning to the dignity of that group and would make them feel less worthy as human beings, or less worthy of full participation or protection in Canadian society. The cap represents more than a simple disappointment...It is demeaning to them because it suggests that their pain is worth less than that of other injury sufferers, in particular member of the comparator group."

Is the breach of Human Rights reasonable and demonstrably justified?

Section 1 "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Applying the *Oakes* test:

1. Is the objective of the legislation pressing and substantial?
2. Is there a rational connection between the government's legislation and its objective?
3. Does the legislation minimally impair the Charter's rights or the freedom at stake?
4. Is the deleterious effect of the Charter breach outweighed by the salutary effect of the legislation?

The burden of proof is on the Crown in relation to each branch of the s 1 analysis. Re 1 found that it was reasonable for the Crown to perceive that an insurance crisis existed or was imminent and that mandatory automobile insurance was becoming inaccessible to many Albertans at the time that the Insurance Reforms were implemented. Re 2 found that the cap is rationally connected to the objective of reducing insurance premiums, but that it "plainly overshoots the mark". Not necessary to find re 3 as 2 not satisfied, but finds that the deleterious effect of furthering a prejudice against a defined group on the basis of a disability and burdening that group with the lion's share of reducing mandatory insurance premiums, outweighs the reduced premiums that have resulted for Alberta drivers

Conclusion: Allowed the constitutional challenge and order that the Minor Injury Regulation be struck down.

Practical approaches to use of the Charter

The Charter promotes human rights by requiring universal changes of thinking and methodology. The ambit of the Charter is day-to-day decisions based upon statutory provisions. The challenge is to look afresh at all statutory provisions and ask, does this affect human rights? The scope for enforcement of human rights goes beyond what have been the traditional approaches under the Equal Opportunity Act. Further the potential of human rights application includes matters not previously considered in Victoria including:

- property rights, s 20 (see *Beaulane Properties Ltd. v Palmer* [2005] EWHC 817 (Ch) (23 March 2005 re impact upon adverse possession),
- the right to life, s 9 (see *Re J* [1996] 2 NZLR 134, re guardianship of a child whose parents, on the basis of their religious beliefs refused a blood transfusion for her,

- protection of families and children and their privacy, s 13 and 17, (see also *DPP v TY* (No 3) [2007] VSC 489 (28 November 2007) for a discussion on the impact of the Convention on the Rights of the Child on Victorian law),
- cultural rights, s19 (see *Mahuika v New Zealand* (Communication No 547/1993) which involved the commercial and non-commercial fishing rights of Maori peoples and the position of dissident Maoris to an agreement reached with majority Maori support).

For practitioners advising people who believe that their human rights have been affected there are potentially a myriad of ways to pursue the protection of those rights. The absence of a stand alone right to damages, s 39(3), and the constraints based upon the declaration of inconsistent interpretation, s 36, mean that practitioners need to be resourceful, innovative and imaginative in protecting their clients interests.

Some suggested approaches

First base: When a public authority makes a decision under a statutory provision, the first question is whether they gave proper consideration to a relevant human to a relevant human right. Asking for reasons for decision will clarify whether such consideration has been given. That may well require submissions to the public authority with respect to the relevant human right and how a decision can be properly reached which is compatible with a human right. Most statutory provisions give the decision maker discretions, advocacy as to the appropriate approach to human rights may well result in a change of decision. Remember this is a “fresh” look at the interpretation of the statutory provision and a focus upon human rights backed by relevant international jurisprudence may lead to a different interpretation.

Second base. When a public authority acts in a way incompatible with a human right is the best option a complaint under the Equal Opportunity Act or an administrative law remedy? Amongst the numerous matters that must be considered are: whether there is a major evidentiary dispute as to whether human rights are involved, delay, costs and damages. One of the substantial difficulties of the VCAT anti-discrimination jurisdiction is that

awards of damages are low and legal costs very high, even when awards of damages are made a successful Applicant is unlikely to enjoy the fruits of their victory after payment of costs. In some circumstances seeking an administrative law remedy, either with or without a claim for damages, may be more cost effective. It is ironic that the Charter promotes Human Rights in the Courts in particular with respect to the rule of law and legal process rights yet provides no economic mechanism to protect Human Rights. Amendments to the ACT Human Rights Act, which come into effect on 1 January 2009, provide a stand-alone right to take action in the Supreme Court in addition to other common law rights currently available.

It is only the use of the Charter as a matter of course in all decision-making and statutory interpretation that the principle that our society respects the rule of law, human dignity, equality and freedom will be fulfilled.

Anne Sheehan, Barrister

**OBSERVATIONS ON THE VICTORIAN
CHARTER OF RIGHTS AND
RESPONSIBILITIES IN PRACTICE**

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Observations on the Victorian Charter of Rights and Responsibilities

Rudi Cohrssen¹

*"The common law system, supplemented as it presently is by statutes designed to protect particular rights, does not protect fundamental rights as comprehensively as do constitutional guarantees and conventions on human rights. ... The common law is not as invincible a safeguard against violations of fundamental rights as it was once thought to be."*²

Introduction

The Victorian Charter of Rights marks a decisive departure, at least in Victoria, from the long-held notion that the best protection for human rights is the good sense of our parliamentary representatives as constrained by the doctrine of responsible government, and the common law as applied by the judiciary.³ Many of the human rights contained in the Charter are, in substance, not new to our law. The focus of the Charter does not lie in the enforcement of human rights by the courts. Instead, the main aim of the Charter is preventative: it requires human rights contained in the Charter to be demonstrably taken into account in the *development* of law and policy by parliament and by government generally. The aim is to prevent disputes from arising, rather than focusing on the enforcement powers of the courts (which form the focus of this paper).

The value of any rights-based instrument is measured by its efficacy in practice, which in turn, is shaped by the conduct of decision makers and the decisions of the courts concerning such conduct. In advising and representing clients, the legal profession plays a pivotal role in shaping the effectiveness of the Charter.

The purpose of this paper is to propose a basic approach in dealing with Charter of Rights advice. Although the purpose may seem ambitious, given the limited scope of this paper, I hope that it will at least provide some food for thought.

¹ Barrister, Victorian Bar.

² Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 12.

³ George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' [2006] *Melbourne University Law Review* 27, 28.

Distilled to its essence, the conventional approach in Charter cases includes at least the consideration of the following factors: application (whether the legal relationship in question is of a kind subject to potential relief in terms of the Charter); interpretation (assuming the Charter applies to the legal relationship, a court must decide whether the Charter right has been infringed); and limitation (assuming the Charter right has been infringed, the court must decide whether the right may be limited by operation of the limitations clause). The provisions of the Charter determine the further content of inquiry in each stage of the analysis. This paper will focus on the first consideration, as the other two considerations have been dealt with in the paper of my colleague, Anne Sheehan.

Scope of the Charter: Application

As a starting point, it is important to understand the position which the Charter occupies in Victorian law. The Charter is not a fully fledged Bill of Rights embodied in the Constitution of Victoria, giving legal supremacy to its constituent rights and in terms of which the courts have extensive powers of enforcement. The objectives of the Charter are more humble, as is evidenced by its deference to the sovereign role of Parliament in Victoria and the limited forms of relief which may be sought by an aggrieved person in the courts of Victoria.⁴

The Charter is generally intended to operate vertically (as between the individual and the State), as opposed to horizontally (as between private individuals). There are no express provisions of the Charter rendering it applicable to disputes between private parties. There is, however, scope for a limited horizontal application: the requirement in section 32 of the Charter that all statutory provisions be interpreted, as far as possible, consistently with human rights would extend to those statutes affecting Charter rights which are applicable to disputes between private individuals. A similar position has been taken by the courts in New Zealand and the United Kingdom.⁵

Part 3 of the Charter (Application of Human Rights in Victoria) articulates the manner in which the Charter is intended to protect human rights in Victoria. In order to render effective advice on the application of the Charter to a dispute or potential dispute, it is important to have an appreciation of when the Charter barks, and when it may bite. The Charter may be enforced as follows:

1. Statements of compatibility. Section 28 (Part 1, Division 3) requires a Member of Parliament introducing a Bill to have prepared a statement of

⁴ Part 3, Divisions 3 and 4 of the Charter.

⁵ See, for example, A. Butler, P. Butler; *The New Zealand Bill of Rights Act – A Commentary*; (2005) at [5.8.16]; *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816.

compatibility stating the reasons for compatibility or incompatibility. Statements of compatibility are not binding on any court or tribunal⁶, nor does the failure to comply with section 28 affect the validity, operation or enforcement of that Act or any other law.⁷ If a Bill or an Act is incompatible with human rights, Parliament may make an 'override declaration'⁸, in which event the Charter ceases to apply to those overridden parts of the Act for a period of five years.⁹ Because the Charter no longer applies in these circumstances, the Supreme Court does not have the power to make a declaration of inconsistent interpretation in terms of section 36.

2. Interpretation of legislation. There is no freestanding right to seek a declaration of inconsistent interpretation in the Supreme Court¹⁰ – the referral must be made or applied for in the context of an existing matter where relief is sought on non-Charter grounds. Section 32(1) requires all Victorian statutory provisions to be interpreted in a way that is compatible with human rights. If a compatibility issue arises before any court or tribunal, or if there is a dispute concerning the application of the Charter, the issue may be referred to the Supreme Court (or to the Court of Appeal if the issue is raised in the Trial Division of the Supreme Court¹¹) upon application by one of the parties to the matter, and if the court or tribunal

⁶ Section 28(4).

⁷ Section 29.

⁸ Section 31.

Override by Parliament

- (1) Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.
- (2) If an override declaration is made in respect of an Act or a provision of an Act that declaration must be taken to extend to any subordinate instrument made under or for the purpose of that Act or provision.

⁹ Section 31(7)A provision of an Act containing an override declaration expires on the 5th anniversary of the day on which that provision comes into operation or on such earlier date as may be specified in that Act.

- (8) Parliament may, at any time, re-enact an override declaration, and the provisions of this section apply to any re-enacted declaration.

¹⁰ Section 36(1).

¹¹ Section 33(3).

considers that the question is appropriate for determination by the Supreme Court.¹² Although the determination of the Charter issue is then stayed in the referring court¹³, a declaration of inconsistent interpretation will in any event have no discernible impact on the outcome of the case.¹⁴ A declaration of inconsistent interpretation by the Supreme Court culminates in a political response, as provided for in section 36(7) and 37. It is for this reason that it may be argued that the power to make a declaration of inconsistent interpretation is not a judicial power.¹⁵ In most matters, a careful assessment should be made to determine whether it is worth seeking declarations of inconsistent interpretation.

3. Obligations on public authorities. The 'teeth' of the Charter are found in sections 38 (unlawful conduct by public authorities) and 39 (legal proceedings and remedies). The first issues to determine relate to the parties. In terms of section 6¹⁶, read with the definition of 'person' in

¹² Section 33(1)

¹³ Section 33(2) If a question has been referred to the Supreme Court under subsection (1), the court or tribunal referring the question must not—

- (a) make a determination to which the question is relevant while the referral is pending; or
- (b) proceed in a manner or make a determination that is inconsistent with the opinion of the Supreme Court on the question.

¹⁴ Section 36(5) A declaration of inconsistent interpretation does not—

- (a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or
- (b) create in any person any legal right or give rise to any civil cause of action.

¹⁵ Alistair Pound, Kylie Evans; An annotated guide to the Victorian Charter of Rights and Responsibilities; (2008), 238-239.

¹⁶ Section 6 **Application**

- (1) Only persons have human rights. All persons have the human rights set out in Part 2.

Note

Corporations do not have human rights.

- (2) This Charter applies to—
 - (a) the Parliament, to the extent that the Parliament has functions under Divisions 1 and 2 of Part 3; and
 - (b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3; and
 - (c) public authorities, to the extent that they have functions under Division 4 of Part 3.
- (3) Subsection (2) does not take away from or limit—
 - (a) any other function conferred by this Charter on an entity specified in subsection (2); or

section 3, only human beings have rights. Further, the act sought to be impugned must be that of a 'public authority', which term is extensively defined in section 4¹⁷ (captioned, quite appropriately, 'What is a public authority?').

In terms of section 38(1), it is unlawful for a public authority to:

- (a) Act in a way that is incompatible with a human right;
- (b) In making a decision, to fail to give proper consideration to a relevant human right.

It is now important to consider whether the exclusionary provisions contained in section 38(2), (3), (4), and (5) apply.

"(2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

(3) This section does not apply to an act or decision of a private nature.

(4) Subsection (1) does not require a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.¹⁸

*(5) In this section **religious body** means—*

- (a) a body established for a religious purpose; or*
- (b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is,*

(b) any function conferred on any other entity by this Charter.

- (4) This Charter binds the Crown in right of Victoria and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

¹⁷ See annexure.

¹⁸ Some rights are traditionally intended to apply only between State and individuals. In *McGrath & O'Ruaric v Maynooth College* [1979] ILRM 166, two priests asked the Irish Supreme Court that their dismissal for various breaches of seminary regulations constituted religious discrimination. The court rejected the claim on the basis of a provision of the Constitution (the Bunreacht) that each religion has the right to manage its own affairs. The court went on to state that freedom of religion was not intended to set standards for internal behaviour and to resolve ecclesiastic or managerial disputes within the religious community.

conducted in accordance with religious doctrines, beliefs or principles.”

Although it may seem more appropriate to discuss available forms of relief at the end of this paper, I do so under the current heading because the requirements of section 39(1) do not appear to establish a free standing right of action against a public authority (unlike the equivalent provisions of the UK Human Rights Act, the Canadian Charter, and the South African Constitution). In order for an applicant to get a foot in the door on a Charter issue, an applicant must first be entitled to seek an existing form of relief using procedures and causes of action independent of the Charter.¹⁹ This issue should thus also be considered in deciding whether the Charter is applicable to the dispute in question. It is significant that the threshold for compliance with section 39(1) comes down to the meaning of the words ‘may seek’. The use of the phrase suggests that the non-Charter claim should at least in good faith allege a cause of action that, if successful, would entitle the person to the relief sought. These words may also mean:

- That only a standing requirement need be established. In other words, if a person has standing otherwise than because of the Charter to challenge the decision or act of a public authority, then such person may challenge the act or decision on Charter grounds, even if it is the only ground upon which relief is sought.²⁰
- The non-Charter ground must be sufficient to survive a strike out application.²¹
- The non-Charter claim should at least not be colourable. Even if the claim is eventually found to be unarguable, and is consequently struck

¹⁹ 39 Legal proceedings

(1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

²⁰ Evans,S, Evans,C; Legal Redress under the Victorian Charter of Human Rights and Responsibilities; (2006) 17 *Public Law Review* 264, 275. Pound and Evans; 249.

²¹ Pound and Evans; 249, and the authorities cited therein.

out, the court should still have jurisdiction to determine the Charter grounds.²²

In *R v Williams* (2007) 16 VR 168; [2007] VSC 2, the accused sought an adjournment of his matter because his counsel of choice was not available to represent him. He alleged that if the matter was not postponed, he would not enjoy a fair trial in terms of section 24 of the Charter, and to counsel of his choosing in terms of section 25(2)(d). Although the issue of whether the rights in the charter had freestanding legal force was not the basis on which the matter was disposed of by the court, King J stated (*obiter dicta*) that it was possible that the combination of sections 6(2), 24 and 25 required the court to take into account the minimum guarantees in section 25 in order to ensure that the accused received a fair trial. The issue will, no doubt, develop in future.

Interpretation

Assuming that the Charter applies to the legal relationship, a court must decide whether the Charter right in question has been infringed. This exercise would normally involve an interpretation of the substantive provisions of the Charter which are relied upon. The interpretation of the substantive provisions of the Charter involves at least a consideration of one or more of the following:

- The content of the substantive provision itself²³;
- Section 32 of the Charter²⁴;

²² Pound and Evans; 250

²³ In *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC), the South African Constitutional Court held, in dealing with a matter where the applicant required urgent kidney dialysis, that although the applicant was entitled in terms of section 27(3) of the Constitution to emergency medical treatment provided by the State, this was subject to the State's obligations in section 27(2) that the right to medical treatment must be provided subject to the availability of resource. This was held to be so despite the applicant's reliance also on the right to life entrenched in terms of section 11. The court held that a court should also be slow to interfere with rational decisions taken at the political level in fixing the Health budget, and at the functional level in deciding upon the priorities to be met. *Contra; Government of the Republic of Namibia v Mwilima and all other accused in the Caprivi Treason Trial* NR 235 (SC).

²⁴ **32 Interpretation**

- (1) 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.
- (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
- (3) This section does not affect the validity of—

- The preamble of the Charter (if applicable), drafting history of the substantive provision relied upon, and context of the Charter as a whole;
- Comparable case law from other jurisdictions, bearing in mind differences of wording, structure and context. The footnoted book by Pound and Evans contains a useful comparative table of rights, which I annex to this paper.
- Then, of course, the particular facts and evidence of the matter in question.

Limitation

Assuming that the Charter applies to the legal relationship, and further assuming that the applicant has established that a Charter right has been infringed, the final issue which merits consideration is whether the infringement is justified by operation of the limitations clause contained in section 7.

In accordance with well established principles of law, the onus of proving an infringement of a Charter right rests with the party who alleges such an infringement: there is no provision of the Charter which suggests the contrary. A court would be called upon to answer the question of whether the right in issue extends to the interests which the party alleges has been affected or threatened. This is a normative question.

Once it has been established that a right has been infringed, the onus of proving that the right may be permissibly limited in terms of the limitations clause, is on the party seeking to uphold the limitation. The standard of proof to be met by the party seeking to justify the limitation is proof on a preponderance of probabilities: in relation to the justification of an infringement of a fundamental right, a high degree of probability is required.²⁵

Remedies

The last, and perhaps the most important issue to the client, is that of available legal remedies. This issue has been dealt with above in this paper to some extent. As stated, the exercise of the power to give declarations of inconsistent interpretation is

-
- (a) an Act or provision of an Act that is incompatible with a human right; or
 - (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

²⁵ R v Oakes (1986) DLR (4th) 200 at 226-227.

effectively meaningless in most cases. If the act or decision of a public authority is challenged on Charter grounds, the requirement to have an independent cause of action, read with the provisions of section 39(2)²⁶ has the effect that an applicant may claim any remedy which may normally be claimed against a public authority to review or restrain unlawful action.

²⁶ (2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right—

- (a) to seek judicial review under the **Administrative Law Act 1978** or under Order 56 of Chapter I of the Rules of the Supreme Court; and
- (b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.

ANNEXURE

4 What is a public authority?

(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

Note

A public official under the **Public Administration Act 2004** includes employees of the public service, including the Head of a government department or an Administrative Office (such as the Secretary to the Department of Justice or the Chairman of the Environment Protection Authority) and the Chief Executive Officer of the State Services Authority. It also includes the directors and staff of certain public entities, court staff, parliamentary officers and holders of certain statutory or prerogative offices.

(b) an entity established by a statutory provision that has functions of a public nature; or

Notes

1 In section 38 of the **Interpretation of Legislation Act 1984** *entity* is defined to include a person (both a human being and a legal person) and an unincorporated body.

2 See subsection (2) in relation to "functions of a public nature".

(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

Example

A non-government school in educating students may be exercising functions of a public nature but as it is not doing so on behalf of the State it is not a public authority for the purposes of this Charter.

Note

See subsections (4) and (5) in relation to "on behalf of the State or a public authority".

(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

Note

Committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.

- (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;

Example

The **Transport Act 1983** confers powers of arrest on an authorised officer under that Act.

- (b) that the function is connected to or generally identified with functions of government;

Example

Under the **Corrections Act 1986** a private company may have the function of providing correctional services (such as managing a prison), which is a function generally identified as being a function 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.

Example

All the shares in the companies responsible for the retail supply of water within Melbourne are held by or on behalf of the State.

- (3) To avoid doubt—

- (a) the factors listed in subsection (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 set out in subsection (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 subsection (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 subsection (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.

TABLE OF COMPARABLE INTERNATIONAL HUMAN RIGHTS LAW PROVISIONS

Charter provision	Description of the right	ICCPR	ACT HRA	South African Bill of Rights	UK HRA	Canadian Charter	NZ BORA
s 8(1)	Right to recognition before the law	Art 16	s 8(1)	No equivalent provision	No equivalent provision	No equivalent provision	No equivalent provision
s 8(2)	Enjoyment of rights without discrimination	Art 2(1)	s 8(2)	s 9	Sch 1, Art 14	s 15(1)	s 19
s 8(3)	Equality before the law	Art 26	s 8(3)	s 9	No equivalent provision	s 15(1)	No equivalent provision
s 9	Right to life	Art 6(1)	s 9(1)	s 11	Sch 1, Art 2	s 7	s 8
s 10	Freedom from torture and cruel, inhuman or degrading treatment or punishment	Art 7	s 10	s 12(1) (d)-(e) and s 12(2)	Sch 1, Art 3	s 12	ss 9-11
s 11	Freedom from forced work	Art 8	s 26	s 13	Sch 1, Art 4	No equivalent provision	No equivalent provision
s 12	Freedom of movement	Art 12	s 13	s 21	No equivalent provision	s 6	s 18
s 13	Privacy and reputation	Art 17(1)	s 12	s 14	Sch 1, Art 8	No equivalent provision	No equivalent provision
s 14	Freedom of thought, conscience, religion and belief	Art 18(1) and (2)	s 14	s 15	Sch 1, Art 9	s 2(a)-(b)	ss 13, 15

Charter provision	Description of the right	ICCPR	ACT HRA	South African Bill of Rights	UK HRA	Canadian Charter	NZ BORA
s 15	Freedom of expression	Art 19	s 16	s 16	Sch 1, Art 10	s 2(b)	s 14
s 16(1)	Freedom of assembly	Art 21	s 15(1)	s 17	Sch 1, Art 11	s 2(c)	s 16
s 16(2)	Freedom of association	Art 22(1)	s 15(2)	s 18	Sch 1, Art 11	s 2(d)	s 17
s 17(1)	Protection of families	Art 23(1)	s 11(1)	No equivalent provision	No equivalent provision	No equivalent provision	No equivalent provision
s 17(2)	Protection of children	Art 24(1)	s 11(2)	s 28	No equivalent provision	No equivalent provision	No equivalent provision
s 18(1)	Right to participate in public affairs	Art 25(a)	s 17(a)	s 19	No equivalent provision	No equivalent provision	No equivalent provision
s 18(2)(a)	Right to vote and be elected	Art 25(b)	s 17(b)	s 19	No equivalent provision	s 3	s 12
s 18(2)(b)	Right of access to the public service	Art 25(c)	s 17(c)	s 19	No equivalent provision	No equivalent provision	s 12
s 19(1)	Cultural rights	Art 27	s 27	ss 30-31	No equivalent provision	No equivalent provision	s 20
s 19(2)	Cultural rights of Aboriginal persons	No equivalent provision	No equivalent provision	No equivalent provision	No equivalent provision	No equivalent provision	No equivalent provision
s 20	Right to property	No equivalent provision	No equivalent provision-	s 25(1)	First Protocol, Art 1	No equivalent provision	No equivalent provision
s 21(1)-(7)	Right to liberty and security	Art 9	s 18(1)-(7)	s 12(1)(a)-(b), s 35(2)(a), s 35(1)(d)-(f)	Sch 1, Art 5	ss 7, 9, 10, 11(e)	ss 22, 23(1)-(3)
s 21(8)	No imprisonment for failure to perform contractual obligations	Art 11	s 18(8)	No equivalent provision	No equivalent provision	No equivalent provision	No equivalent provision
s 22	Humane treatment when deprived of liberty	Art 10(1) and (2)	s 19	s 35(2)(e)	No equivalent provision	No equivalent provision	s 23(5)

