

PUBLIC AUTHORITIES and the Victorian Charter of Human Rights

Where to with civil liability?

By Sophie Ellis



HUMAN
RIGHTS

The extent to which public authorities should be held civilly liable for breaches of human rights has been the subject of significant debate in Victoria.

Submissions to a recent review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter), demonstrated strong support for the Charter – which imposes human rights obligations on public authorities – to be amended to provide an independent cause of action for Charter breaches. Such an amendment would be consistent with the ACT's Human Rights Act. However, the parliamentary committee tasked with reviewing the Charter did not endorse this approach – nor did the Victorian government in its response to the review. Questions arising out of the Charter review remain with respect to the role of the courts and tribunals and what reform(s), if any, will be made in respect to public authorities' obligations under the Charter. Despite these questions, the Charter remains, and Victoria's experience of it provides useful guidance for states yet to implement legislative protection of human rights and demonstrates positive impacts on the policy and decision-making processes of public authorities.

OVERVIEW OF THE CHARTER

The Charter was enacted in 2006. Structured similarly to its ACT and UK counterparts,¹ the Charter adopts a parliamentary model of human rights protection, designed to strengthen human rights through three key mechanisms:

1. Parliamentary scrutiny – ministers must issue statements of compatibility with human rights when

introducing Bills to Parliament, and the Scrutiny of Acts and Regulations Committee is required to report to Parliament about each Bill's compatibility with human rights.²

2. Obligatory measures – public authorities must act compatibly with the human rights in the Charter (Charter Rights) and ensure that relevant rights are considered when making decisions.³
3. Judicial oversight – statutory provisions must be interpreted in a way that is compatible with Charter Rights (so far as it is possible),⁴ and the Supreme Court may declare that a statutory provision is inconsistent with a Charter Right(s).⁵ The requirement that the relevant minister respond to any declaration of inconsistent interpretation provides a further mechanism for scrutinising human rights impacts of legislation.⁶

DEFINING 'PUBLIC AUTHORITIES' – WHICH ENTITIES HAVE OBLIGATIONS UNDER THE CHARTER?

The definition of 'public authority' under the Charter broadly captures State entities and private organisations carrying out functions 'of a public nature' on behalf of the State – for example, private prison operators.⁷ Victoria Police, local councils, ministers and public officials, all fall within the definition – so too, do courts and tribunals acting in an administrative capacity.⁸ Entities that would >>

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ordinarily appear to be a public authority for the purposes of the Charter can, however, be explicitly declared by regulation not to be a public authority – the Youth and Adult Parole Boards being examples.⁹ Unhelpfully, and unlike the ACT's *Human Rights Act*, the Charter does not provide an explicit list of functions that are deemed to be of a public nature. In further contrast with the ACT's *Human Rights Act*, there is also no option for private entities to elect to be subject to the human rights obligations imposed on public authorities.¹⁰

THE HUMAN RIGHTS OBLIGATIONS OF PUBLIC AUTHORITIES

The Charter prescribes that:

'[I]t 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.'¹¹

Despite the imposition of this legal obligation on public authorities, however, the ability of a person to bring a claim under the Charter on the grounds of the unlawfulness of a public authority's action or decision is constrained by various legislative exemptions. For example, a public authority that breaches a Charter Right will not be acting

unlawfully if, 'as a result of a statutory provision...the public authority could not reasonably have acted differently or made a different decision'.¹²

Public authorities 'acting to give effect to a statutory provision that is incompatible with a human right,' are not, therefore, acting unlawfully.¹³

Additionally, the Charter provides a rights-limiting provision in s7(2), which states that '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 'any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve'.

Finally, there is no independent right to bring a claim against a public authority for breach of a Charter Right. A person can bring an action against a public authority for breach of the Charter only if the person already has a claim *independently* of the Charter to seek relief or remedy in respect of the alleged unlawfulness of the public authority's decision or conduct. Further, if a breach is ultimately found, there is no right to damages for breach of the Charter.¹⁴ Many have called for reform of these provisions. The Law Institute of Victoria, for example, has said 'the Charter's limitation on proceedings and damages is inappropriate and unclear'.¹⁵ But is reform necessary?

EFFECTING HUMAN RIGHTS OUTCOMES OUTSIDE OF THE COURT ROOM

One view is that reform is not necessary – arguably, the Charter is delivering its stated objectives through its intended means. The legislative intent behind the Charter was never to advance human rights protections through the courts. Conversely, the legal obligations imposed by

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the Charter are measures designed to ensure Victorians' human rights are protected and upheld when laws and policies are created, and when public services are delivered. Parliamentary sovereignty is firmly embedded by the legislative model adopted in the Charter – promoting 'a dialogue between the three arms of the government – the Parliament, the executive and the courts – while giving parliament the final say.'¹⁶ Pursuant to that intent, courts are not empowered to strike down legislation found to be incompatible with Charter Rights. While limited provision is made to enforce the legal obligations of public authorities through court proceedings, the obligations imposed on public authorities are primarily borne out by other means.

Rachel Ball, of the Human Rights Law Centre (HRLC), notes that one of the great benefits of the Charter is that it empowers both public authorities and individuals. Public authorities are provided with a framework to make robust decisions that fully consider human rights implications before actions are taken and decisions are made, and individuals are given a tool with which to hold public authorities accountable and to agitate for appropriate changes to policies. The HRLC observes that:

'For most people in the community, their interaction with government isn't through parliament or the courts, but through contact with government departments and public services. The requirement that public authorities consider and act in accordance with human rights is therefore where the Charter has the most impact in the day-to-day lives of Victorians. Evidence shows that having reference to human rights when making decisions improves service delivery – it contributes to outcomes that are consistent, responsive and equitable.'¹⁷

This view is reflected in the broader community. Reporting to the Victorian Human Rights and Equal Opportunity Commission (VEOHRC), a community member remarked: "What's good about the Charter is that you don't have to get all the way to court to get a policy change ... we've seen policy changes in disability, and housing, and homelessness, and health, that have been enormously helpful and didn't get near court, and that's a great thing."¹⁸

The former Victorian Equal Opportunity and Human Rights Commissioner has emphasised the importance of public authorities having legal obligations under the Charter, which 'carry considerably more weight and independence than service standards or customer charters, or many of the other devices used by government to define its relationship with the people it serves'.¹⁹ Indeed, evidence shows the legal obligations of public authorities in respect of human rights are of increasing effect. Feedback that VEOHRC has received from public authorities 'indicates there is a cultural change taking place within government and that, for many agencies, taking human rights considerations into account in their work is becoming business as usual'.²⁰

Whether or not the mechanisms currently available under the Charter to provide redress for breaches of Charter Rights are strong enough, however, remains a legitimate question.

ENFORCING THE LEGAL OBLIGATIONS OF PUBLIC AUTHORITIES – ARE THE CURRENT HUMAN RIGHTS PROTECTION ENOUGH?

Under both the ACT and the UK human rights acts, plaintiffs can bring a direct cause of action against public authorities that commit human rights breaches.²¹ The UK's *Human Rights Act* also provides the courts with the jurisdiction to 'grant such relief or remedy, or make such order within its powers as it considers just and appropriate', including an award of damages.²² And, despite the fear pedalled by some commentators about 'floodgate' litigation, in those jurisdictions where human rights statutes provide a direct cause of action and flexible remedies for breaches, there is no evidence to suggest that these provisions have increased the costs, length or amount of litigation.²³

The obligations of public authorities under the Charter and the mechanisms for enforcing those obligations were examined in the recent review of the Charter by the Victorian government's Scrutiny of Acts and Regulations Committee (SARC). It was the first of two mandatory reviews prescribed by the Charter, which required the Attorney-General to cause a review of the Charter's first four years of operation (Charter Review).²⁴

The Charter Review was required to consider, among other things, whether 'further provision should be made [in the Charter] with respect to proceedings that may be brought or remedies that may be awarded in relation to acts >>

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Despite the legal obligation on public authorities, the ability of a person to bring a claim under the Charter on the grounds of the unlawfulness of a public authority's action or decision is constrained by various legislative exemptions.

or decisions of public authorities made unlawful because of [the Charter]'.²⁵

Various submissions to the Charter Review advocated for an independent cause of action and the provision to the courts of power to award the full gamut of relief or remedies within their powers when breaches of Charter Rights are found - including damages as necessary. Amnesty International, for example, affirmed that:

'For human rights to be adequately respected, protected and fulfilled there must be effective remedies for people who have had their rights violated. Compensation and reparation are an accepted part of human rights law and therefore should be recognised and included in the Charter to ensure protection of human rights.'²⁶

The Law Institute of Victoria (LIV) advocated similarly, cautioning, however, that damages should not be a measure of first resort.²⁷ According to Rachel Ball at the HRLC, the question of providing a direct cause of action and damages for breaches of Charter Rights is not just a question of rights instruments providing adequate remedies, but of adding efficiency, effectiveness and clarity to the Charter – for practitioners, rights-holders and public authorities alike.²⁸ This sentiment is supported by LIV findings that a majority of legal practitioners with Charter experience 'had difficulties applying or understanding the Charter', with 47 per cent of survey participants reporting difficulties in connection with remedies and 38 per cent having difficulties in respect of cause of action.²⁹

Such reforms were not, however, supported by SARC. In its report tabled on 14 September 2011, the SARC majority recommended against amending s39 of the Charter to provide for an independent cause of action or damages for breach.³⁰ Even more radically, the SARC majority recommended the Charter be significantly wound back, so 'that only Division 1 of Part 3 of the Charter (scrutiny of new laws) be retained' (with certain modifications), 'and that Divisions 3 (interpretation of laws) and Divisions 4 (obligations of public authorities) be repealed'.³¹ Quite clearly, a repeal of such substantive sections would have

a grossly limiting effect on the Charter's ability to impact human rights outcomes.

THE GOVERNMENT'S RESPONSE

The government's response to the SARC report was tabled on 14 March this year. Significantly, the government endorsed the continued operation of the Charter and the need for legislative protection of human rights, while affirming an 'ongoing place for the courts in protecting rights in relation to the Charter'.³² However, it determined that 'the Charter should not provide an independent remedy or damages for breach' and deferred comment on the ongoing obligations on public authorities – in respect of which it has committed to seeking legal advice.³³ The determination to defer decision on these critical issues was framed largely as a response to key cases that were handed down just before SARC provided its report – which considered the jurisdiction of the Victorian Civil and Administrative Tribunal to make decisions in respect of Charter breaches by public authorities, and the application of the rights limiting provision in the Charter.³⁴ The government did, however, endorse SARC's recommendation that in the event that the Charter is retained (as it has been), public authorities be supported to develop internal procedures for dealing with complaints that engage Charter Rights. Notably, some public authorities have already taken significant steps in this regard. For example, the Transport Accident Commission has a dedicated team to address complaints pertaining to the Charter, which logs and reports on these complaints.³⁵

CONCLUSION

The next Charter review is due to be carried out on the Charter's 5th to 8th years of operation and tabled before each House of Parliament on or before 1 October 2015. It may not be before that time that any reforms are made to the Charter, including in respect to the availability of a direct cause of action for breaches of Charter Rights and a full range of remedies being made available for such breaches. In the meantime, Victoria, long heralded as a leader in progressive legal reforms, will remain out of step with both the ACT and UK and legal practitioners bringing proceedings for breaches of Charter Rights will continue to be subject to convoluted procedures.

Even without these reforms, practitioners and public authorities can take heart in the observation of the VEOHRC that, '[f]our years after its introduction, there is clear evidence that the Charter is making a genuine difference for individuals and communities'.³⁶ This is borne out through anecdotal evidence from rights-holders and public authorities, and through cases brought before courts and tribunals. Note the story of a city council that re-examined its local laws relating to public question time procedures after concerns were raised by a disabled man that the local laws – which required that questions to councillors be made in writing – discriminated against people unable to write, and were incompatible with the Charter.³⁷ Or the case where the application for a possession order by a public authority (a landlord contracted to provide transitional

housing by the government), was refused on the basis that the application of its youth housing policy – which the eviction was pursued under – was unlawful because it arbitrarily interfered with a youth's right to privacy, family and home, as protected by the Charter.³⁸

The Charter has made a positive impact on the human rights landscape of Victoria. What lies ahead is the opportunity to build upon the current framework and address issues that other states may face implementing similar legislative schemes. ■

Notes: **1** *Human Rights Act 1998 (UK); Human Rights Act 2004 (ACT)*. **2** *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (Charter) ss28, 30. **3** Charter s38. **4** Charter s32. **5** Charter s36. **6** Charter s37. **7** Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006*, 5; Charter s4(2)(b). **8** See further: *Kracke v Mental Health Review Board & Ors* (General) [2009] VCAT 646 (23 April 2009). **9** See *Charter s4(k)* and *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009 (Vic)* regs 6(a),(c) (Regulations). The Regulations expire on 27 December 2013. **10** *Human Rights Act 2004 (ACT)* s40D. Currently, four entities have elected to be subject to the obligations of a public authority under s40D, including Relationships Australia (Canberra and Region) and the Women's Legal Centre (ACT and region). **11** Charter s38(1), emphasis added. **12** Charter s38(2). **13** *Ibid*. **14** Charter s39(3). **15** Law Institute of Victoria, Submission to the Security of Acts and Regulations Committee, Victorian Parliament, *Inquiry and review of the Charter of Human Rights and Responsibilities Act 2006 (Vic)*, 30 June 2011, para 78. **16** Victoria, Parliamentary Debates, House of Representatives, 4 May 2006, 1290 (Robert Hulls). **17** Interview with Rachel Ball,

Human Rights Law Centre (Melbourne, 14 May 2012). **18** Victorian Equal Opportunity & Human Rights Commission, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities* (Charter Report) (2011) 16. **19** Dr Helen Szoke, Charter Report, 2. **20** Charter Report, 9. **21** *Human Rights Act 1998 (UK)* s7; *Human Rights Act 2004 (ACT)* s40(C). **22** *Human Rights Act 1998 (UK)* s8(1). The power to grant an award of damages is restricted to those courts that have the power to award damages or awards of compensation in civil law matters (see s8(2)). **23** See note 15 above, paras 80-2. **24** Charter s44(1). **25** Charter ss44(2)(c),(d). **26** Amnesty International Australia, Submission to the Security of Acts and Regulations Committee, Victorian Parliament, *Review of the Charter of Rights and Responsibilities Act 2006*, 10 June 2011, 6. **27** See note 15 above, para 80. **28** Above note 17. **29** Alice Palmer, *Charter Impact Project Report* (Law Institute of Victoria, August 2011) 14. **30** Parliament of Victoria, SARC, *Review of Charter of Human Rights and Responsibilities Act 2006*, Recommendation 8. **31** *Ibid*, 35. **32** *Victorian Government Response to the Review of the Charter of Human Rights and Responsibilities Act 2006* (14 March 2012) para 1.12. **33** *Ibid*, Para 2.19. **34** *Momcilovic v R* (2011) 228 ALR 221; *Director of Housing v Sudi* [2011] VSCA 266. **35** See: Security of Act and Regulations Committee, *Review of Charter of Human Rights and Responsibilities Act 2006*, Recommendations 5, 6; *Victorian Government Response to the Review of the Charter of Human Rights and Responsibilities Act 2006* (14 March 2012) paras 2.56-2.64. **36** Charter Report, 8. **37** Charter Report, 17. **38** *Homeground Services v Mohamed (Residential Tenancies)* [2009] VCAT 1732 (26 June 2009).

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