

## **Charter of Human Rights and Responsibilities Act 2006 - What does it mean for the Public Service?**

The Act comes in operation on 1 January 2007 except ss 32-37 (interpretation of laws) and 38-39 (obligation of public authorities) which come into operation on 1 January 2008.

In the second reading speech, the Attorney-General stated amongst others the following:

This Bill is based on human rights laws that now operate successfully in the Australian Capital Territory, the United Kingdom and New Zealand.

Importantly, it is nothing like the United States Bill of Rights. This Bill promotes a dialogue between the three arms of the government – the Parliament, the Executive and the Courts – while giving Parliament the final say. Unlike the United States, Courts will not have the power to strike down legislation.

Further, the Attorney-General continued:

The Bill will be a powerful tool in assessing whether human rights protection in Victoria reaches minimum standards. The Bill will promote better

government, by requiring government laws, policies and decisions to take into account civil and political rights. The Charter will make sure that there is proper debate about whether proposed measures strike the right balance between the rights of Victorians and what limits can be justified in a free and democratic society.

There was opposition to the Bill. One speaker stated, in conclusion, the following:

... This is a fundamental shift in the law. There will be unintended consequences of this fundamental shift in the law. It will devolve political power increasingly to unelected judges and officials. Members should not think for one minute that just because they are unelected, they are not subject to criticism. We are going through a dispute at that moment in relation to sentencing. The issue is that we will be devolving those powers. To a large extent rights can be fashion items; they can change and adapt over time. Those rights need to change and adapt over time when you are faced with increasingly difficult problems like terrorism.

Another speaker stated:

We see it as being unnecessary, divisive, likely to be the repository of lost causes,

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disruptive to the rule of the law as we know it in the State of Victoria, calculated to cause confusion in the minds of Victorians, and substantially constituted by a body of meaningless rhetoric. Mainly, we see it as conferring nothing in its terms apart from a prospect there may well be confusion and ramifications relating to the way the State continues to function in the future. The substance of the Bill will confer nothing in the way that the government wants people to believe it will provide.

So we have three views on the Act, one view that it will only protect rights, another view that it will be a law that will affect every Victorian in the way they go about their business and the way they engage with government and a third view that the Act has no impact, is total rhetoric has no tangible impact and has no effect. We shall see who was right.

As the Attorney-General said in his second reading speech, the Victorian Act is based on the ACT, English and New Zealand Acts. However, the Victorian Act is different from all of those three Acts and, accordingly, their court judgments will be of limited assistance. The Victorian Act does not contain some of the difficulties encountered in the ACT and New Zealand Acts and we will not have the same arguments.

Further, it must be reinforced that the Act recognises our Westminster system of government. That is, the Act recognises the three tiers of government - Parliament, the Executive and the judiciary. There is no fundamental shift in the way we are governed.

I will give a broad overview of the Act and Ully will discuss its likely impact on the public service with reference to what

occurred in the ACT and New Zealand. Chris Humphreys will end by providing an update as to the Act's implementation.

The Act is divided into five parts. Part 1 is the preliminary section which includes the purpose section and the definitions. Part 2 is entitled Human Rights and in Part 2 the various rights are set out. Part 3 is entitled Application of Human Rights in Victoria. Divisions 1 and 2 of Part 3 relate to the Parliament, Division 3 relates to the interpretation of laws and Division 4 relates to the obligations on public authorities. Division ss 1.2, 3 and 4 will affect the public service the most.

Part 4 deals with the new Victorian Equal Opportunity and Human Rights Commission. Part 5 deals with general matters. The most important sections in Part 5 deal with the review of the Charter after four and eight years of operation and the amendments to the *Ombudsman Act* which Ully will discuss. There is also an amendment to the *Public Administration Act* to the 'Public Sector Values'.

Section 1 states that the Act may be referred to as the Charter of Human Rights and Responsibilities. The main purpose of the Charter is to protect and promote human rights by:

- (a) setting out the human rights that Parliament specifically seeks to protect and promote;
- (b) ensuring that all statutory provisions whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights;
- (c) in placing an obligation on all public authorities to act in a way that is compatible with human rights;

- (d) requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility;

(I interpolate here that these two purposes are the main purpose that will affect the public service).

- (e) conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with the human right and requiring the relevant Minister to respond to that declaration.

Section 3 is the definition section. Importantly, s 4 defines what is a public authority. 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*;
  - (b) an entity established by a statutory provision that has functions of a public nature;
  - (c) an entity whose functions are and 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);
  - (d) Victoria Police;
  - (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;

- (f) the Minister;
- (g) members of a Parliamentary Committee where the Committee is acting in an administrative capacity;
- (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.

You will recall that I previously stated that this Act was different from the UK Act. One of the main differences is that in the *UK Bill of Rights Act*, a court or tribunal would be a public authority and would be required to act in a way that is compatible with human rights.

Section 4(2) assists in determining if a function is of a public nature.

Section 5 states that the Charter does not abrogate or limit any other right that arises or recognised under any other law including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth.

Part 2 is entitled Human Rights and sets out the various human rights that Parliament specifically seeks to protect and promote. For this talk, I don't think it is

necessary to specifically list all the rights set out in Part 2. We have provided you with a copy of the publication put out by the current Equal Opportunity Commission of Victoria entitled 'The Charter of Human Rights and Responsibilities – Protection of Freedoms and Rights for Everyone in Victoria'. The new Commission has a very important role in educating the public about the new Charter.

Importantly, the rights are not absolute. Section 7(2) provides that these rights may be subject under law to such reasonable limits as can be demonstrably justified in a free and democratic society.

Part 3 of the Act is entitled 'Application of Human Rights in Victoria'. As stated, Division 1 and Division 2 relate to Parliament. Pursuant to s 28 of the Act, a member who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill. Pursuant to s 28(3) a statement of compatibility must state:

- (a) Whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and
- (b) If, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.

Pursuant to s 29 of the Act, a failure to comply with s 28 does not affect the validity, operation or enforcement of the Act. Section 30 of the Act provides that the Scrutiny of Acts and Regulations Committee of the Parliament must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.

The Committee also has a role in ensuring subordinate legislation is compatible with human rights. Section 31 of the Act allows the Parliament to override the Act.

Section 31(1) provides that 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. The Minister must justify the override. Section 31(4) provides that it is the intention of Parliament that an override declaration will only be made in exceptional circumstances.

One could see that an override declaration would be needed for Acts relating to the containment of terrorism or if legislation such as relating to the Commonwealth Games were again passed. You may recall that, in the Commonwealth Games legislation, there were provisions that curtailed the public right to freedom of movement which is a right pursuant to s 12 of the Act.

Division 3 is entitled Interpretation of Laws. Section 32(1) is as follows:

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.

In my opinion, this will not cause the difficulties suggested by others. The High Court has stated on many occasions that in interpreting statutes one looks at their purpose. Section 32(1) merely says that provisions must be interpreted in a way that is compatible with human rights consistent with their purpose.

Section 32(3) makes it clear that the validity of an Act is not affected by an

incompatibility with a human right. For example, counter-terrorism legislation could not be read down using s 32(1). As for judges making it up, Gaudron and McHugh JJ in *Breen v Williams* 186 CLR 71 at 115 stated that:

Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rule and principles. Any changes in legal doctrine, brought about by judicial creativity, must 'fit' within the body of accepted rules and principles. The Judges of Australia cannot, so to speak, 'make it up' as they go along.

Further, in the Court of Appeal decision *Royal Women's Hospitals v Medical Practitioners Board of Victoria* earlier this year, President Maxwell of the Court of Appeal made it clear that courts had been taking into account international conventions for years.

Sections 33 and 34 relate to referrals to the Supreme Court of a question of law that relates to the application of the Charter or a question arising with respect to the interpretation of a statutory provision in accordance with this Charter.

Section 36 deals with declarations by the Supreme Court of inconsistent interpretation. Section 36(2) is as follows:

Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision can't be interpreted consistently with the human right, the Court may make a declaration to that effect in accordance with this section.

Pursuant to s 36(5), a declaration of inconsistent interpretation does not affect in any way the validity, operation or enforcement of the statutory provision. If a

declaration of inconsistent interpretation is made, the Minister administering the statutory provision must prepare a written response to the declaration and cause a copy of that response to lay before each House of Parliament and published in the Government Gazette. The Act does not direct that the law be amended. The Minister's response may well be that yes there is an inconsistent interpretation and that is what Parliament meant.

Division 4 will also affect the policy officers and lawyers in the public service. Section 38(1) is as follows:

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

However, if a public authority acts in a way that it is incompatible, the Act does not give rise to a cause of action. It may be relevant to a cause of action that a person has not under the Act.

Section 39 is entitled Legal Proceedings. Section 39(1) is as follows:

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.

Section 39(2) makes it clear that the section does not affect any right that a person has to seek any relief or remedy in respect of an act or decision of a public authority including a right to seek judicial review.

I can perceive that in judicial review proceedings there will be a further ground to seek judicial review that the public authority failed to give proper consideration to a relevant human right and accordingly failed to take into account a relevant matter.

Part 4 provides for the new Victorian Equal Opportunity and Human Rights Commission and provides for functions in relation to the Charter. One of its functions is to provide education about the Charter. Part 5 relates to General Matters and the most important being a review of the Charter after four years and eight years of operation.

I am of the opinion that the world as we know it is not going to come to an end when the Act comes into operation on 1 January 2007. In fact, I am of the opinion that s 38 will assist in the decision-making. Parliament in passing legislation and the Executive in enacting policies have for years had to deal with and weigh up different interests. The Charter brings nothing new to that. The Charter is not directed to seeking remedies in courts but ensuring that the policies and decisions are correct in the first place.