



## Client Newsletter

### Government Response to the Charter Act Review: what does it mean for you?

April 2012

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#### Background

On 14 March, the Government tabled its formal response to the Scrutiny of Acts and Regulations Committee (SARC)'s review of the *Charter of Human Rights and Responsibilities Act 2006* (Charter Act).

The review, which was published by SARC in September last year, contained 35 recommendations ranging from minor technical amendments to significant structural reforms. Below, we consider the Government's response to these recommendations and the practical implications for public authorities across Victoria.

#### Courts and public authorities

SARC's most significant recommendation was that the Government should consider repealing the provisions of the Charter Act relating to the role of the courts and the obligations on public authorities. The Charter Act currently provides that:

- Public authorities must act compatibly with Charter Act rights and give consideration to relevant rights in decision making.

#### Summary

The Government has formally responded to the SARC review of the *Charter of Human Rights & Responsibilities Act 2006*. The key points are:

- The Charter Act will continue to operate and will not be repealed.
- Public authorities must continue to consider Charter Act rights when making decisions and must not impose any unreasonable limits on human rights.
- Public authorities involved in preparing legislation, statutory rules or legislative instruments should take into consideration the Government's commitments to improve the processes for statements of compatibility and human rights certificates.
- Public authorities should consider incorporating procedures for dealing with Charter Act claims into their human rights processes, and any complaints-handling templates should make reference to the Ombudsman's role in investigating Charter Act complaints.
- The Government is seeking further legal advice regarding the operation of the public authority obligations and the role of the courts.

- Where possible, courts must interpret legislation compatibly with Charter Act rights, and may declare laws to be inconsistent with the Charter Act. Courts may also provide remedies in certain circumstances where public authorities have failed to comply with their Charter Act obligations.

The Government has stated that the courts will have an ongoing role in relation to the Charter Act. However, it has indicated that it will seek further specific legal advice about the nature of this role. At this stage, no change has been made to the role of courts or public authorities under the Charter Act.

*What this means for you:*

Public authorities, including departments, Government agencies, Ministers and most public servants, remain under an obligation to consider relevant Charter Act rights when making decisions and to act compatibly with those rights. Individuals affected by a breach of these obligations may seek a legal remedy in a court or tribunal, although only in circumstances where they may seek that remedy on a non-Charter Act ground.

## Statements of compatibility and human rights certificates

Under the Charter Act, all Bills introduced into Parliament must be accompanied by a statement of compatibility, and most statutory rules and legislative instruments must be accompanied by a human rights certificate. These documents contain an analysis of the human rights impacts of the proposed legislation, rule or instrument, and include a statement about whether or not the Minister considers the new laws to be compatible with Charter Act rights.

### Drafting practices for statements of compatibility

The Government response indicated that statements of compatibility will still be required for all Bills introduced into Parliament. However, the Government has committed to reviewing drafting practices for statements of compatibility to ensure that statements are not overly long or technical.

*What this means for you:*

Details of any revisions to drafting practices have yet to be released. However, as a general guide, you should keep in mind that statements should:

- be drafted in **plain language**;
- be **succinct**; and
- focus on **significant engagements** with human rights.

### Draft Consultation Bills and Regulatory Impact Statements

The Government has committed to considering, on a case-by-case basis, whether a statement of compatibility should be published alongside a Draft Consultation Bill to enable early community engagement. The *Premier's Guidelines*, which are made under the *Subordinate Legislation Act 1994*, will also be amended to require that draft human rights certificates be published during the regulatory impact statement (RIS) process for new statutory rules and legislative instruments.

*What this means for you:*

If your agency or department is responsible for publishing a Draft Consultation Bill, you should consider whether it is appropriate to publish a draft statement of compatibility. Publishing the draft statement of compatibility is not mandatory, but it will enable early community comment on any human rights issues that may arise.

Once the *Premier's Guidelines* are amended, it is likely to be mandatory to publish a draft human rights certificate as part of the RIS process.

### Statements of compatibility for House amendments

The Government has indicated that it will introduce legislation providing that either House of Parliament may request a statement of compatibility for House amendments to Bills under consideration.

*What this means for you:*

If you are responsible for preparing a House amendment to a Bill, you should consider any human rights impacts early, and be prepared to provide Parliament with a statement of compatibility if requested to do so.

## Internal complaints processes

The Government has indicated its support for SARC's recommendation that public authorities be supported to develop internal complaints processes that incorporate procedures for Charter Act claims. The Government also supported the recommendation that any complaints handling templates should include reference to the Ombudsman's power to investigate whether any administrative action is incompatible with a human right protected under the Charter Act.

### *What this means for you:*

Public authorities should consider whether their existing internal complaints mechanisms sufficiently incorporate processes for dealing with human rights complaints. The Government has indicated that it will aim to improve practices in this area with the assistance of the Victorian Equal Opportunity and Human Rights Commission and the Ombudsman.

Public authorities should also ensure that complainants raising human rights claims are made aware of the Ombudsman's powers to deal with Charter Act complaints.

## Other changes

In addition to the issues discussed above, the Government has committed to:

- Repealing the provision setting out a process for Parliament to 'override' the Charter Act (Parliament can do this even without such a provision).
- Clarifying the legal status of various processes and documents under the Charter Act.
- Enabling SARC to conduct an annual review, for Charter Act compatibility, of amendments and regulations made under national applied law schemes.
- Considering whether any additional civil and political rights should be incorporated into the Charter Act.

These additional changes are unlikely to have significant impacts upon the day-to-day operations of public authorities.

## Conclusions

The Government response to the SARC review of the Charter Act has not identified any radical changes to the Government's human rights obligations in Victoria. Some changes have been made in various areas, including Parliamentary scrutiny and internal review processes. Importantly, public authorities are still required to act compatibly with Charter Act rights.

The VGSO is available to assist you in relation to your obligations under the Charter Act by providing:

- practical advice about what your obligations are and how to meet them;
- representation in related litigation;
- drafting assistance with statements of compatibility and human rights certificates; and
- assistance in the development and application of effective internal complaints policies.

## Further information

For further information or legal advice on Charter Act issues, please contact:

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