



The Right Changes

Update on the Review of the Charter of Human Rights and Responsibilities

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The Charter – a brief history

- *Charter of Human Rights and Responsibilities Act 2006 (Vic)*
- Commenced part operation on 1 January 2007
- In full operation on 1 January 2008
- 4 year review in 2011
- 8 year review in 2015



The Charter – a brief summary

- The Charter protects 20 human rights, mainly civil and political rights
- Human rights may be subject to reasonable and justifiable limits under s 7(2)
- Sets human rights standards for legislature, executive and judiciary
 - Parliament must scrutinise legislation for compatibility with human rights
 - Public authorities must
 - give proper consideration to relevant human rights, and
 - act compatibly with human rights
 - Courts must, so far as possible, interpret legislation compatibly with human rights and apply human rights in exercising their functions
- Dialogue model in which Parliament is sovereign



2015 Review

- Conducted by Michael Brett-Young
- Terms of reference focused on:
 - Ways to enhance the effectiveness of the Charter
 - developing a human rights culture in Victoria
 - complaint handling, Parliamentary scrutiny, application to non-State entities
 - **Any desirable amendments to improve the operation of the Charter**
 - Whether a further review of the Charter is necessary



'Any desirable amendments to improve the operation of the Charter'

- Clarifying the role of human rights in statutory construction, including
 - the role of the proportionality test in s 7(2)
 - declaration of inconsistent interpretation under s 36
- Clarifying the provisions regarding public authorities
 - identifying public authorities
 - the content of their human rights obligations
 - the role of the proportionality test in s 7(2)
- Clarifying the provisions regarding legal proceedings
 - remedies against public authorities
 - obligations of courts
 - notification provisions



Human rights in statutory construction

- Section 32(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.’
- Two big controversies
 - Is s 32(1) a special rule of interpretation that allows a provision to be rewritten so that it is compatible with human rights?
 - What is the role of the proportionality analysis s 7(2), and when should it be done?



Momcilovic

- Court of Appeal (2010) 25 VR 436 – joint judgment
 - Section 32 does not create a special rule of interpretation
 - Three step approach – (1) ascertain meaning of provision applying s 32(1) and other principles of statutory interpretation; (2) consider whether provision limits a human right; (3) apply s 7(2) to determine whether the limit is justified
- High Court (2011) 245 CLR 1 – six judgments
 - Section 32 is an ordinary rule of interpretation; courts may not rewrite a provision to achieve compatibility with human rights
 - No ratio about role of s 7(2) and whether or when it applies
 - Section 36 declaration of inconsistent interpretation is valid (4:3)



After *Momcilovic*

- Stalemate about if or when to consider proportionality under s 7(2)
- Some consensus has emerged from Court of Appeal
 - Section 32 is an ordinary rule of interpretation, similar to the principle of legality
 - Where a provision has more than one meaning, choose the meaning that is **most compatible** with human rights
 - Where a provision cannot be interpreted compatibly with human rights, it may not be rewritten
- Questions remain
 - Does s 32(1) permit a choice between compatible meanings, or between incompatible meanings?
 - What (if any) role does s 7(2) have in statutory interpretation?



What the 2015 Review recommended

- Section 32(1) needs clarification – for everyone
- Court of Appeal's post-*Momcilovic* approach is workable, but ...
- Clarify that s 32(1) is a stronger rule of interpretation than the common law principle of legality
- Direct choice of most compatible or least incompatible meaning available
- Use s 7(2) to work out relative compatibility
- Set out the steps for human rights compatible interpretation
- Clarify key relationship between s 7(2) and compatibility with human rights



Proposed model for statutory interpretation

A step by step approach

Step 1 Possible meanings?

- Work out the **possible meanings** of the provision with reference to the ordinary principles of statutory interpretation and the human rights in the Charter. The Charter rights are an additional lens.
- As a statutory rule of interpretation, section 32 is stronger than the principle of legality. In working out the possible meanings of a provision, it is permissible to depart from the literal or grammatical meaning of the words to find a meaning that does not limit rights.
- Section 7(2) has no role in Step 1.

Step 2 Choice of meanings?

- Are **multiple meanings** possible?
- If no, apply the one meaning.
- If yes, choose the meaning that is **most compatible with human rights**.
- If no human rights compatible meaning is possible, choose the **least incompatible** meaning.
- To work out the most compatible, or the least incompatible, meaning, apply section 7(2).

Step 3 Declaration?

- This final step is for the **Supreme Court** only.
- If the only possible meaning is **incompatible with human rights**, the Supreme Court may make a declaration to bring this incompatibility to Parliament's attention. This has no impact on the validity of the law, which continues to be applied.
- Before deciding that a provision is incompatible with human rights, the Supreme Court must consider whether the relevant limit on human rights is reasonable and demonstrably justifiable, under section 7(2). Justification at this stage may require evidence.



Government response

- Recommendation 28 is supported **in principle**
‘The Government agrees that the correct process in relation to section 32(1), and the role for section 7(2), should be clarified and supports legislative amendment to achieve this. The Government will consider how best to achieve this in the Charter.’
- Recommendation 29, to define the concepts of ‘compatibility’ and ‘incompatibility’ by reference to s 7(2), is supported
- Amending legislation is being drafted



Public authorities

- Key concept of 'public authority'
 - defined in s 4, has obligations under s 38
 - core and functional public authorities
 - regulations can prescribe an entity to be, or not to be, a public authority
- Uncertainty about functional public authorities
 - government funded services delivered by the private and community sectors
 - e.g. community housing sector
 - services and functions contracted out by government



What the 2015 Review recommended

Clarify coverage of public authorities by:

- Specifying functions of a public nature
 - list of functions similar to s 40A(3), *Human Rights Act 2004* (ACT)
- More active use of regulation-making power to clarify status of particular entities, for example
 - community housing sector
 - national schemes
- Specifying public authority obligations in relevant State contracts
- Permitting entities to 'opt in' to public authority obligations



Government response

- Recommendation 12 (list of public functions) is supported **in principle**
'The Government agrees that greater clarity is required regarding functional public authorities and will consider how to achieve this, noting the need to ensure that the definition remains sufficiently flexible to reflect the variety of ways in which government services are delivered.'
- Recommendation 13 (use of regulations) is supported
- Recommendation 14 (State contracts to clarify public authority obligations) is supported
- Recommendation 15 (opting in) is supported



Obligations of public authorities

- Section 38(1) – ‘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.’
 - Substantive obligation – to act compatibly with human rights
 - Procedural obligation – to give proper consideration to relevant human rights
- Uncertainties
 - Does ‘act’ including ‘making a decision’?
 - What is the role of s 7(2)?



What the 2015 Review recommended

- Amend the Charter to clarify that **decisions** of public authorities must be compatible with human rights
 - either define 'to act' to include 'to make a decision'
 - or provide in s 38(1) that it is unlawful for a public authority to make a decision that is incompatible with a human right
- Define 'compatibility' to clarify that an act or decision that limits a human right is compatible with human rights if the limit is reasonable and demonstrably justifiable in terms of s 7(2)
- Both recommendations are supported by Government



Remedies

- Section 39(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.’
- An ‘irremediable’ remedies provision that is ‘convoluted and extraordinarily difficult to follow’
- Charter claims must ‘piggy-back’ another cause of action
- No entitlement to damages for breach of the Charter – s 39(3)



What the 2015 Review recommended

- Creating a direct cause of action in VCAT for breach of s 38(1)
 - in combination with the proposed dispute resolution function for VEOHRC
- Retaining the ability to rely on the Charter in other legal proceedings
- Continuing to preclude damages as a remedy under the Charter
- Clarifying that decisions are subject to judicial review on the ground of Charter unlawfulness alone



Government response

- Recommendation 27(a) (direct cause of action) is under further consideration
‘This recommendation is closely related to recommendation 23 – that the Commission be given the statutory function and resources to offer dispute resolution for disputes under the Charter. This recommendation is under further consideration with recommendation 23.’
- Recommendation 27(b) (Charter claims in other legal proceedings) is supported as it retains the status quo
- Recommendation 27(c) (judicial review for Charter unlawfulness) is supported in principle, but remains under further consideration with recommendation 27(a)



Charter litigation

- Notification of Attorney-General and VEOHRC
 - Remove notice requirement in County Court – recommendation not supported
 - Give other judicial officers and tribunal members discretion to require notice to be issued – supported
 - Give power to place conditions on intervention to support case management - supported
- No change to Charter's application to courts and tribunals
 - s 4(1)(j) – courts and tribunals are not public authorities except when acting in an administrative capacity
 - s 6(2)(b) – Charter applies to courts and tribunals to the extent that they have functions under Part 2 (Human Rights) and Division 3 of Part 3 (Interpretation of laws)



Human rights protected by the Charter

- Clarification that the human rights protected by the Charter
 - are all of the rights in Part 2, not only civil and political rights
 - exclude s 7(2), which allows reasonable and justifiable limitation of human rights
- Right to self-determination of Aboriginal Victorians
- Definition of 'discrimination'
- Freedom of expression - s 15
- Right to birth registration – s 17



Self-determination

- Aboriginal Victorians have a right to self-determination under international law
- The content of the right is not easy to define
- The importance of self-determination for Aboriginal Victorians should be recognised in the Preamble to the Charter
- Realisation of self-determination in practice requires ongoing engagement between Government and Aboriginal communities



Discrimination

- Charter picks up the definition of 'discrimination' in the *Equal Opportunity Act 2010*
- Uncertain whether the definition
 - includes positive obligations e.g. to make reasonable adjustments for disability or reasonably accommodate family responsibilities
 - excludes discrimination that is lawful because an exception or exemption applies
- Review recommends defining discrimination as 'direct and indirect discrimination' on the basis of a protected attribute in the EO Act
- Recommendation supported



Freedom of expression

- Review recommended repeal of internal limitation in s 15(3)
- Section 7(2) a general limitations provision that enables freedom of expression to be restricted, does the same work as s 15(3)
- Not supported – Government considers s 15(3) is a clear statement from Parliament about reasonable limitations to freedom of expression and should be retained



Right to birth registration

- Article 24(2), ICCPR – every child shall be registered immediately after birth and shall have a name
- Strong case made for addition of this right to the Charter
- Recommendation 50 – include a new provision that ‘every person born in Victoria has the right to a name and to be registered as soon as practicable after birth’
- Recommendation supported



What next?

- Implementation of recommendations to strengthen Victoria's human rights culture
 - Provision of human rights education for the Victorian public sector
- Amending legislation to implement other supported recommendations
- Further consideration of recommendations about dispute resolution, complaint handling and remedies
- Further review four years after commencement of proposed complaints and remedies provisions