

Charter of Human Rights and Responsibilities Act 2006 — Act No. 43/2006

Editor's note: I have included the full second reading speech for the Victorian Charter of Human Rights Act in this section of the journal because, like Euthanasia, and Freedom of Information, the issue is extremely important, in particular because Australia has no Bill of Rights, making it more and more unusual among democratic countries. Moreover the issue is little discussed, and Victoria's moves in creating a Charter were barely mentioned elsewhere in Australia.

Second Reading Speech: 4 May 2006
House: Legislative Assembly
Minister introducing Bill: Hon. Rob Hulls MLA
Portfolio responsibility: Attorney-General

Purpose^{*}

The purpose of the *Charter of Human Rights and Responsibilities Bill* (the 'Charter') is to establish a framework for the protection and promotion of human rights in Victoria....

These rights primarily derive from the *International Covenant on Civil and Political Rights 1966* (the 'Covenant').

The Charter facilitates the protection and promotion of human rights by Parliament in the development of new legislation and increases transparency in the consideration of human rights in parliamentary procedures. All Bills introduced into Parliament must be accompanied by a statement of compatibility prepared by the relevant member of Parliament.

* A reference in this report to '*Article' is a reference to the relevant Article in the Covenant.

The Scrutiny of Acts and Regulations Committee will also have a role in the process by examining all Bills introduced into the Parliament and report to the Parliament whether a Bill is incompatible with the Charter.

The Charter imposes obligations on public authorities to act in a way that is compatible with the human rights protected by the Charter.

The Charter requires courts and tribunals to interpret Victorian statutes and statutory instruments in a manner that is compatible with human rights so far as it is possible to do so in accordance with the purpose of the statute or statutory instrument.

... The Charter changes the name of the Equal Opportunity Commission to the Victorian Equal Opportunity and Human Rights Commission and confers new functions on the Commission. The Victorian Equal Opportunity and Human Rights Commission is intended to act as an independent monitor of the operation of the Charter.

... The Charter contains a number of general provisions including requirements for the Charter to be reviewed. It also grants the Governor in Council a power to make regulations and provides for consequential amendments and savings and transitional provisions.

Content and Committee comment

... Charter rights are in addition to other rights and freedoms

[5]. Declares that the Charter does not limit any right or freedom (whether under international law, the Commonwealth constitution, a law of the Commonwealth, or under common law) that is *not* included in the Charter.

[6]. Outlines the application of the Charter. Under the Charter only natural persons have human rights. Corporations do not have human rights under the Charter. The provision applies regardless of whether a person is an Australian citizen and applies to all people physically present within the State. In brief, the relevant parts of the Charter apply to the Parliament, courts and tribunals and to public authorities. ...

Part 2 — Human rights

Human rights may be limited

[7]. The Charter provides a general limitation by recognising that no right is absolute and that there may be various limitations imposed on any right.

Under the Charter, a human right may only be subject to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The clause recognises that human rights are, in general, not absolute rights, but must be balanced against each other and against other competing public interests.

The factors that may be taken into account when assessing whether a human right may be limited include — the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Note: Examples of laws that may reasonably limit human rights are those necessary to protect security, public order or public safety.

Nothing in the Charter gives a person, entity or public authority a right to limit or destroy the human rights of any person.

The Charter rights

Equality before the law

[8.1]. Declares that every person has the right to recognition as a person before the law. *Article 16

[8.2]. Declares that every person has the right to enjoy his or her human rights without discrimination. *Article 26.

Note: The definition of discrimination in the Charter has the same meaning as provided in section 6 of the Equal Opportunity Act 1995.

[8.3]. Declares that every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination. *Article 26.

[8.4]. Provides that certain measures assisting disadvantaged persons does not constitute discrimination.

Right to life

[9]. Declares that every person has the right to life and must not be arbitrarily deprived of life. *Article 6(1).

Note 1: This is to be read together with the savings provision in clause 48 which states that nothing in the Charter affects any law applicable to abortion or child destruction.

Note 2: The right to life has been interpreted in some international judgments as encompassing a procedural obligation to undertake effective coronial investigations where required.

Protection from torture and cruel, inhuman or degrading treatment

[10]. Declares that a person must not be subjected to torture or treated or punished in a cruel, inhuman or degrading way. *Article 7.

Note: In accordance with clause 32(2), courts and tribunals may consider Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 when examining whether conduct amounts to torture.

Paragraph (c) establishes a right not to be subject to medical or scientific experimentation or treatment without full, free and informed consent. *Article 7.

Note: This clause expands on Article 7 of the Covenant as it also includes a prohibition on medical or scientific treatment without consent. In addition it has been modified to provide that consent must be full, free and informed. This modification is intended to reflect the requirements for consent outlined in section 5(1) of the Medical Treatment Act 1988.

It is intended that the rights in this clause may be subject under law to reasonable limitations. For example, under Victorian law there are some well recognised situations where full, free and informed consent to medical treatment is not required. These include where there is an emergency or where a person is incapable of giving consent and consent is provided by a substitute decision-maker. Some procedures are also permitted without consent in accordance with Divisions 4 and 6 of the Guardianship and Administration Act 1986. These procedures will not breach the Charter since they are reasonable limitations under law and can be demonstrably justified in a free and democratic society.

Freedom from forced work

[11]. Declares that a person must not be held in slavery or servitude and establishes a right to be free from forced or compulsory labour. *Article 8(3)(a).

Note: The Charter qualifies the right to freedom from forced or compulsory labour by providing three exceptions to these prohibitions. For example work or service normally required of a person who is under detention because of a lawful court order, or who, under a lawful court order, has been conditionally released from detention or has been ordered to perform work in the community or work or service required because of an emergency threatening the Victorian community or part of the Victorian community or work or service that forms part of normal civil obligations. An example of normal civil obligations is jury service pursuant to the Juries Act 2000.

Freedom of movement

[12]. Declares that every person within Victoria has the right to move freely within the State and to enter and leave it and to choose where to live. *Article 12

Note: Exceptions include restrictions on the freedom of movement of persons lawfully detained, such as prisoners and persons who are subject to a lawful order restricting their movement or where they may live such as those made by the Adult Parole Board.

Privacy and reputation

[13]. Declares a right to privacy and the right not to have his or her reputation unlawfully attacked. *Article 17

Freedom of thought, conscience, religion and belief

[14]. Establishes the right to freedom of thought, conscience, religion and belief and includes the freedom to have or to adopt a religion or belief of a person's choice and the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private. The clause also provides that a person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching. *Article 18

Freedom of expression

[15]. Declares that every person has the right to hold and express an opinion without interference. There may be reasonable limitations imposed in respect to this right. *Article 19.

Note: The right to freedom of expression may be subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons, or to protect national security, public order, public health or public morality.

Peaceful assembly and freedom of association

[16]. Declares that peaceful assembly is the right of every person. Article 21, the clause also establishes the right to freedom of association with others. *Article 22.

Note: Reasonable limits may be justified in order to ensure the safety and security of prison facilities in Victoria.

Protection of families and children

[17]. Declares that families are the fundamental group unit of society and are entitled to be protected by society and the State. *Article 23(1). The clause also declares that every child, without discrimination, has the right to such protection as is in the best interests of the child and which is needed by reason of being a child. *Article 24(1).

Taking part in public life

[18]. Declares that it is every persons right to participate in the conduct of public affairs, directly or through freely chosen representatives and provides that every eligible person has without discrimination, the right to vote and to be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors, and the right to have access, on general terms of equality, to the Victorian public service and public office. *Article 25.

Cultural rights

[19]. Declares that all persons with a cultural, religious, racial or linguistic background must not be denied the right, in community with other members of that

background, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language. *Article 27.

Note: The provision is also based on section 4 of the Multicultural Victoria Act 2004 which enshrines in law a number of important principles of multiculturalism.

The clause recognises and provides specific rights for Aboriginal persons in Victoria. *Article 25 of the United Nations Draft Declaration on Indigenous Rights.*

Property rights

[20]. Declares that a person must not be deprived of property other than in accordance with the law.

Note: This right does not provide a right to compensation and reflects the constitutional legislative powers of States in respect to 'fair and just compensation' confirmed in the recent decision of the High Court in *Durham Holdings v New South Wales* [2001] 75 ALJR 501.

Right to liberty and security of person

[21]. Declares that every person has the right to liberty and security of the person and must not be subjected to arbitrary arrest or detention.

The clause also establishes a prohibition on the deprivation of liberty, except on grounds and in accordance with procedures established by law.

A person must be informed at the time of arrest or detention of the reason for the arrest or detention and about any proceedings to be brought against the person.

The clause provides a number of procedural rights for persons arrested or detained on a criminal charge such as prompt appearance before a court and no unreasonable delay before a trial. The clause also establishes a number of procedural rights for persons awaiting trial.

A person may seek a declaration or order regarding the lawfulness of a person's detention and requires a court to make a decision without delay and order the release of the person if the court finds that the detention is unlawful.

A person must not be imprisoned only because of his or her inability to perform a contractual obligation. *Articles 9 and 11

Humane treatment when deprived of liberty

[22]. Declares that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

An accused person who has been detained or a person detained without charge, must be segregated from persons convicted of offences, except where reasonably necessary.

An accused person who has been detained or a person detained without charge, has the right to be treated in a way that is appropriate for a person who has not been convicted. *Article 10

Children in the criminal process

[23]. Declares that an accused child who has been detained or a child detained without charge has the right to be segregated from accused and convicted adults.

An accused child must be brought to trial as quickly as possible.

Note: This is a more onerous obligation than the requirement of trial 'without unreasonable delay' provided in clauses 21(5)(b) and 25(2)(c).

A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age. *Article 10(2)(b)

Fair hearing

[24]. Declare that a person charged with a criminal offence or a party to a civil proceeding has a right to have the charge or proceeding decided by a competent, independent or impartial court or tribunal after a fair and public hearing.

A court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than the Charter.

Courts and tribunals must make public all judgments and decisions. *Article 14(1)

Note: The requirement does not apply if the best interests of a child or a law other than the Charter requires or permits otherwise.

Rights in criminal proceedings

[25]. Provides for various rights in criminal proceedings.

- a person charged with a criminal offence to be presumed innocent until proved guilty according to law.
- a person charged with a criminal offence is entitled, without discrimination to certain minimum guarantees (listed in clause 25(2)).
- a child who is charged with a criminal offence is entitled to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.
- a person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.

*Article 14(2) to (5)

Right not to be tried more than once

[26]. Declares that a person must not to be tried or punished more than once for an offence for which that person has already been finally convicted or acquitted in accordance with law. *Article 14(7)

Retrospective criminal laws

[27]. Declares that a person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.

A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

Declares that if a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.

Declares that nothing in the clause affects the trial and punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done. The purpose of this provision is to ensure that a person may still be tried and punished for crimes under international law, as long as the offences existed under international law at the time they were committed or omitted. *Article 15

Part 3—Application of Human Rights in Victoria*Statement of compatibility*

[28]. Establishes a requirement on a member of Parliament who proposes to introduce a Bill into a House of Parliament to cause a statement of compatibility to be prepared in respect of that Bill.

The statement of compatibility must be laid before Parliament before the member gives his or her second reading speech on the Bill. The requirement applies to both Ministers introducing government Bills and members of Parliament introducing non-government Bills.

The statement of compatibility is not binding on any court or tribunal.

Statement under clause 28 does not affect validity of any law

[29]. Declares that a failure to make a statement of compatibility in respect of Bills does not affect the validity, operation or enforcement of any ensuing Act or any other statutory provision.

Scrutiny of Acts and Regulations Committee to report to Parliament

[30]. The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and to report to Parliament as to whether the Bill is inconsistent with human rights.

Note: The requirement also extends to the review of statutory rules pursuant to section 21 of the Subordinate Legislation Act 1994.

Parliamentary override declaration

[31]. Parliament may expressly declare in an Act that the Act or a provision of that Act overrides the Charter notwithstanding an incompatibility with the Charter. The override may only be made in exceptional circumstances such as threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria.

Where a declaration is made it extends to any subordinate instrument made under or for the purpose of that Act or provision.

A Member of Parliament introducing a Bill containing an override declaration to make a statement to the Council or the Assembly explaining the exceptional circumstances that justify the inclusion of the override declaration.

To the extent of the declaration, the Charter will not apply to the Act or provision for which the override declaration has been made and therefore the Supreme Court cannot give a declaration of inconsistent interpretation under clause 36 in respect of that Act or provision.

A provision of an Act containing an override declaration expires after five years however the Parliament may re-enact an override declaration at any time.

The clause also declares that a failure to comply with the procedure in the Charter for an override declaration will not affect the validity, operation or enforcement of any ensuing Act or any other statutory provision.

Interpretation of Laws

[32]. Declares that courts and tribunals must interpret all statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistently with the purpose of the statutory provision.

Courts and tribunals may consider international law and judgments of domestic, foreign and international courts and tribunals relevant to a human right in reading and giving effect to a statutory provision.

An Act, or a subordinate instrument or provision of a subordinate instrument, will remain valid even if they are incompatible with a human right.

Referral to Supreme Court

[33]. A referral may be made to the Supreme Court where, in a proceeding before a court or tribunal, a question of law arises relating to the application of the Charter or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter. If a question is referred by the Trial Division of the Supreme Court the referral is to be made to the Court of Appeal.

Attorney-General may intervene

[34]. The Attorney-General has an unqualified right (his or her discretion) to intervene in proceedings involving the Charter and may be joined as a party to the proceedings.

Notice of human rights issue arising in a proceedings to be given to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission

[35]. Contains requirements for the giving of notice to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission if, in a Supreme Court or County Court proceeding, a question of law arises that relates to the application of the Charter or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter, or if a question is referred to the Supreme Court under clause 33.

Supreme Court may make a declaration of inconsistent interpretation

[36]. The Supreme Court may issue a declaration of inconsistent interpretation in certain circumstances. The section applies if -

- (a) in a Supreme Court proceeding a question of law arises that relates to the application of the Charter or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter; or
- (b) the Supreme Court has had a question referred to it under clause 33; or
- (c) an appeal before the Court of Appeal relates to a question of kind referred to in paragraph (a).

A declaration of inconsistent interpretation does not affect the validity, operation or enforcement of the statutory provision in respect of which the declaration is made, or create in any person a legal right or give rise to any civil cause of action.

Action on declaration of inconsistent interpretation

[37]. The Minister administering the statutory provision in respect of which a declaration of inconsistent interpretation has been made must within 6 months of receiving the declaration prepare a written response to the declaration and cause a copy of the declaration, together with his or her written response to it, to be laid before each House of Parliament and published in the Government Gazette.

Conduct of public authorities

[38]. Declares that it is unlawful for public authorities to act in a way that is incompatible with human rights. It also prohibits public authorities from failing to give proper consideration to relevant human rights when making a decision. The obligation does not apply where the public authority acts to give effect to a statutory provision that is incompatible with a human right in circumstances where they could not reasonably have acted differently or made a different decision.

Legal proceedings

[39]. Provides that if, otherwise because of the Charter, a person may seek any relief or a remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, the person may seek relief seek that relief or remedy on a ground of unlawfulness arising because of the Charter.

Note: (1). The clause does not create a new or independent right of relief or a remedy if there is nothing more than a breach of a Charter right nor does it confer an entitlement to an award of damages for as breach of a Charter right.

(2). The Charter does not displace a person's right to seek any remedy in respect of an act or decision of a public authority, including a right to seek judicial review, a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.

A person is not entitled to be awarded any damages because of a breach of this Charter.

Note: The Charter does not create any independent cause of action or any independent forms of relief.

Victorian Equal Opportunity and Human Rights Commission

... [40]. Establishes the Commission's unqualified right to intervene and be joined as a party in proceedings involving the Charter.

Functions, powers and reports of the Commission

[41]. Outlines the functions of the Victorian Equal Opportunity and Human Rights Commission under the Charter. [42]. Grants the Commission a general power to perform its functions. [43]. Provides for reports of the Commission to be laid before Parliament.

General*Review of Charter after 4 year of operation*

[44]. Establishes an obligation on the Attorney-General to cause a review to be undertaken of the first 4 years of operation of the Charter. It obliges the Attorney-General to cause a report of the review to be presented to Parliament on or before 1 October 2011. The clause lists the matters to be considered in the Attorney-

General's review including the possible inclusion of additional human rights contained in a number of International Conventions.

Review of Charter after 8 years of operation

[45]. Establishes an obligation on the Attorney-General to cause a review to be undertaken of the 5th to 8th years of operation of the Charter. It obliges the Attorney-General to cause a report of the review to be presented to Parliament by 1 October 2015.

Regulations

[46]. Empowers the Governor in Council to make regulations under the Charter.

Consequential amendments

[47]. Makes consequential amendments to a number of Acts listed in the Schedule to the Charter including the following Acts —

The *Parliamentary Committees Act 2003* to confer an additional term of reference on the Scrutiny of Acts and Regulations Committee (new section 17(a)(viii)) to consider whether a provision in a Bill is incompatible with the human rights set out in the Charter.

The *Subordinate Legislation Act 1994* to require a human rights certificate to be prepared by the responsible Minister in respect of all proposed statutory rules. The required content of a human rights certificate is outlined in the amendment provisions and an exemption is provided for certain statutory rules, such as court rules. The amendments also confer an additional term of reference on the Scrutiny of Acts and Regulations Committee (new section 21(1)(ha)) to consider whether a provision in a statutory rule is incompatible with the human rights set out in the Charter.

Laws concerning abortion and child destruction not affected by Charter

[48]. Declares that the Charter does not affect any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.

Note: This encompasses both statute law and any common law interpretation of statute law.

Transitional provisions

[49]. Establishes that the Charter applies to all Victorian Acts and subordinate instruments regardless of when they commenced. The Charter does not apply to any legal proceedings commenced before 1 January 2008. The obligations on public authorities in the Charter do not apply to any act or decision made by a public authority before 1 January 2008. ▲