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## *Rights without remedies*

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# Rights without remedies

AN INDEPENDENT REVIEW RECOMMENDED THE CHARTER BE AMENDED TO ALLOW LEGAL PROCEEDINGS BASED ON BREACH OF THE RIGHTS IN THE CHARTER. RECENT CASES ILLUSTRATE THE CURRENT DIFFICULTIES AND THE NEED TO PROVIDE EASIER ACCESS TO LEGAL REMEDIES WHEN HUMAN RIGHTS ARE NOT COMPLIED WITH. BY BILL SWANNIE



In 2006 Victoria was the first Australian state to enact a charter of human rights.<sup>1</sup> This was regarded as “an historic day for Victoria”<sup>2</sup> by the then Attorney-General. The United Kingdom, New Zealand, Canada, India and South Africa all have charters of human rights. The trend in Western democracies is towards having a comprehensive statement of rights, either entrenched in a country’s constitution, or in national legislation. Australia has so far resisted this trend at a national level.

Concern for protecting human rights is often seen as a response to the atrocities of WWII. The United Nations was formed in 1945, and the Universal Declaration of Human Rights (UDHR) drafted in 1948. The Victorian Charter is based on certain rights contained in the UDHR, and particularly the civil and political rights contained in the International Covenant on Civil and Political Rights 1966.

Human rights charters can be an effective means for citizens to hold a government directly accountable for its actions and policies. They protect and promote certain core political values, such as individual dignity, equality and liberty.

The Victorian Charter, however, provides a relatively weak model for human rights protection. Although it includes most of the rights included in international treaties – such as the right to life, freedom of expression, freedom from torture etc – it has a complex model for enforcing or protecting those rights.<sup>3</sup>

## The dialogue model

In drafting the Charter, parliament had two main models to choose from. On the one hand, there was the US model, with power for courts to declare laws passed by parliament to be invalid if they breached the Bill of Rights. Under the US model, individuals can also be awarded compensation if their rights are breached.

This model was not the one supported by the government. It was said to give too much power to the courts, and to rely unduly on litigation, rather than preventing and mediating disputes.

The Victorian parliament instead adopted a “dialogue” model, based on the UK Human Rights Act 1998. Under

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this model, human rights are protected by a dialogue between the branches of government. Each branch – parliament, the executive and the courts – has responsibilities under the Charter, and the three branches are meant to work together to ensure that rights are adequately protected.

In summary, the responsibilities of each branch of government under the Charter are:

- Parliament – must provide a “statement of compatibility” in relation to every new bill presented to parliament (s28). This states whether the bill is compatible with human rights, and the nature and extent of any incompatibility
- Executive – “public authorities” must act compatibly with human rights and must consider any relevant human rights when making a decision (s38). This applies to public servants, members of Victoria Police, government ministers, local government etc<sup>4</sup>

- Courts – must interpret all laws compatibly with human rights, so far as this is possible to do consistently with their purpose (s32). Importantly, courts cannot declare a law to be invalid on the grounds that it is incompatible with human rights. A court may make a “declaration of inconsistent interpretation” if a statute cannot be interpreted consistently with human rights. This does not make the law, or any decision made under it, invalid (s36). There is a process for referring the declaration to the relevant minister, but parliament is not required to reconsider or amend the relevant legislation (s37).

### Current provisions regarding legal proceedings and remedies

The Charter is clear that laws that have been found by a court to be inconsistent with human rights are nonetheless completely valid and enforceable. This does, however, create legal and practical anomalies. In *R v Momcilovic*<sup>5</sup> the Victorian Court of Appeal declared a provision in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) to be incompatible with the Charter, as the reverse onus of proof under the Act was contrary to the presumption of innocence in the Charter. However, this declaration did not affect the validity of the relevant provisions of the Act, and it did not provide grounds for setting aside Momcilovic’s conviction for serious drug offences under the Act.<sup>6</sup>

The Charter was intended to protect rights through “dialogue”, rather than litigation. The Charter is rather confusing when it comes to legal proceedings and remedies for infringement of the Charter. Section 38 provides that it is “unlawful” for a “public authority” to act incompatibly with a human right or to not give proper consideration to human rights when making a decision.

However, s39 of the Charter seems to provide that there is no independent or “free standing” cause of action for breach of the Charter. In other words, it is unclear whether there is a right to seek a remedy or relief in legal proceedings against a public authority based purely on failure to comply with the Charter. It appears that breach of the Charter can be raised only if another challenge can be brought to the lawfulness of the conduct or the decision on a non-Charter basis. For example, as an additional ground of review in an application for judicial review of an administrative decision in the Supreme Court.<sup>7</sup>

#### SNAPSHOT

- The Victorian Charter of Human Rights does not currently provide for an individual cause of action based on breach of rights in the Charter.
- A recent independent review of the Charter has recommended the creation of an individual cause of action.
- The absence of an individual cause of action restricts access to justice for people whose rights have been breached.

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### Independent review of the Charter

Enacted in 2006, the Charter provides for review of its operation after four years, and again after eight years. The eight year review was completed and tabled in Victorian parliament late in 2015.<sup>8</sup> The review made a number of recommendations aimed at strengthening Victoria's human rights culture and making the Charter more accessible, effective and practical.

One of the terms of reference for the review was whether the provisions regarding legal proceedings and remedies needed to be "clarified". The reviewer, Michael Brett Young, received many submissions on this topic. The Victorian Council of Social Services stated in its submission that there was a perception in the community that the inability to seek a remedy under the Charter made it appear that the government was not taking human rights seriously. The same submission stated that there was a feeling reported by many in the community that some Victorian public authorities had not incorporated human rights into their policies and practices because there are no repercussions for not doing so.

### Problems with the remedies provision

The Victorian Equal Opportunity and Human Rights Commission, and other human rights organisations, made a submission to the review that the Charter's purpose to protect and promote human rights could be better supported through improving the legal consequences for breaches of the Charter.<sup>9</sup>

These submissions highlighted that it can often be difficult to bring legal proceedings against a public authority for alleged breach of the Charter. A common scenario is that of a person living in public housing made subject to an eviction decision in which their rights, or the rights of their family and children, have not been properly considered.

When the Charter first came into force, tenancy advocates raised the Charter as a defence in proceedings in the Victorian Civil and Administrative Tribunal (VCAT) where the Director of Housing had made an application to evict the tenant. The Charter was invoked to argue that the Director had failed to give proper consideration to the human rights of the tenant and their family, or that there were insufficient reasons for the eviction, so as to make it an unreasonable and arbitrary interference with their home and family, in breach of the Charter's privacy right (s13).

In some early decisions under the Charter, VCAT dismissed possession order applications on the basis that the Director's decision to evict a tenant was in breach of the Charter. However, VCAT's power to do this was challenged. In 2011, the Court of Appeal in the case of *Director of Housing v Sudi*<sup>10</sup> ruled that the Charter's remedy provision did not empower VCAT to conduct this kind of "review" of the Director's decision as it was "collateral" to the possession order application before it.

Subsequently, the only option for a tenant to seek review of an application to evict them on human rights grounds

is to seek judicial review in the Supreme Court. This does not seem consistent with the objective of the Charter to minimise resort to litigation. Further, bringing an action in the Supreme Court is an expensive, legally complex and time-consuming process.

The 2014 case of *Burgess v Director of Housing*<sup>11</sup> illustrates the difficulties with having to apply to the Supreme Court. Ebony Burgess was a 34-year-old woman who had battled drug dependence, depression and anxiety. Her home in public housing where she had lived since 2006 was important to her recovery, her parole compliance, avoiding homelessness, and providing stability for her teenage son who was undertaking his VCE.

The Director of Housing had issued a notice to vacate for no reason, followed by an application for a possession order and then a warrant of possession in VCAT. Because it was not possible to challenge an alleged Charter breach in the VCAT applications, the tenant's pro bono lawyers made an urgent application for judicial review in the Supreme Court. They sought review of the Director's decisions on the ground that it did not properly consider the rights of Ms Burgess and her son. The Supreme Court held that the Director had breached the Charter and found, as a result, that the warrant was of no legal force. This case illustrates how complex it can be to seek a practical outcome under the Charter.

### Review recommendations

The review recommended that the Charter be amended so that a person who claims that a public authority has not acted compatibly with their human rights can commence legal proceedings on this basis alone.

The review took into account submissions (including from Victoria Police) that it would be a fundamental shift to include a freestanding right of action. It also considered arguments that the Charter's major strength was its emphasis on human rights compliance at the policy making stage, which seeks negotiated outcomes rather than adversarial contests. However, the reviewer concluded that "providing for human rights without corresponding remedies sends mixed messages to the public sector and to the community about the importance of those rights" and that, to be an effective regulatory model, it must include an ability to enforce the standards it sets.<sup>12</sup>

The review recommended that VCAT have a major role in determining these types of matters. VCAT was seen as more "accessible" than the courts in terms of costs, informal procedures and timeliness in hearing and determining matters. In particular, the review recommended a similar role for VCAT as exists under Victoria's *Equal Opportunity Act*, where there is an option to make an application directly to VCAT that a public authority has acted unlawfully, or, where appropriate, to first pursue dispute resolution at the Commission to attempt to reach a conciliated resolution.

The review noted that the UK *Human Rights Act* currently provides for proceedings to be commenced against a public authority based on non-compliance with human rights. The UK Act includes limitations, for example, that proceedings

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can be commenced only by a “victim” and only within 12 months of the alleged infringement.

The *Australian Capital Territory Human Rights Act 2004* (ACT Act) also provides that a person’s rights under the Act can be relied on in the Supreme Court and in other legal proceedings. The ability to bring a direct legal proceeding to seek relief or remedy for a human rights breach was added to the ACT Act in 2009, and there does not appear to have been a flood of human rights claims in the ACT.<sup>13</sup>

### Conclusion

The recent independent review of the Charter recommended that it be amended to enable a stand-alone cause of action against a public authority. The review highlighted that the current provisions regarding legal proceedings and remedies are unnecessarily complex and cumbersome. The provisions do not enable individuals whose rights have been breached by a government department to seek a remedy for this breach.

Government departments are generally much better resourced to respond to claims than are the individuals who seek to have their rights vindicated. These are, for example, people who are being evicted from their public housing accommodation and those who have been denied government services.

On 22 July 2016, the Victorian government responded to the recent review’s recommendations. Although the government supported 45 of the 52 recommendations, no legislation has been introduced yet, and the recommendations to establish an independent cause of action and to strengthen the Charter’s enforcement mechanisms are “under further consideration”. ■

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1. *Charter of Human Rights and Responsibilities Act 2006* (Vic) (“the Charter”).
2. Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1289 (Rob Hulls).
3. The rights protected by the Charter are listed in Part 2 of the Act.
4. See s4 of the Charter regarding the definition of a “public authority”.
5. *R v Momcilovic* [2010] VSCA 50.
6. Momcilovic’s conviction was overturned on appeal to the High Court, on other grounds: *Momcilovic v R* [2011] HCA 34. This case raises many issues regarding the Charter that are outside the scope of this article.
7. Michael Brett Young, “From Culture to Commitment: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*”, 121. The full report of the review is available at [www.justice.vic.gov.au](http://www.justice.vic.gov.au).
8. Note 7 above.
9. The Commission’s submission is available at [www.humanrightscommission.vic.gov.au](http://www.humanrightscommission.vic.gov.au).
10. *Director of Housing v Sudi* [2011] VSCA 266.
11. *Burgess v Director of Housing* [2014] VSC 648.
12. Note 7 above, 127.
13. Note 7 above, 126.

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