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An overview of the Charter

How it works and some recent key cases

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Speakers



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Agenda

- **Anatomy of the Charter**
- **Section 38 in practice**
- **Recent cases considering the Charter**

A vertical photograph of a modern building's facade, showing blue and white curved panels. A large, light-colored circular opening is visible at the base of the building.

Anatomy of the Charter

Context & background

- International context
- The fight for a Charter in Victoria
- Charters of Rights in Australia: ACT, Vic, QLD.

Charter of Human Rights and Responsibilities Act 2006 (Vic)

What it is:

- Statutory (not constitutional)
- Limited
- An accountability mechanism

What it isn't

- American-style
- Sole source of a cause of action (s39) / source of damages
- Binding, indefeasible, immutable

What does the Charter do?

The crux is at s 7(2):

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

- The importance of purpose and proportionality.
- The Charter is a filter / speedbump / hurdle.

Three main applications of human rights

- **The interpretive obligation**
See section 32.
- **Conduct of public authorities**
See section 38.
- **Courts and Tribunals**

Charter applies to Courts and Tribunals when exercising functions under Part 2 (s6(2)(b)) (not all rights) (broadly: when exercising judicial rather than executive (ie administrative review) power).

Consequences of breach or failure?

The Charter does not create a standalone cause of action or entitlement to damages.
There has to be another available cause of action to which a Charter action can attach.
NB section 39.

A bird's eye view: Key provisions & why they are important

- Section 4: what is a public authority?
- Section 7: Human rights – what are they and when they may be limited?
- Section 8 – 27: The rights protected under the Charter
- Sections 28-30: Scrutiny of legislation (including statements of compatibility & SARC)
- Section 31: Override by Parliament – Acts / provisions can have effect despite being incompatible with human rights.
- Section 32 – 37: Interpretation of laws. (NB s 32: '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').
- Section 38 – 39: Obligations on public authorities
- Sections 40 – 43: Victorian Equal Opportunity and Human Rights Commission
- Sections 44 – 49: General (review after 4 and 8 years, transitionals and savings).

Which rights are protected?

- Equality/non-discrimination (s 8) – (as defined in EO Act)
 - Right to life (s 9)
 - Right against torture, cruel, inhuman or degrading treatment (s 10)
 - Freedom from forced work (s 11)
 - Freedom of movement (s 12)
 - Privacy (s 13)
 - Freedom of thought, conscience, religion, belief (s 14)
 - Freedom of expression (s 15)
 - Freedom of assembly (s 16)
 - Protection of families and children (s 17)
 - Right to participate in public life (s 18)
 - Cultural/aboriginal rights (s 19)
 - Property rights (s 20)
 - Right to liberty and security (s 21)
 - Conditions of detention (s 22)
 - Children in criminal process (s 23)
 - Fair hearing (s 24)
 - Criminal procedure rights (s 25)
 - Right against double jeopardy (s 26)
 - Right against retrospective criminal laws (s 27)
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- Some rights are absolute (ie freedom from torture).
 - Some are ‘internally modified’ ie s13(a) – right against arbitrary interference with privacy, right against arbitrary detention.
 - Some have other specific limitations ie s15 right to freedom of expression (co-existence of rights).
 - All other rights are subject to the general limitations clause in 7(2):



Section 38 in practice

- **Why** to use it — Consequences of unlawfulness under s 38
- **How** to use it — Roadmap for using s 38 in practice

Section 38 Conduct of public authorities

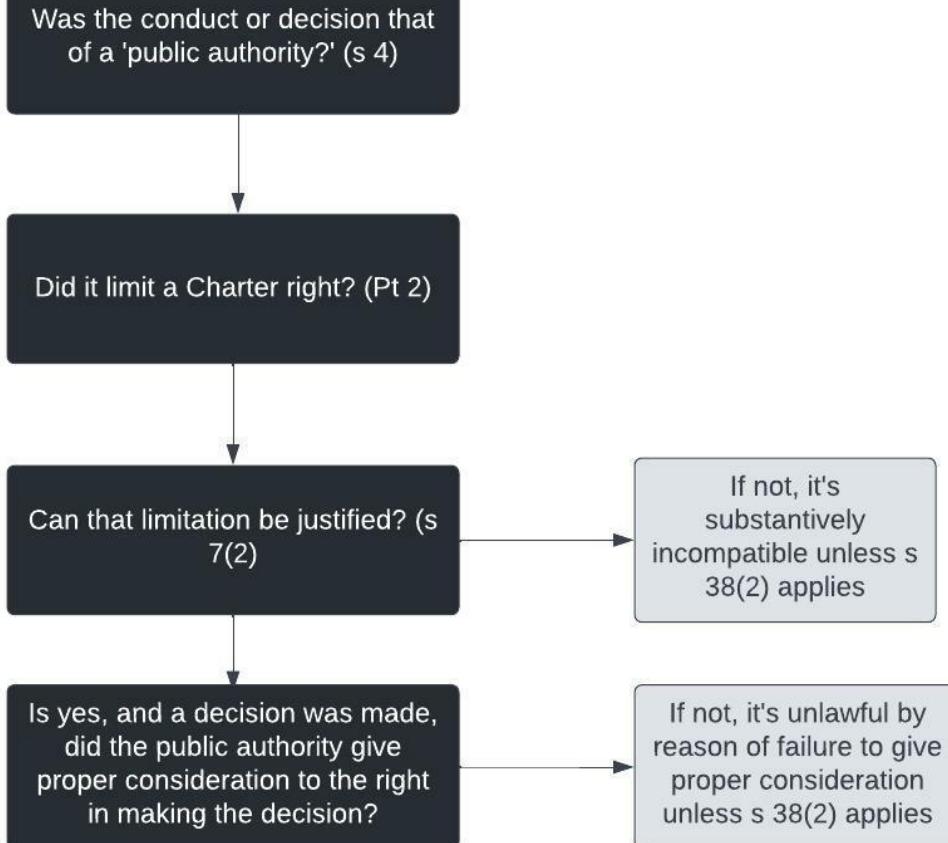
- (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
- (2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

Example Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.

Why to use s 38 – Some consequences of breach

- Section 138 of the *Evidence Act* (exclusion of improperly or unlawfully obtained evidence)
- Declaratory and injunctive relief e.g. prison conditions

Section 38 Roadmap



Was the conduct or decision that of a public authority? S 4

- ‘Specified public authorities’ — including Victoria Police
- Other public authorities
- Prescribed bodies that are not public authorities (*Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* (Vic) — e.g. the Adult Parole Board

Limitation of a Charter right? Pt 2

- Right to recognition and equality before the law (section 8)
- Right to life (section 9)
- Right to protection from torture and cruel, inhuman or degrading treatment (section 10)
- Right to freedom from forced work (section 11)
- Right to freedom of movement (section 12)
- Right to privacy and reputation (section 13)
- Right to freedom of thought, conscience, religion and belief (section 14)
- Right to freedom of expression (section 15)
- Right to peaceful assembly and freedom of association (section 16)
- Right to protection of families and children (section 17)
- Right to take part in public life (section 18)
- Cultural rights (section 19)
- Property rights (section 20)
- Right to liberty and security of person (section 21)
- Right to humane treatment when deprived of liberty (section 22)
- Rights of children in the criminal process (section 23)
- Right to a fair hearing (section 24)
- Rights in criminal proceedings (section 25)
- Right not to be tried or punished more than once (section 26)
- Retrospective criminal laws (section 27)

Justification? s 7(2)

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

- (a)the nature of the right; and
- (b)the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d)the relationship between the limitation and its purpose; and
- (e)any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Proper consideration in decision-making

A decision-maker must:

- Understand in general terms the rights affected and how the decision will interfere with them
- Seriously turn their minds to the impact of the decision and the implications for the person/s affected
- Identify the countervailing interests (i.e. why the right should be limited in the circumstances)
- Balance the competing public and private interests

One final practical matter: Notice

- Section 35(1) requires that notice of a Charter case be given to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission
- The form is specified in the *Charter of Human Rights and Responsibilities (General) Regulations 2017* (Vic)
- A word version of that notice can be found here:
<https://www.humanrights.vic.gov.au/resources/section-35-notice-instructions/>

** Notice is not required in the Magistrates' Court.



Recent cases considering the Charter

- *Thompson v Minogue* [2021] VSCA 358
- *Gebrehiwot v State of Victoria* [2020] VSCA 315
- *Dudley v Secretary to the Department of Justice and Community Safety* [2021] VSC 567
- *Re Shea* [2021] VSC 207 & *Re Raffoul* [2020] VSC 848

Thompson v Minogue [2021] VSCA 358

Considered: ss. 7, 13, 22, 38 Charter

Facts

- Dr Minogue serving sentence (life) in Barwon.
- Directed to undergo random drug test – urine sample, followed by a strip search.
- Pursuant to a prison policy (5% of total population required to drug test each month).
- Months later, required to undergo random drug test, and directed to undergo a strip search before and after contact visit with any external visitor.

First instance decision

- Richards J found that Dr Minogue's rights under the Charter were breached by Corrections, largely because:
 1. *The decision to implement the scheme for urinalysis tests and associated strip searches (the Urinalysis Procedure) did not involve proper consideration of the relevant rights as required by s 38(1) (the proper consideration finding).*
 2. *It was not lawful to require Dr Minogue to undertake a strip search before each test because there were no reasonable grounds, as required by Corrections Regulations, reg 87(1)(d), for Corrections to consider that doing so was necessary for the security and good order of the prison (the reasonable grounds finding).*
 3. *The urinalysis tests and associated strip searches limited Dr Minogue's privacy and dignity rights and that limitation was not justified, contrary to s 38(1) (the substantive breach finding).*

Thompson v Minogue [2021] VSCA 358

Considered: ss. 7, 13, 22, 38 Charter

Court of Appeal

- The Court of Appeal granted leave and allowed the appeal on the proper consideration finding.
- Ultimately, relief granted in respect of the strip searches, but not in respect of the random urine tests.

Considered

- Right to privacy
- Right to dignity

Gebrehiwot v State of Victoria [2020] VSCA 315

Considered: ss. 8(3), 12, 21, 10(b), 22(1) and 38

Facts

- Police tort case – injuries suffered following an incident with Victoria Police.
- Proceeded before jury.
- The applicant claimed that the police officers had, in assaulting and falsely imprisoning him, acted incompatibly with his human rights in contravention of s 38(1) of the Charter. Specifically, the applicant alleged the police officers breached his rights under ss 8(3), 12, 21, 10(b) and 22(1) of the Charter.
- Trial Judge rejected proposition that Charter breaches would be relevant to the jury.

Court of Appeal

- Breach of charter cannot be relied upon as a means of recovering damages.
- However, noted that trial judge had erred in holding that s.32 Charter was irrelevant. Was relevant because *may have affected the jury's consideration of whether s.462A Crimes Act (ie, 'force not disproportionate')* had been satisfied.

Dudley v Secretary to the Department of Justice and Community Safety [2021] vsc 567

Considered: ss. 21, 23, 32 in context of EMDs

Facts

- Plaintiff applied for judicial review of decision not to grant any EMDs.

Cavanough J, Supreme Court

- On ultimate issue, dismissed application for judicial review, on basis that relevant considerations were relevantly discharged, and it was at the lawful discretion of the decision maker to make no award of EMDs.
- However, in obiter, in relation to charter, noted that that discretion must be construed in accordance with s.32(1), and that it was *arguable* that the decision making might engage the right to liberty and security, and right to humane treatment in detention.
- No concluded view as to the Charter applicability was ultimately given.

Re Shea [2021] VSC 207

Re Raffoul [2020] VSC 848

Considered: ss. 21, 25, 32 in context of bail decisions

Relevant Facts

- Both CDPP drug importation/related charges where accused were likely to spend at least 2 to 3 years in custody before being brought to trial.

Relevant obiter of Croucher J in *Re Raffoul*

- Considered 2-3 years an 'unreasonably delay' in the context.
- At paragraph [90]:

Section 21(5) of the of Charter of Human Rights and Responsibilities Act 2006 (Vic) ("the Charter") provides, in effect, that a person who is arrested or detained on a criminal charge has the right to be brought to trial without unreasonable delay, and must be released if that right is not observed. Further, s 25(2) provides that a person charged with a criminal offence is entitled without discrimination to minimum guarantees, including being tried without unreasonable delay. Section 32(1) provides that, 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 (which includes those rights in ss 21(5) and 25(2)). I should have thought that a delay of two-and-a-half years between charge and trial is an unreasonable delay, and that, in turn, this might inform the interpretation of whether and when exceptional circumstances are established by reason of delay.



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Jessie Taylor BA(Hons) LLB(Hons) MSc(HA) first signed the roll of counsel in 2011, winning the Daniel Pollak Readers' Pro Bono Award for pro bono work in her first six months at the Bar. Jessie advises and appears in an array of administrative law matters and enjoys a strong government advisory practice, including on the operation of the *Charter of Human Rights and Responsibilities Act 2006*. She accepts briefs in Coronial Inquests, Commissions and Inquiries and appeals and public law generally, often in matters touching on mental health, public health and capacity. She has a growing common law & personal injury practice (with a particular interest in institutional liability).

She is a member of the Australian and New Zealand Association of Psychiatry, Psychology and the Law (ANZAPPL), the Australian Institute of Administrative Law (AIAL) and the Australian-Hazara Legal Network. Jessie is a Director of Donkey Wheel, and a former President of the Victorian Council for Civil Liberties (Liberty Victoria) (2016–2019). In 2018 she participated in the Justice & Society Symposium at the Cranlana Centre for Ethical Leadership. She is co-creator of the documentary *Between the Devil and the Deep Blue Sea*. She speaks Hazaraqi and French.



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Katharine has a broad trial and appellate practice, with particular experience in matters involving public and criminal law.

Prior to joining the Bar, Katharine was an associate to the Hon Justice Gageler AC at the High Court of Australia.

She was previously a Senior Solicitor at the Office of Public Prosecutions and a Solicitor at the Victorian Government Solicitor's Office. She holds a Masters of Law from Duke University and has lectured in Evidence Law at Melbourne and Monash Universities. She has also worked at the Center for Constitutional Rights in New York City.



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