

# KELLEHERS AUSTRALIA

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## In-House Memorandum

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### Public Authorities and the *Charter of Human Rights and Responsibilities Act 2006*

The Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') contains important provisions affecting all public authorities. The Charter applies to public authorities, to the extent that they have functions to exercise a power or perform a duty. It stipulates that:

*'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'*<sup>1</sup>.

"Public authority", which explicitly includes Victoria Police, is defined to exclude:

*'a court or tribunal except where it is acting in an administrative capacity'*<sup>2</sup>.

Thus, the Charter applies to all Councils and Water Authorities. It also applies to VCAT when it is acting in an administrative capacity, ie when it is exercising its review jurisdiction<sup>3</sup> to make a decision in the shoes of an administrative body or a Responsible Authority<sup>4</sup>. The obligation 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.'*<sup>5</sup>

The Public Administration Act 2004 requires public officials to 'actively implement, promote and support human rights'<sup>6</sup>. While this Act specifically does not give rise to any legal rights, it must be a relevant consideration for public officials exercising broad discretions. More than just not breaching human rights, it requires action that will not hamper the free enjoyment of such rights.

According to s32(1) of the Charter, public authorities, courts and tribunals, including VCAT, 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 provisions<sup>7</sup>. International law and judgments of domestic, foreign and international courts and tribunals may be taken into account in interpreting a human right and relevant statutory provision<sup>8</sup>.

In 2011, the High Court found that the Charter:

*'requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the common law rights and freedoms. ... Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.'*<sup>9</sup>

Subsequently in 2013, the Victorian Court of Appeal overruled a Magistrate's decision requiring s 32(1) of the Charter to be treated:

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<sup>1</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s38(1), Div 4, Part 3

<sup>2</sup> *Charter*, s4(1)(j)

<sup>3</sup> *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 51

<sup>4</sup> *Planning and Environment Act 1987* (Vic), ss 77-82B

<sup>5</sup> *Charter*, s 38(2)

<sup>6</sup> *Ibid.*, s 7(1)(f)

<sup>7</sup> *Ibid.*, Ss 6(2)(b) and 32(1)

<sup>8</sup> *Ibid.*, s 32(2)

<sup>9</sup> *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1 per French CJ, at [51]

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*'at least as reflecting the common law principle of legality. The principle directs that statutes are not to be construed as encroaching upon certain rights unless Parliament has made its intention to do so unequivocal'<sup>10</sup>.*

Section 7(2) of the Charter provides that:

*'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 Chief Justice of the Victorian Supreme Court in 2009, observed that:

*'...human rights should be construed in the broadest possible way. The purpose and intention of Parliament in enacting the Charter was to give effect to well recognised and established rights in the criminal justice system ... It should not be assumed that the Charter has narrowed traditional common law rights .... The Charter supports the approach that rights should be construed in the broadest possible way before consideration is given to whether they should be limited in accordance with s 7(2) of the Charter. That section serves the purpose of mitigating any damage to society that may arise from upholding an individual's right.'<sup>11</sup>*

This case followed an earlier VCAT decision in which Deputy President Dwyer, considering the planning framework, saw it as providing a balance in dealing with competing rights and interests in a free and democratic society<sup>12</sup>:

*'Any decision that properly considers all relevant planning considerations... would in my view represent a reasonable, proportionate and justifiable limitation on [the] right to privacy.'<sup>13</sup>*

Questions concerning the operation of the Charter and the Public Administration Act remain to be resolved within land use planning. Outcomes may turn on the extent of any limitation imposed upon parties. It remains to be seen what VCAT's approach will be to a future Application, following the High Court and Supreme Court decisions, as to whether grant or refusal of a planning permit limits rights reasonably or unreasonably.

Robert Forrester & Cameron Algie  
17 March 2014

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<sup>10</sup> *Victorian Toll & Anor v Taha & Anor; State of Victoria v Brookes & Anor* [2013] VSCA 37.

<sup>11</sup> *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, at [80].

<sup>12</sup> *Smith v Hobsons Bay City Council* [2010] VCAT 668, at [35]-[36]

<sup>13</sup> *Ibid.*