

Update

Issue #2

Public Law



Getting to Grips with the Charter of Human Rights and Responsibilities

Human Rights Laws in Practice

With the *Charter of Human Rights and Responsibilities Act 2006* (Vic) due to come into force on 1 January 2007 (partially) and 1 January 2008 (fully) it is time for public bodies that are going to be affected by this legislation to start thinking about what this legislation means. Even before full implementation occurs on 1 January 2008 the legislation is already exerting some sort of influence on judicial thinking. In September the Charter was again cited by the Victorian Court of Appeal— this time in the context of what restrictions on liberty might be reasonable in a free society, *TSL v Secretary to the Department of Justice* [2006] VSCA 199.

As a starting point we have put together a 'hit list' of some of the most significant human rights cases from the UK since their legislation came into force on 2 October 2000.

In reverse order they are:

- *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* (2005) - a small NGO sought judicial review of a decision of the Department of Trade and Industry not to consult them in relation to new anti-bribery measures that would apply to UK exporters. The NGO's lawyers were operating on a CFA, the NGO could not afford to be exposed to a costs order and so sought a protective costs order from the Administrative Court. The application was refused at first instance and they appealed to the Court of Appeal. The purpose of a PCO in these cases is to allow issues of public importance to be litigated. Overriding the first instance decision the Court of Appeal granted the PCO. In its reasons it explained that it was appropriate in this instance because the issues were of general public importance and the NGO did not stand to make financial gain from the proceedings. The case is notable as it

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provides further encouragement for the use of PCO's in HRA litigation. In the Australian context it is interesting to notice that the power to make PCO's was found in the general costs discretion which is not dissimilar to the cost powers available in the Victorian Supreme Court.

- ***R (on the application of Wooder) v Feggetter*** (2002) - doctors acting under mental health legislation who wanted to administer medication to a competent but non-consenting adult had to make sure that their decision was accompanied by reasons. The court reasoned that the issue was so important that the obligation to provide reasons was triggered. At the same time there are instances of bodies such as the General Medical Council's disciplinary body not having to provide reasons. Another interesting case about the need to give reasons was a challenge to the Millennium Commission's selection of competing proposals for the development of the Millennium Dome where the only reason given to one of the proponents for rejecting their proposal was that "we preferred other applicants". In that case the reasons were found to be sufficient!
- ***R (Limbuela) v Secretary of State for the Home Department*** (2005) - Refusal of asylum support was a breach of the HRA. Interestingly it was found that the Article 3 - prohibition on inhumane, degrading treatment - was absolute and that the intentional act of the State to render these people homeless and destitute was in breach of that prohibition. Whether this case could have wider implications in areas such as homelessness and other areas where marginalised people are reliant upon support remains to be seen.
- ***R (Laporte) v Chief Constable of Gloucestershire*** (2004) - an interesting decision to not only prevent coach-loads of potential protestors attending an anti-war demonstration at the Fairford base (from which many of the bombing raids against Iraq were launched) but to force them to return to London by non-stop coach was challenged. The claimants alleged that the action was unlawful and therefore constituted false imprisonment. It was found that the decision to turn them away was justified but that there was no need to compel them to return by non-stop coach and that this decision contravened the HRA. The claim for false imprisonment succeeded.

- ***R (Hammond) v Secretary of State for the Home Department*** (2005) - provisions in the criminal justice legislation provided that in relation to certain matters regarding tariffs there was only an entitlement to a paper consideration. It was argued that Article 6 ECHR (right to a fair hearing) would in some circumstances require an oral hearing. The House of Lords found that to read the statutory provisions compatibly with the HRA it was necessary to read in an implied condition that allowed for oral hearings where fairness required it. Thereby a straightforward 'no' in the statutory language became a 'maybe' when the interpretative obligation was applied.
- ***R (SB) v Head teacher and Governors of Denbigh High School*** (2005) - a school uniform policy had been meticulously developed by a school which had a high proportion of Muslim students. The application of the policy meant that the claimant, a Muslim girl, was not allowed to wear a jilbab. The Court of Appeal refused to intervene (reversing the decision of the first instance decision) on the basis that the school had taken extensive and careful steps to develop a policy which they were able to justify and demonstrate was workable.
- ***R (on the application of Quintavalle) v Secretary of State for Health*** (2002) - it was held by the Court of Appeal, refusing judicial review in this instance, that a particular statutory licensing scheme applied to 'embryos' created by cell nuclear replacement. To reach this conclusion the court adopted a purposive approach to their interpretation of the legislation which required them to update the statutory language in their construction of the provisions. The case is illustrative of a number of instances in which there is increasing judicial willingness to be robust and imaginative in attempting to find solutions and outcomes that accord with interpretive obligation under section 3 of the HRA
- ***R (on the application of Watts) v Bedford Primary Care Trust*** (2003) - the applicant sought judicial review of a refusal to reimburse her for the cost of a hip-replacement operation obtained in France because the waiting period for the treatment in the UK was too long. The court found that Article 8 ECHR did not create a positive obligation to provide treatment and that Article 22 ECHR could not be engaged unless treatment under the NHS was so slow as to be ineffective.

- Given the more recent decision of the Court of Appeal in *Rogers* it might be that this decision is ripe for revisitation.
- ***R (on the application of Heather) v Leonard Cheshire Foundation*** (2002) - the LCF operated public housing and provided housing for publicly funded local authority placements. The question arose as to whether they were a public authority for the purposes of the HRA which would have increased the claimant rights against them. The Court of Appeal found that the LCF were not a public authority. However, the claimant's could rely upon the HRA to enforce statutory obligations (arising under national assistance legislation) against the local authority. The case has frequently been cited in decisions exploring the limits of the 'public authority' concept. This is an area where there is as yet no settled answer.
- ***R (on the application of Pretty) v Director of Public Prosecutions*** (2001) - this tragic case involved judicial review of the DPP's refusal to agree in advance not to prosecute Diane Pretty's husband if he assisted her suicide in accordance with her wishes. The House of Lords found the State to be acting lawfully as Article 2 of the ECHR did not create a right of self determination in relation to life and death. Nor did Article 3 of the ECHR give rise to a right to live and die. The case arose in the early stages of the development of domestic jurisprudence in the UK and there was heavy criticism of the perceived judicial conservatism. Many commentators consider that this case might be decided differently in the current judicial climate.
- ***R (on the application of L) v Manchester City Council*** (2001) - The City Council set short-term foster care payments at a different (much lower) level where the carer was a relative/friend than where the carer was a hired professional. This decision was (1) arbitrary and inflexible; (2) conflicted with the legislated welfare principle; (3) was irrational; and (4) was discriminatory and therefore in breach of Article 14 of the ECHR. The case provides a fantastic example of how the human rights legislation can be used to attack obvious unfairness in public policy decision making.
- ***R (on the application of International Transport Roth***

GmbH) v Secretary of State for the Home Department (2002) - there were a number of instances in which asylum seekers would stow away in the back of heavy goods vehicles in France, cross the channel and pass through customs whilst concealed. Then, when the driver eventually opened the doors they would leap out (to his astonishment) and run off into the distance. The State took action to curtail this practice by imposing sanctions on hauliers whose trucks were used in this way. The sanctions included the detention of the vehicles. The legislation was disproportionate and the power of detention of vehicles was incompatible with the HRA (Article 1 Protocol 1 - right to property).

The legislation also contravened Article 6 ECHR - right to a fair hearing - in that it reversed the burden of proof in relation to a criminal charge. This case represented a dramatic defeat for the State which received considerable coverage in the media.

- ***R (Rogers) v Swindon Area Health Authority*** (2006) - this case concerned Ms Rogers' eligibility for treatment with the breast cancer drug trastuzumab (brand name "Herceptin"). The decision of the PCT to refuse her treatment with Herceptin was overturned.

The "Herceptin" cases had been expected to address head-on the clash between an individual's demand for the best possible treatment and the limited availability of resources. In fact, the Court of Appeal was able to make the decision on more technical grounds because the PCT had adopted a policy that was easily attacked. The policy of the PCT was not to fund treatment with Herceptin for women with early stage breast cancer save in exceptional circumstances.

The PCT then said that their decision had nothing to do with costs (thereby avoiding the expected clash) but relied instead upon the regulatory process for the licensing of new treatments and drugs. The Court argued that the only relevant considerations that were left were clinical considerations and there was no basis for distinguishing between Ms Rogers and any other women falling within the relevant category. The decision of the PCT was therefore unlawful.

- ***Begum v Tower Hamlets London Borough Council*** (2003) - under the UK's homelessness legislation a person owed a duty by a Council could appeal an unfavourable decision. That appeal was an internal appeal which was then subject to statutory review (on what were essentially judicial review grounds) to the County Court. The decision of the County Court was appealable to the Court of Appeal and ultimately the House of Lords. The claimant argued that Article 6 - right to a fair hearing - was breached because at no stage was there a full merits review by an independent and impartial tribunal. Accepting that the internal appeal could not satisfy Article 6 the House of Lords nevertheless found that the availability of statutory appeals gave sufficient opportunity to correct any unfairness. This decision has been applied in other contexts (such as town planning and decisions to exclude pupils from schools).
- ***R v Secretary of State for the Home Department, ex p Daly*** (2001) - the Home Secretary introduced a blanket policy of searching legal correspondence of prisoners. This amounted to an unjustified interference with the right of legal professional privilege protected under Article 8 of the ECHR. The case has proved to be a catalyst for the development of a proportionality test in the context of HRA decisions. Essentially the test requires decision makers to achieve legitimate ends by the least intrusive method. The test operates to the exclusion of ordinary *Wednesbury* reasonableness in the HRA challenges. There are also signs that it may be about to replace *Wednesbury* reasonableness in ordinary administrative law challenges.
- ***A v Secretary of State for the Home Department*** (2004) - the detention of non-UK nationals under the anti-terrorism legislation without trial on the basis of the threat that they posed to national security violated Article 5 ECHR. The Human Rights Act 1998 (Designated Derogation) Order 2001 was disproportionate as it was not rationally linked to the security threat because it did not apply to UK nationals. In those circumstances article 3 of the Derogation Order was quashed. Another high profile defeat for the State and a victory for the rule of law...

This list is intended to provide some idea of the types of issues that arise in

the UK and are likely to arise in Victoria. On a broader and less public scale there is a change of culture that is necessary for organisations to understand and become compliant with the new Charter.

Coulter Roache is planning to use Simon French's experience of advising various public bodies in the UK between 1998 and 2003 to develop and offer training modules to public bodies in Victoria. The intention at the moment is to offer this training either in person or in an electronic format which can be accessed online and updated as the need arises.

Anybody who would be interested in this training should contact Simon French on 5273 5246 or by email at sfrench@coulterroache.com.au.

Document Destruction - A Summary of the New Criminal & Civil Provisions

A formalised document retention policy is now more important than ever. The ongoing AWB saga and the still fresh memories of the scandal surrounding the BAT litigation will tend to make people sceptical in their dealings with government and big business.

New provisions in the *Crimes Act 1958* (Vic) (see Division 5 of Part 1) create an offence of destruction of evidence.

Also, new provisions in the *Evidence Act 1958* (Vic) (see Division 9 Part 3) give wide-ranging powers to the courts in circumstances where evidence is unavailable.

It is important to understand the scope of these provisions to make sure that compliance can be properly managed.

Criminal Provisions

Criminal sanctions are now available where a person intending to prevent documents being used in legal proceedings destroys or conceals documents that are *reasonably likely* to be required in any *ongoing or future* legal proceedings. The penalties are serious - up to 6 years imprisonment and/or a fine of up to \$300,000.

If it can be shown that a "corporate culture" existed which permitted, tolerated or encouraged this sort of behaviour, that will be relevant to the question of intention and also to whether or not the action was authorised or permitted.

It is worth noting that (depending upon the exact circumstances) it will be a defence to demonstrate that due diligence was exercised to prevent the contravention of these provisions.

A formal policy should be developed and implemented to ensure that sufficient protection from the potentially damaging acts of its employees, agents or other officers is in place.

Civil Provisions

If a document that has been in the "possession, custody or power" of a party is unavailable in civil proceedings and that unavailability causes unfairness to the other party the consequences for the party that has failed to produce the document are potentially very damaging. A court can make any order that is necessary to ensure fairness. The legislation includes a non-exhaustive list of the sorts of orders that could be made:

- an adverse inference may be drawn from the unavailability of the document;
- that a particular fact be presumed to be true;
- that certain evidence may not be relied upon;
- that a party's case be struck out; and
- that the burden of proof may be reversed.

A court must consider all the surrounding circumstances before making an order. Inevitably the court would want to know what document retention policies and practices were operating at the relevant time. It would obviously be advantageous to be able to point to a comprehensive policy that had been properly implemented.

Application

These are new provisions that came into force on 1 September 2006. They can potentially be used in the context of any type of legal proceedings. This means that as well as obvious matters such as product liability, matters such as: employment disputes; workers compensation issues; claims relating to breach of intellectual property; regulatory enforcement actions and any commercial or administrative law dispute that you can think of could well be covered.

Freedom of Information - Recent High Court Decision

The recent High Court Case of *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 concerns the interpretation of S58(5) of the *Freedom of Information Act 1982* (Cth), which allows for the review of a decision to withhold disclose on "public interest" grounds.

The appellant asked for information from the Department of Treasury about "bracket creep" and the "First Home Owners Scheme". Access was largely denied on public interest grounds.

In this case the Treasurer had produced numerous reasons for his decision to refuse an application for access to documents. However, the High Court found that there needed to be only one reasonable reason to withhold the information sought. The High Court also stated that there is no need to even consider the arguments in favour of disclosure and that there is no balancing test to perform. The case also contains much judicial consideration of the reasons advanced by the Treasurer that may be of assistance to decision makers in the future.

Recognition of Same Sex Unions

The Australian Tax Office (ATO) has refused to accept a joint tax return from a gay couple who were married abroad. The ATO believe that the governing legislation does not recognise same-sex unions and therefore they are not able to accept the tax return. An impasse has been reached with the couple refusing to lodge a tax return until their marriage is recognised by the ATO. Either the couple or the ATO will have to back down and in the meantime we will have to wait and see how the dispute develops.

Of course the issue is highly topical and is certainly one that public authorities need to be aware of in the formulation of policies, the application of their legislation and the assessment of their risks.

For further information



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Correcting Errors in Written Reasons

Mr lacono is a registered tax agent and his registration is governed by Part VIIA of the Tax Assessment Act 1936 (Cth) (the 1936 Act). Under that Part of the 1936 Act the Tax Agents' Board of Victoria (the Board) has power to cancel a registration. There are two regimes for doing this. The first arises under section 251K(1) and where this avenue is used the penalty imposed shall be suspension or cancellation for a period of "not less than three months.". The other avenue is section 251K(2) and in this case the power is to suspend or cancel for "such a period as the Board concerned thinks fit."

Mr lacono's registration was suspended under section 251K(2) and the matter was appealed to the Administrative Appeals Tribunal (the Tribunal). The Tribunal confirmed the decision to suspend for three months. In its reasons the Tribunal said:

"[26] Mr Athanasiou [the solicitor for the applicant] submitted that Mr lacono's suspension as a tax agent should be for a period of less than 3 months. However s 251K(3B) of the ITAA provides that the period of suspension under subsection (1) shall not be less than 3 months.

[27] Therefore the board's decision should be affirmed."

Shortly after the decision of the Tribunal was handed down an employee of the Australian Government Solicitor wrote to the Deputy Registrar of the Tribunal seeking to correct the obvious error that the Tribunal had made. The Tribunal then issued a direction substituting the above passage with the following:

"[26] Mr Athanasiou submitted that Mr lacono's suspension as a tax agent should be for a period of less than 3 months. In my opinion, a period of 3 months is appropriate in this case."

Section 43AA allows of the Administrative Appeals Tribunal Act 1975 (Cth) allows for the correction of "obvious errors." However, as Finn J pointed out in the Federal Court obvious errors covers typographical mistakes or expressions that are clearly inconsistent with the decision taken in the case.

It is also firmly established that a decision maker cannot use this sort of provision to revisit the substance of a decision. In this instance the error that the Tribunal sought to correct was an error of law that was manifested through this section of the reasons and it is not the purpose of these provisions to correct such errors no matter how obvious they are.