THE CHARTER AND THE GOVERNMENT: IMPLICATIONS FOR PRIVATE SECTOR CONTRACTS

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The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) received royal assent on 25 July 2006. The Charter incorporates certain civil and political rights stipulated under the *International Covenant on Civil and Political Rights* 1966 (ICCPR). It recognises that public powers and functions must be exercised in a principled manner and aims to protect and promote the rights defined under it in the development of new and existing legislation and increase compatibility with those rights in government actions. This will be achieved by requiring:

(a) a statement to be prepared and submitted with all bills introduced into parliament, confirming the bill's compatibility with the Charter;
(b) the actions of public authorities to be compatible with the Charter; and
(c) Victorian Courts and Tribunals to interpret statutory instruments in a manner that is consistent with the rights set out in the Charter.

Victoria is a modern administrative state where public administration is governed by principles which promote consistent and fair decision making.

The legislative protection of rights under the Charter invokes a consideration of comparative and international law. It is now necessary to turn to comparative jurisprudence to ascertain and predict how the rights protected under the Charter will impact Victorians.

This article will discuss possible implications of the Charter for the Victorian government and its agencies when contracting with the private sector, using a comparative analysis of the development of jurisprudence in the United Kingdom. In the United Kingdom, there is a great deal of uncertainty about the application of the *Human Rights Act* 1998 (UK) (the UK Act), when the public sector contracts out its services to private sector service providers. There appears to be a considerable degree of confusion about where responsibility lies for actively securing and promoting the underlying standards of human rights when the public service enters into a contractual relationship with the private sector.

Considering the similarity between the relevant provisions of the Charter and the UK Act, it is likely that the Victorian public service will be presented with the same issues when contracting with the private sector. This article will discuss the implications of the Charter for the Victorian public sector, by drawing on developments in the United Kingdom in relation to public authorities that have contracted out functions of a public nature to the private sector.

Obligation for public authorities to act compatibly with the Charter

The Charter requires a public authority to act in a way that is incompatible with or fails to give proper consideration to a right protected under the Charter. [1] In making a decision, public authorities are required to give proper consideration to relevant human rights.[2]

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A 'public authority' is defined under the Charter to include the Victorian Police, local councils and councillors, Ministers and members of parliamentary committees, as well as Courts when acting in an administrative capacity. The Charter is also directed at private sector organisations acting on behalf of the government or public authorities when performing functions of a public nature. The intention is that the obligation to act compatibly with human rights should apply broadly to government and to bodies exercising functions of a public nature.

Importantly, the obligation on public authorities to comply with the Charter extends only to situations where the authority is performing functions of a public nature.[3] Further, the Charter requires public authorities to give 'proper consideration' to relevant human rights. The requirement of 'proper consideration' is intended to encourage public authorities to give real and genuine consideration to human rights.

Importantly, s 7 of the Charter acknowledges that the rights contained in it are not absolute and that they need to be balanced against each other and other competing public interests. Questions of compatibility will turn on the facts of each individual case and it is therefore difficult to prescribe or predict situations in which incompatibility may be found under the Charter. This paper will however not canvass this aspect of the Charter.

The Charter sets out the following factors for determining whether a function is of a *public nature:*

> (d) whether the function is conferred on the entity by or under a statutory provision;
> (e) the function is connected to or generally identified with functions of government;
> (f) the function is of a regulatory nature;
> (g) the entity is publicly funded to perform the function; or
> (h) the entity that performs the function is a company (within the meaning of the Corporations Act) and all of its shares are held by or on behalf of the State. [4]
>
> It is anticipated that much of the judicial interpretation of the Charter will centre on what constitutes a function of a public nature when such a function is being exercised on behalf of the State or a public authority. Comparisons from case law developments under the UK Act will provide some useful guidance, in particular because the factors set out above appear to be a codification of the developments in the United Kingdom.[5]

Implications for government departments when contracting with the private sector

The Charter has the potential to bind the private sector. Section 4(1)(c) of the Charter provides that the term 'public authority' can include 'an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)'.

The rationale for the extension of the obligations under the Charter beyond so-called 'core public authorities' is explained in the Explanatory Memorandum to the Charter as follows:

> The obligation to comply with the Charter extends beyond these "core" government authorities, to cover other entities when they are performing functions of a public nature on behalf of the State (paragraph (c)). This reflects the reality that modern governments utilise diverse organisational arrangements to manage and deliver government services. The Charter applies to "downstream" entities, when they are performing functions of a public nature on behalf of another public authority. Guidance on the meaning of "functions of a public nature" and on the meaning of "on behalf of the State or a public authority" is provided in sub-clauses (2) and (4) respectively.

The Charter will impact on the private sector where a private sector company exercises a function of a 'public nature' or when a statutory provision affecting a private sector body is interpreted in accordance with the Charter.

This paper will only consider the implications for government departments when private sector bodies perform functions on their behalf under contract. Specific functions are expressly dealt with under the Charter. For example, private prisons may be public authorities if they exercise a function (such as managing a prison) that is connected to, or generally identified with the functions of government.

Although the factors enumerated under the Charter are not intended to be prescriptive, they provide valuable guidance on the type of considerations which will guide Courts and Tribunals when deciding whether a private body is exercising a 'public function' for the purposes of the Charter.

It is likely that Victorian Courts and Tribunals will have regard to case law from the United Kingdom when interpreting these provisions of the Charter. This paper will consider the position in the United Kingdom in respect of private entities exercising 'public functions' in accordance with their respective Human Rights legislation.[6] The UK Act does not provide any guidance as to how the public nature of a function is to be determined. As a result, English courts have applied a restrictive definition to private bodies, exercising a function of a public nature and many privatised service providers that would have been expected to fall within the ambit of the UK Act have been excluded from its application. Further, English decisions fail to conclusively resolve the issue of when a body will be held to exercise 'functions of a public nature'. Case law developments on this issue have been *ad hoc* and fragmented. Nevertheless, it is possible to distil a number of principles which have led English Courts to determine whether or not a body is performing functions of a public nature.

Trends drawn from the jurisprudence in the United Kingdom

In the United Kingdom, private or quasi-private bodies will only be considered public authorities (and therefore amenable to judicial review) for the purposes of the UK Act if they are underpinned by 'governmental' action or are at least recognised by the government. Until recently, the determining factor was the source of power.[7] In an administrative law context, the general trend is that Australian courts are moving towards an acceptance of the English test, asking whether the body is exercising 'public functions' or making decisions of a 'public character'.

According to the jurisprudence in the United Kingdom, a private body is likely to be considered a public authority performing public functions (a 'functional' public authority) under s 6(3)(b) of the UK Act if:

- its structures and work are closely linked with the delegating or contracting out State body; or
- it is exercising powers of a public nature directly assigned to it by statute; or
- it is exercising coercive powers devolved from the State.[8]

The following factors have also been considered in case law (and when applied cumulatively) have been considered to be indicative of functions of a 'public flavour'[9]:

- the fact of delegation from a State body;
- the fact of supervision by a State regulatory body;
- whether the body relies on public funding;
- the public interest in the functions being performed;

- motivation of serving the public interest (rather than for profit);
- historical role of the state in the activity;
- amenability to judicial review;
- whether its decisions are recognised by statute or parliament or have public consequences; or
- whether they are supported by sanction.

It is very clear that government departments and employees of the public service fall under the rubric of 'public authorities' or public bodies contemplated under the Charter and therefore will be subject to the operation of the Charter. What remains contentious is how widely the obligations will reach the 'private' contracted out bodies when they are performing a function on behalf of a public authority.

In the United Kingdom, cases such as *Poplar Housing and Regeneration Community Association v Donoghue*[10] and *R v Leonard Cheshire Foundation*[11] have found that a public authority which contracts out functions (which it would otherwise discharge itself), remains liable under the UK Act for any breach of the human rights. Accordingly, the public authority does not 'delegate' its functions, but rather, it exercises its functions by entering into contracts for the provision of services.

In *Poplar Housing* at [60], the Court of Appeal supported the retention of human rights liability by the public authority by stating that:

> the European Court made it clear that the State cannot absolve itself of its Convention obligations by delegating the fulfilment of such obligations to private bodies or individuals, including the head master of an independent school. However, if a local authority, in order to fulfil its duties, sent a child to a private school, the fact that it did this would not mean that the private school was performing public functions. The school would not be a hybrid body. It would remain a private body. The local authority would, however, not escape its duties by delegating the performance at the private school. If there were a breach of the Convention, then the responsibility would be that of the local authority and not that of the school.

This view was restated by the Court of Appeal in *Leonard Cheshire* at [33], when the Court added that:

> if the arrangements which the local authorities made with LCS had been made after the HRA came into force, then it would arguably be possible for a resident to require the local authority to enter into a contract with its providers which fully protected the residents' Article 8 Rights …

A contrary view was considered in *Aston Cantlow v Wilmore & Billesley Parochial Church Council v Warbank & Anor,*[12] the leading authority on the meaning of 'public authority' in the United Kingdom. In that case, the House of Lords decided that the correct test should focus on the nature of the function performed and not the nature of the institution. The House of Lords found that the relevant factors to be taken into account were the extent to which the body was carrying out the relevant function for which the body was publicly funded; whether or not it was exercising statutory powers or whether it was taking the place of central government (or local authorities) or was providing a public service.[13] Lord Hope was clear that the correct test should be 'functional' rather than 'institutional':

It is sensitive to the facts of each case. It is a function that the person is performing that is determinative of the question whether it is, for the purposes of that case, the hybrid public authority. The question whether section 6(5) applies to a particular act depends on the nature of the act which is in question in each case.[14]

The functional test endorsed in this case is significantly broader than the test set out in *Poplar Housing*, as it does not rely on 'institutional links'. However, the House of Lords failed

to refer to either *Poplar Housing* or *Leonard Cheshire* in their decision and therefore subsequent courts have side-stepped the decision and have determined the public nature of functions by reference to their amenability to judicial review[15] and by considering the institutional links of the organisation to the public authority.

As discussed in *Poplar Housing* and *Leonard Cheshire,* where a public authority contracts out functions which it would otherwise discharge itself, the public authority could remain liable under the UK Act for any breach of the human rights that results. However, a public authority can protect itself from potential human rights liability by considering possible human rights implications arising out of contractual relationships at the outset. Considering that some English Courts have found human rights liability to rest on the public authority when contracting out its services, it is prudent for Victorian government departments and agencies to consider possible human rights implications in their contractual relationships with the private sector. Express provisions in contractual relationships for human rights protection could provide evidence that the parties to the contract intended that the private contractor should have human rights responsibilities equivalent to those of a public authority.

In this manner, government departments and agencies could minimise breaches of human rights by service providers and ensure that the human rights of service users are protected. This will effectively bind service providers to the Charter. In doing so, government departments and agencies could ensure that subsidiary bodies comply by building human rights concerns into their risk management systems and adopting contract clauses with termination notices if a contractor defaults in human rights responsibilities. Further, it would demonstrate that 'proper consideration' has been given to Charter rights by the public authority.

Conclusion

To instil a human rights culture, government departments may consider adopting Charter rights in their policies and risk management strategies. This will ensure that human rights implications are considered in contractual relationships with the private sector. To hold private sector bodies liable for any potential breach of human rights of service users, it is recommended that express terms of compliance with the Charter are incorporated into contractual relationships. Further, the public service may consider implementing policies which give priority to private sector clients with risk management strategies that positively outline compliance with human rights. This will not only protect the public authority from any human rights liability, but will also encourage the private sector contractors to take human rights seriously. As stressed in the report by the Victorian Consultative committee, human rights protection in Victoria is not only concerned with access to court and the enforcement of human rights standards through litigation. The Charter aims to achieve human rights protection through good practice and the development of an organisational culture of respect for human rights. Although the use of express contract clauses does not provide a complete answer, it will serve to promote good practice and instil a consciousness of human rights protection within the private sector.

Endnotes

1 Charter, s. 38(1)
2 Charter, s. 38(3)
3 Ibid
4 Charter, s.4(2)
5 Under s 6(3)(a) of the UK Act, 'pure' public authorities (such as government departments, local authorities, or the police) are required to comply with human rights in all their activities (both when discharging intrinsically public functions and also when performing functions which could be done by any private body).

Under s 6(3)(b), those who exercise some public functions, but are not 'pure' public authorities are required to comply with human rights when they are exercising a 'function of a public nature' but not when their actions are of a private nature (s 6(5) of the UK Act).

6 The recent New Zealand case of *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 demonstrates that New Zealand courts will be heavily influenced by current English authority on the topic.

7 Raymond Finkelstein, "Crossing the Intersection: how courts are navigating the 'public' and 'private' in Judicial Review" (2006) 48 *AIAL Forum* 1,6

8 Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act,* 7th Report 2003-04 Session (23 February 2004) HL Paper 39, HC 382, 16

9 Ibid.

10 (2001) EWCA CIV 595

11 (2002) EWCA Civ 366

12 (2004) 1 AC 546

13 *Aston Cantlow,* per Lord Nichols at [10] and [12]

14 *Aston Cantlow* , per Lord Hope at [41]

15 *R (Mullins) v The Appeal Board of the Jockey Club* (2005) EWHC 2197; *Hampshire CC v Graham Beer Hammer Trout Farm* (2003) EWCA Civ 1056; *R (Johnson and Others) v Havering London Borough Council* (2006) EWHC 1714