**LEO CUSSENS LITIGATION CONFERENCE 2008**

**KEY NOTE ADDRESS**

**1510 words (Approx 15 Minutes)**

# The Victorian Charter of Human Rights and Responsibilities and its effect on litigation in Victorian Courts

**The enactment of the *Charter of Human Rights and Responsibilities Act 2006* was a significant moment in Victoria's history. It formalised the protection of human rights, encapsulating existing common law principles in a legislative framework that will impact on every jurisdiction in this State. The short time period since the Charter was introduced means that some of the potential impacts are, as yet, undiscernible. However, some change can be seen already. The effect of the Charter is not simply a legal one, it is also cultural. This morning I intend to discuss both aspects beginning with cultural change and moving to survey the beginnings of a human rights jurisprudence developing in Victorian courts.**

**The Victorian Equal Opportunity and Human Rights Commission reported in 2007 that we can be 'confident that a strong foundation has been laid for the successful implementation of the Charter and the emergence of a human rights culture across government in Victoria.' My colleague, Justice Bell, recently delivered a speech entitled *'Enhancing Australian democracy with a Federal Charter of Rights and Responsibilities'* in which his Honour noted that the Victorian Charter helps to ensure the relationship between government and the community reflects human rights values. This is a good in itself, yet it also encourages society as a whole to become more rights-respecting and tolerant. These cultural aspects of the Charter's effect should not be over-looked. The full text of Justice Bell's speech is available on the Supreme Court website.**

**From a legal perspective, the introduction of the Charter placed Victoria in a position to take the leading role in developing a jurisprudence of human rights law in Australia. For myself, and many of my colleagues, the moment was one of excitement and**

**exhilaration, but also one of trepidation and reservation. The challenge has proven to be in interpreting competing rights in the absence of Australian case law and precedent to guide decision making. Now, nearly two years on we have begun to observe the foundation of a new human rights jurisprudence being laid and it is to these cases that I now turn.**

**The effect of the Charter on the court's role in relation to unrepresented parties was raised in *Kortel v Mirik & Mirik*, heard in the Supreme Court in April this year. The case concerned an application for a compensation order. In the early stages, the respondents did not have legal aid and were not represented. The central issue was whether section 6(2)(b) - which makes the Charter applicable to Courts and Tribunals in certain circumstances - operates together with the right to recognition and equality before the law, and the right to a fair hearing, to impose a positive obligation on the court to ensure a fair hearing by giving due assistance to respondents as unrepresented litigants. However, these questions were left open when the**

**respondents were granted legal aid and became represented causing the issue to fall away.**

**Another Supreme Court case, *Sabet v Medical Practitioner's Board,* provides guidance on the test to be applied in relation to section 38 of the Charter. Section 38 provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or fail to give proper consideration to a relevant human right when making a decision.**

**In *Sabet,* Justice Hollingworth considered an application for judicial review of a decision by the Medical Practitioner's Board to suspend a doctor's registration. The applicant sought to argue that, in considering whether he should be suspended, the Board was required to apply the presumption of innocence contained in section 25(1) of the Charter.**

**Justice Hollingworth held that section 38 was applicable to the Board in that it was a 'public authority', but also as a tribunal**

**acting in an administrative capacity. Her Honour then turned to determine whether the Board had contravened section 38, and held that, in analysing whether there has been a breach of a human right under the Charter a three-stage test is appropriate:**

> **First, the engagement question, that is, has a Charter right been engaged?**
>
> **If so, the court turns to the limitation question - did the public authority impose any limitation on the right?**
>
> **If a limitation as imposed, the court considers the justification question - was the limitation reasonable and justified within the circumstances set out in s 7(2) of the Charter?**

**In relation to the engagement question, Justice Hollingworth surveyed jurisprudence in relation to the presumption of innocence from around the world to determine that the presumption in the Charter was only intended to apply to criminal proceedings and, as such, it does not apply to disciplinary proceedings in which no finding of guilt is to be**

**made. As such, the presumption did not apply directly to the Board, however, the question of whether it could indirectly apply to prevent public authorities from making public statements affirming the guilt of the accused, and thus potentially prejudicing the outcome of a trial, was left open.**

**If the Charter had been engaged in this case, Justice Hollingworth considered that the limitation question would be answered in the negative and the Board had not interfered with the right. Her Honour was careful to point out that the relevant right is the presumption of innocence, not the right to practice medicine. Merely taking criminal charges into account, or evaluating material and forming an opinion incompatible with innocence did not amount to a limitation on the right to a presumption of innocence.**

**As to whether a limitation might be reasonable and justified her Honour noted that the Court's assessment of this question must be by reference to the factors listed in section 7(2), not general**

**notions of proportionality as is the case in much of the international jurisprudence. And, that in considering whether any less restrictive means are reasonably available under section 7(2)(e), there is no obligation on a public authority to choose the least intrusive means possible. The relevant inquiry is whether the chosen measure falls within a range of reasonable alternatives.**

**Earlier in the year, in *Gray v DPP*, Justice Bongiorno considered the application of the right to trial without unreasonable delay contained in sections 21(5)(c) and 25(2)(c) of the Charter and the effect of the inability of the Crown to provide a timely trial on the question of bail. His Honour observed that a trial which may not be held until the accused has spent more time on remand than he or she is likely to serve upon sentence is unlikely to be considered a timely trial.**

**In terms of Charter arguments raised in the Court of Appeal, one ground of the appeal in relation to suppression orders on the**

**broadcast of the television drama 'Underbelly' raised a Charter argument concerning freedom of expression. The Solicitor-General appeared to argue against the appellant, Channel 9's, contentions in this respect. Eventually, after extensive argument, the point was abandoned by the appellant because of the delays that would arise from notice to the Attorney-General of a**

**Two cases heard together recently by the Court of Appeal have raised interesting Charter issues.** ***RJE v Secretary of the Department of Justice*** **and** ***ARM v Secretary of the Department of Justice*** **both concern the imposition of extended supervision orders under the** ***Serious Sex Offenders Monitoring Act 2005.*** **RJE is contesting the decision of a judge to impose an extended supervision order. ARM seeks to challenge the nature of the order imposed and the primary judge's decision not to suppress certain personal information.**

**A significant amount of the hearing was devoted to argument around Charter issues. More specifically, whether and how a court must take into account Charter rights in making such decisions and whether the imposition or nature of extended supervision orders raises any inconsistencies with Charter rights. Judgment in both cases has been reserved so we must wait to know the outcome of these matters.**

**Lastly, I strongly recommend that you read the Supreme Court's Practice Note number 3 of 2008 which assists in relation to the notification required under section 35. Notification to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission is required of all parties to a proceeding where a question of law regarding the application of the Charter or a question of statutory interpretation in accordance with the Charter arises.**

**I have discussed a few cases arising from proceedings in the Supreme Court, however it is important to note that a number of**

**interesting cases have also arisen in VCAT, in particular *LM (Guardianship)* where the Tribunal considered a number of Charter rights.**

**If you wish to know more about the Charter and recent cases, I suggest you obtain an annotated guide to the Charter or visit one of several the websites that provide summaries of Victorian Charter cases. It is indeed an exciting time for the development of an Australian human rights jurisprudence.**