

The Charter of Human Rights and Responsibilities & the Residential Tenancies Act

Background

The *Charter of Human Rights & Responsibilities Act 2006* VIC (the *Charter*) is a Victorian statute that contains (mainly) civil and political rights and became fully operational on 1 January 2008. This Practice Note concentrates on how the provisions of the *Charter* might be raised with a matter under the *Residential Tenancies Act 1997* VIC (the RTA). A contravention of the *Charter* does not give rise to a separate cause of action but must be raised in conjunction with a related proceeding.

What is the issue?

The *Charter* may be relevant to a tenancy issue in the following ways:

1. When a public authority (such as the Director of Housing) exercises its powers under the RTA (for example, deciding to give a Notice to Vacate);
2. When the Victorian Civil and Administrative Tribunal (VCAT) interprets legislation; or
3. When VCAT exercises an administrative function (such as listing a matter for hearing).

Landlord as a public authority

VCAT does not have power to make determinations about whether a public authority (such as the Director of Housing) has complied with the *Charter*. This was determined in *Director of Housing v Sudi* [2011] VSCA 266.

However, the Supreme Court may consider whether the *Charter* has been complied with when a decision by a public authority is subject to judicial review. When undertaking judicial review, the Court examines a decision or action by a public authority to determine whether it is a valid exercise of power. Grounds for a judicial review include bias, failure to provide procedural fairness, failure to take into account factors that are required by a statute (relevant considerations), taking into account factors which a statute specifically prohibits (irrelevant considerations) or acting *ultra vires* (beyond power given by statute). An application for judicial review can be made by a person who is affected by a decision made by a public authority.

Failure to comply with the *Charter* in itself is not likely to be sufficient to found an application for judicial review (*Patrick's case*) However, the Supreme Court could consider whether the *Charter* has been complied with when making a decision on an application for judicial review.

You should advise your client to seek legal advice if you believe that they may have grounds to seek judicial review.

Interpreting legislation

Section 32 of the Charter states:

‘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.’

This implies that if the meaning of a word or provision in the RTA is unclear, you can argue that VCAT should adopt an interpretation that is consistent with the rights in the Charter.

Section 32(2) provides that international law and decisions of foreign and international courts and Tribunals relevant to the human right in question may be considered during interpretation. However, the High Court has warned that courts should be cautious when using materials from other jurisdictions (*Momcilovic v R and Ors* (2011) 245 CLR 1).

When VCAT exercises an administrative function

VCAT is a public authority when it is exercising an administrative function (such as listing a matter for hearing) and therefore VCAT must comply with the Charter. This is in contrast to when VCAT is hearing and resolving a dispute, when its function is judicial in nature.

What should you do?



1. Any argument based on the *Charter* has to start with its relevance. If it is statutory interpretation that you are asking VCAT to consider, then you must make the argument as to how the provision in question should be interpreted and cite relevant case law (s32).
2. Once you have established coverage, it is then your opportunity to raise the possible rights relevant to your matter. There are twenty (20) rights and responsibilities in the *Charter* and possible ones that might come up in RTA advocacy are:

s8 - **Recognition and Equality before the law.** This is the anti-discrimination provision, so a tenant that is being harassed and experiencing a loss of quiet enjoyment (s67 RTA) on the basis that they are of a particular race could also raise s8 of the *Charter*.

s13 – **Privacy and Reputation.** This section includes the words “A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with”. ‘Home’ and ‘family’ have been broadly interpreted at an international and domestic level.

s17 – **Protection of families and children.** In any situation where a carer or parent has been given a Notice to Vacate (esp. a 263 NTV), this right should be raised.

The above list is not exhaustive as there are other rights that might be relevant to your matter. An advocate should be familiar with the 20 rights and responsibilities in the *Charter* and the relevant case law for each one.

This Practice Note does not cover the VCAT Act and its relevance to the *Charter*. However all Victorian legislation is to be interpreted and applied in accordance with the *Charter*, as long as this is if possible and it does not undermine the purpose of that particular Act.

This Practice Note is a guide only and should not be used as a substitute for professional legal advice. If you have a question about this Practice Note or a specific case you are require advice about then you should contact us on **(03) 9411 1444**.

Tenants Union Legal Team

References:

Charter of Human Rights & Responsibilities Act 2006 VIC [ss 4, 7, 8, 13, 17, 32, 38]

Residential Tenancies Act 1997 VIC [ss 67, 263]

Director of Housing v Sudi [2011] VSCA 266

PJB v Melbourne Health and State Trustees Ltd [2011] VSC 327 (Patrick's case)

Momcilovic v R and Ors (2011) 245 CLR 1