



Victorian Equal Opportunity
& Human Rights Commission

31 January 2014

The Hon Richard Dalla-Riva MLC
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House
MELBOURNE VIC 3002

Dear Mr Dalla-Riva

Legal Profession Uniform Law Application Bill 2013 – Victoria's first override declaration

The Victorian Equal Opportunity and Human Rights Commission (**Commission**) writes to the Scrutiny of Acts and Regulations Committee (**Committee**) to comment on issues raised by the first override declaration to be made under section 31 of the *Charter of Human Rights and Responsibilities Act 2006* (**Charter**).

The override declaration is in clause 6 of the *Legal Profession Uniform Law Application Bill 2013* (**Application Bill**). The central purpose of the Application Bill is to enact a scheme for the consistent regulation of the Australian legal profession. It repeals the *Legal Profession Act 2004* and replaces it with template legislation, the Legal Profession Uniform Law (**Uniform Law**), which is in Schedule 1 to the Bill. As the first state to pass the Uniform Law, Victoria will be the host jurisdiction and other participating jurisdictions will then apply the law of the host jurisdiction as a law of their own jurisdiction. The interpretation of the Uniform Law in all jurisdictions will be governed by the *Interpretation of Legislation Act 1994* (Vic).

Operation of the Charter

As an Act of Victoria the Charter would normally apply to the Uniform Law. Namely, section 32 would require its provisions to be interpreted in a way that is compatible with human rights (so far as is possible to do so consistently with their purpose) and, under section 36, the Supreme Court could make a declaration of inconsistent interpretation if a provision could not be interpreted consistently with a human right. Similarly, the Charter would normally apply to a number of the Victorian bodies with regulatory functions under the Uniform Law, because they would generally fall within the definition of 'public authority' for the purposes of the Charter and be required to comply with section 38.

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Clause 6 of the Application Bill provides that the Charter has no application to the Uniform Law as it applies in Victoria and other jurisdictions and that a body is not a public authority under the Charter when performing functions or exercising powers under the Uniform Law. The Explanatory Memorandum explains that excluding the Charter's application to the Uniform Law and to bodies acting under the Uniform Law is required to ensure interjurisdictional consistency in its application and to prevent the extrajurisdictional application of the Charter.

The Statement of Compatibility in respect of the Application Bill states that section 31 of the Charter empowers Parliament to override the Charter in this manner.

The Commission has an interest in any laws that seek to exclude the application of human rights in Victoria. While there are unlikely to be any significant human rights issues in the application of this Bill, the question of the application of the Charter to uniform schemes will be an increasing issue as more aspects of public life are addressed in this manner. These issues warrant careful consideration.

The use of the override declaration also raises a number of practical issues about the mechanism of section 31 of the Charter. The Commission draws the Committee's attention to the following issues that are raised by the override declaration in clause 6 of the Bill.

- **Importance of a statement explaining the exceptional circumstances**

Section 31 of the Charter was intended to allow Parliament in 'exceptional circumstances' to enact legislation notwithstanding that it was incompatible with human rights. Potential exceptional circumstances envisaged in the Explanatory Memorandum were 'threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria.'¹

This override declaration is not in relation to legislation that is said to be incompatible with human rights nor in relation to a threat to national security or a state of emergency. Rather, its purpose is 'to not apply the Charter to the Uniform Law in order to effect uniformity in an interjurisdictional scheme.'²

Nevertheless, in any circumstances where section 31 is relied upon by Parliament to override the Charter, section 31(3) requires the member of Parliament who introduces a Bill to make a statement explaining the exceptional circumstances that justify the inclusion of the override declaration.

This statement is important in all cases where section 31 is relied on to exclude the Charter's application. It would be particularly useful in this context in light of the different approaches that have been taken with respect to the application of the Charter to national uniform laws applying in Victoria and to the bodies acting under them.³ This would provide clarity for the community about why the Charter is applied to uniform schemes in some contexts, but not others.

We note that such a statement may be forthcoming in the legislative process.

¹ Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill, clause 31 (p 22).

² Statement of Compatibility in Hansard, 12 December 2013, p 4661.

³ This is not the first application of an applied law scheme in Victoria. Victoria has been the host jurisdiction of cooperative national laws (see, eg, *Education and Care Services National Law Act 2010*) and has applied the laws of other jurisdictions as a law of Victoria (see, eg, *National Gas (Victoria) Act 2008* and, more recently, the *Marine (Domestic Commercial Vessel National Law Application) Bill 2013*).

- **Application of the override declaration to say that a body is not a public authority**

While section 31 expressly states that an override declaration can be made in respect of an Act or a provision in an Act, there is a separate mechanism in the Charter, the use of Regulations under section 46, to prescribe entities not to be public authorities for the purposes of the Charter when exercising certain functions.

- **Provision that the sunset clause does not apply to the override declaration**

An override declaration made in accordance with section 31 is intended to apply for a fixed period of time. Section 31(7) provides that override declarations expire after five years. This is an important safeguard that ensures that the exceptional circumstances that justify the override declaration are reassessed at least every five years and an override is only re-enacted if those exceptional circumstances continue.

Even though this override declaration is not for the purpose of overcoming human rights inconsistencies, this does not remove the need for it to be time limited. No reason has been provided for removing the application of section 31(7) to the override declaration.

- **Ensuring national uniform laws applying in Victoria are compatible with human rights**

The use of an override declaration in this context highlights the challenges that arise with respect to the interaction of the Charter with national cooperative schemes.

Areas of activity and public life are increasingly regulated by cooperative schemes resulting from intergovernmental agreements. As applied law schemes become more common in Victoria, it is important that uniform legislation applying in Victoria is compatible with the human rights in the Charter and is subject to appropriate human rights scrutiny. This is important whether or not the Charter's operative provisions are declared to apply to the uniform law.

The Commission highlights the recent views of the Commonwealth Joint Committee of Human Rights that 'the issue of compatibility with human rights should be an integral part of the development of any national scheme.'⁴ Looking forward, taking human rights into account in the design of cooperative schemes will help ensure that future applied legislation in Victoria is drafted consistently with the human rights protected in the Charter.

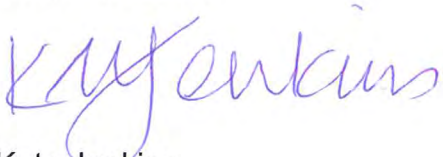
The Commission notes that the requirement for a statement of compatibility is an important aspect of the Charter's dialogue model that is not excluded by the making of an override declaration. That requirement has been complied with here.

Recognising that the making of an override declaration under section 31 of the Charter touches on complex issues regarding the Charter's application, I would be happy for you to discuss these issues further with representatives from the Commission.

⁴ See Joint Committee on Human Rights, Committee Reports 2013 - Examination of legislation in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), Marine Safety (Domestic Commercial Vessel) National Law Amendment Bill 2013, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/2013/32013/c09.

If the Committee would like further information please feel free to contact me on 9032 3403 or kate.jenkins@veohrc.vic.gov.au.

Yours sincerely

A handwritten signature in blue ink that reads "Kate Jenkins". The signature is written in a cursive, flowing style.

Kate Jenkins
Commissioner