

Uncharted Territory: Key Charter Lessons from the Pandemic

Presenter: Jasmine Still



‘Human rights are of importance even in urgent or emergency situations, if governments and executives can disregard them, they are not rights of any real value.’

‘[T]he protection of human rights has, at least, the same importance in times of emergency as in normal times. Human rights are not suspended during states of emergency or disaster. As well as protecting individuals, the consideration of human rights assists in thoughtful decision-making.’

(His Honour Justice Ginnane, *Loiello v Giles* [2020] VSC 722, [17] and [245])

1. What does the Charter do?

2. When will the Charter not apply?

Donohue v Westin [2022] VSC 37

3. How can decision-makers comply with the Charter during an emergency?

(Loiello v Giles [2020] VSC 722)

4. How can we prove Charter compliance?

(Loiello v Giles [2020] VSC 619)

The Charter and government decision-making

Section 38(1) of the Charter provides that it is unlawful for a public authority to:

- act in a way that is incompatible with a human right (the **substantive obligation**) or
- in making a decision, to fail to give proper consideration to a relevant human right (the **proper consideration obligation**).

The substantive obligation

1. Is any human right relevant to the decision? (the **relevance question**)
2. If so, has the public authority done or failed to do anything that limits that right? (the **limitation question**)
3. If so, is that limit under law reasonable and demonstrably justified having regard to the matters set out in s 7(2) of the Charter? (the **proportionality question**)

Section 7(2) – A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

- the nature of the right and
- the importance of the purpose of the limitation and
- the nature and extent of the limitation and
- the relationship between the limitation and its purpose and
- any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

(See *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251 at [174])

The proper consideration obligation

1. Understand **which rights may be relevant** and whether (and if so how) those rights will be interfered with by the decision.
2. Seriously turned their mind to the **possible impact** of the decision on human rights and the implications for the affected person.
3. **Identify the countervailing interests** or obligations.
4. **Balance** competing private and public interests.

(See *Castles v Secretary to the Department of Justice & Ors* [2010] VSC 310 at [185 – 186])

***Donohue v Westin* [2022] VSC 37**

‘Section 38 of the Charter does not require a decision maker to consider how he or she can maximise or increase the enjoyment of the rights of the person who may be affected by the decision.’

(His Honour Justice of Appeal Niall at [44])

Loiello v Giles [2020] VSC 722



Loiello v Giles [2020] VSC 619

Evidence Act 2008

Section 122 – Loss of client legal privilege — consent and related matters

...

(2) Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.

(3) Without limiting subsection (2), a client or party is taken to have so acted if—

(a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or

...

Key takeaways

- Charter compliance is a vital part of government decision-making, especially during an emergency.
- Decision makers are not required to consider how they can maximise enjoyment of rights.
- Clear legal advice and robust processes play an important role in ensuring Charter compliance.
- The Supreme Court may grant a declaration to someone whose rights have been breached, even if those rights are no longer being limited.
- Detailed evidence of Charter compliance is key.
- But be cautious of inadvertently waiving client legal privilege.

Questions?

Comments?

Thoughts?



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