

The Victorian Charter of Human Rights and Responsibilities

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Debate about human rights in Australia is often polarised. One view commonly expressed is that by Sir Robert Menzies in 1967, just retired as Prime Minister, that ‘the rights of individuals in Australia are as adequately protected as they are in any other country in the world’.¹ This was echoed by then Prime Minister John Howard in 2000 when he remarked that ‘Australia’s human rights reputation compared with the rest of the world is quite magnificent’.² An alternate view is that the nation’s record on human rights is poor, especially when assessed from the perspective of people with little political power or suffering economic hardship or social isolation.

The answer lies somewhere in the middle. Australia has a proud history of political freedom and in regard to many aspects of human rights protection. We also have national and State based frameworks of government that establish a robust democratic system combined with independent courts charged with enforcing the rule of law. Over the last century Australians have also made many important contributions internationally to the protection of human rights in other countries as well as to the development of universal human rights standards like the Universal Declaration of Human Rights of 1948.

While Australia undoubtedly has a better human rights record than many other nations, there is still considerable room for improvement. The record contains some major blemishes. Its historic and contemporary weaknesses have been exposed, including by the federal government's own Human Rights and Equal Opportunity Commission in regard to the forced removal of Aboriginal children from their families (the 'Stolen Generations') and the detention of children seeking asylum. Developments after September 11 have also led people to question how well human rights are protected in Australia, in part due to new laws on sedition and for control orders and preventative detention without charge or trial.³ As Brian Burdekin, a former Australian Human Rights Commissioner, commented in 1994: 'It is beyond question that our current legal system is seriously inadequate in protecting many of the rights of the most vulnerable and disadvantaged groups in our community'.⁴

The Victorian Charter of Human Rights and Responsibilities is premised upon the idea that democracy in Australia has many strengths, but that things are far from perfect. It does not seek to undermine traditional understandings about how we are governed, but to improve those same processes. Hence, concepts like parliamentary sovereignty continue to apply. While the changes are limited rather than radical, they do mean that key human rights must be taken far more seriously and must be taken into account much more often.

Australia's first Charter of Rights was the *Human Rights Act 2004* of the Australian Capital Territory. The Victorian Charter, while the second such instrument, is the first in an Australian State. Like the Australian Capital Territory law, it is a change to the Australian system of government in the form of an ordinary act of parliament that protects a range of civil and political rights. Like that law, it also cannot affect national laws enacted by the federal Parliament. Both laws are heavily influenced by the New Zealand *Bill of Rights Act 1990* and the *Human Rights Act 1998* (UK). As Acts of Parliaments, they can all be amended

over time. Unlike constitutional instruments such as the United States or South African Bill of Rights, the Victorian Charter does not give the final say to the courts, nor does it set down unchangeable rights in the Victorian Constitution.

The Victorian Charter became law on 25 July 2006 after being passed by Parliament and assented to by the Victorian Governor. It came into force on 1 January 2007, except for parts dealing with the interpretation of laws and new obligations on public authorities, which were delayed to 1 January 2008. This was to give government time to train staff and scrutinise existing practices, policies and laws for consistency with the Charter.

Which Rights?

The Victorian Charter of Human Rights and Responsibilities is written, as far as possible, in clear language. It begins with a preamble that sets out the community values that underpin it:

On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.

This Charter is founded on the following principles —

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

The Charter protects rights that are commonly considered to be essential to an open and free democracy. The included rights extend to:

- recognition and equality before the law;
- right to life;
- protection from torture and cruel, inhuman or degrading treatment;
- freedom from forced work;
- freedom of movement;
- privacy and reputation;
- freedom of thought, conscience, religion and belief;
- freedom of expression;
- peaceful assembly and freedom of association;
- protection of families and children;
- taking part in public life;
- cultural rights;
- property rights;
- right to liberty and security of person;
- humane treatment when deprived of liberty;
- children in the criminal process;
- fair hearing;
- rights in criminal proceedings;
- right not to be tried or punished more than once; and
- retrospective criminal laws.

These rights are contained in the International Covenant on Civil and Political Rights, to which Australia has been a party since 1980. Some of the rights in this instrument have been modified or even not included so that the Charter best matches the contemporary aspirations of the Victorian people and so that it contains only those rights that have majority community acceptance.

The rights that attracted the most contention in the debate over the Charter were the right to life and to self-determination. In regard to the former the Human Rights Consultation Committee, composed of Rhonda Galbally AO, Andrew Gaze, the Hon Professor Haddon Storey QC and myself and charged with reporting to the government on community views about

a charter, received many submissions arguing with great passion both for and against abortion. Unlike the general community support for other rights, there was no consensus when it came to the right to life as it applies to abortion. Given this, and the desire of the committee to draft a Charter that was capable of unifying rather than dividing Victorians around a set of human rights, it was recommended that the right to life be modified.

Section 48 of the Charter operates as a saving provision in stating that ‘nothing in this Charter affects any law applicable to abortion or child destruction’. The provision meant that the Charter could be enacted in a way that maintains the status quo in the law as it relates to abortion. The extent to which the law of abortion might be altered is left as a matter of ongoing political and legal debate in Victoria without the possibility of it being resolved by judicial determination under the Charter.

The second area of contention was the right to self determination, a right protected by international conventions including that on civil and political rights. Like the issue of abortion, this attracted strong views both for and against. Many Indigenous people spoke powerfully in favour of the need to recognise self determination because they felt it might assist with longstanding and unresolved governance issues. Others in the community opposed such a provision, perhaps exactly for this reason. The committee took the view that a self determination right should not be included because not only did it lack clear community support but its application was uncertain. This also reflected a view that while issues of Indigenous self-governance were pressing and important, these cannot be adequately resolved through a human rights instrument like the Charter, but required a broader constitutional settlement through a treaty or other instrument.⁵ While the Charter does not include a self-determination right, it does in section 19 contain cultural rights, including in subsection (2) specific recognition of the ‘distinct cultural rights’ of Aboriginal persons.

Many Victorians said that the Charter should contain rights relating to matters such as food, education, housing and health, as found in the International Covenant on Economic, Social and Cultural Rights 1966, as well as more specific rights for Indigenous people, women and children. Overall, 41% of submissions argued for the inclusion of some or all of such rights (while 95% argued for the inclusion of civil and political rights).⁶ While the committee agreed that these rights are important, and also that the distinction between these and civil and political freedoms can be arbitrary or even non-existent, it did not recommend that they be included in the Charter at this stage. Instead it was decided that the focus should be on those democratic rights with broad support that apply equally to everyone. This meant that the Charter only includes human rights that had very strong, certainly at least majority, community support.

Change Over Time

The rights included in (and excluded from) the Charter must be seen in light of the law including a mechanism for review and change in four and then eight years (with further reviews also possible). This will enable a broader range of human rights as well as other issues to be considered again with the benefit of having seen the Charter in operation. A first review is mandatory by 1 October 2011, with section 44 stating that the Attorney-General ‘must cause’ a review to examine matters such as whether additional human rights, including a right to self-determination and rights contained in the International Covenant on Economic, Social and Cultural rights, should be included in the Charter. This gives the proponents of such rights a four-year period in which to educate the community and to make the case for their inclusion.

These mandatory reviews demonstrate how the Charter is not a one-off piece of legislation designed to set down a static set of human rights in Victorian law. The committee viewed the Charter as only the first step in the better protection of human rights in the State. This was one reason why, based on strong

community views, it rejected the entrenchment of human rights in a constitutional form like the United States Bill of Rights. Rather than permanently including (or excluding) rights that might be viewed differently with the benefit of hindsight (such as the ‘right of the people to keep and bear arms’ in the second Amendment to the United States Constitution), the expectation was that the Charter be updated and improved with the benefit of experience and in line with community thinking. The Charter is designed to be the start of long term incremental change, not the end of it.

No Rights are Absolute

As is commonly the case with Charters and Bills of Rights in other nations, the human rights set out in the Victorian law are not absolute. They can be limited where the circumstances justify it. This provides a framework within which the Victorian Parliament can continue to make decisions on behalf of the community about matters such as how best to balance rights against each other, protect Victorians from crime and distribute limited funds amongst competing demands. Under the Charter Parliament can make such decisions informed by, but without having to defer unduly to, judicial pronouncements on such subjects. The Victorian Charter states:

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—

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

In setting out factors (a) to (e), the Charter is more explicit than most other like laws in outlining how to balance rights against other community interests. This reflects the Victorian government's broader goals about the role of the charter. By spelling matters out, the charter is more accessible for people without legal training who must apply it in policy and other contexts, such as departmental officers and members of the Victorian Parliament. It also means that non-lawyers will be able to use the charter without relying heavily on legal advice — appropriately enough for a law that is focused not on litigation in courts but on the choices made in and the cultures that pervade government and Parliament. In addition, it makes the charter easier to follow for members of the public who want to know when restrictions on their freedoms can be justified.

The Charter further recognises the power of the Victorian Parliament not just to balance human rights and other interests but to override the rights listed in the Charter. Section 31(1) states that Parliament may expressly declare that an Act or provision 'has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter'. The declaration lasts for five years, and can be renewed. Its effect is recognised in section 32(6) as being that 'to the extent of the declaration this Charter has no application to that provision' (for example, a court might be excluded from making a declaration of inconsistent interpretation with regard to the provision).

It can be argued that the inclusion of the override mechanism is dangerous because it allows Charter rights to be overridden where a law could not be justified under the section 7 limitation clause. This is a real risk, but it is a low one because of the high political cost involved in using section 31. Section 31(4) states that 'It is the intention of Parliament that an override declaration will only be made in exceptional circumstances', while section 31(3) provides that the member of Parliament introducing a Bill containing an override declaration must make a statement to Parliament 'explaining the exceptional circumstances that justify the inclusion of the override declaration'. This

non-justiciable requirement requires a level of transparency and compelling political justification that sets a major hurdle to using the override. A like mechanism in Canada has been very rarely used because the political price has been too high. A government desiring, for example, to override the ‘right not to be subjected to any cruel and unusual treatment or punishment’ must be prepared to meet strong and organised resistance from many sections of the community.

Remedies

Section 38 of the Charter states that ‘it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right’. Section 4 contains an elaborate definition of what is a ‘public authority’. The essence is that it is ‘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 definition captures government and private bodies where they are exercising public power on behalf of the State. While a note to section 4 states that this does not include a non-government school in educating students (because it is not doing so on behalf of the State), the definition would include a privately run prison conferred with the coercive powers of the State to deprive people of their liberty.

Under the Charter a breach of this obligation can give rise to remedies. However, the Charter does not create new causes of action. It merely recognises in section 39 that existing causes of action are possible, such as administrative review of government decisions and injunctive relief to prevent a wrong occurring. The section further says that the Charter does not create a new right of action for damages. Damages can still be gained, but only where this is already permitted by the law. For example, the Charter might mean that a law is interpreted to make a person’s detention illegal. The person might then sue under the existing law seeking damages to compensate for their unlawful imprisonment.

The Victorian Charter goes significantly further than the ACT Human Rights Act when the latter law was first enacted, which neither imposed obligations nor recognised remedies in regard to the contravention of human rights by public authorities. This was a major weakness of that the ACT law that has now been fixed through amendment.

A New Conversation About Human Rights

An important aim of the Charter is to foster a dialogue both within and between the arms of government as to the consistency of laws and governmental action with the civil and political rights in the Act. This can be understood as the following interactions and points at which the Charter will be applied:

First, within the executive, public servants must take the human rights in the Charter into account in applying existing and developing new policies and laws. Government departments and other public authorities may also undertake audits of their programs and policies to ascertain whether they comply with the Charter. Where decisions need to be made about new laws or major policies, submissions to Cabinet will be accompanied by a Human Rights Impact Statement.

Second, when a Bill is introduced into the Victorian Parliament, it must be accompanied by a Statement of Compatibility made by the person introducing the Bill setting out with reasons whether the Bill complies with the Charter. Parliament may pass the Bill whether or not it is thought to comply with the Charter. Parliament's Scrutiny of Acts and Regulations Committee must advise Parliament on whether each Bill is consistent with human rights.

Third, under section 32 Victorian courts and tribunals must interpret, 'so far as it is possible to do so consistently with their purpose, all statutory provisions ... in a way that is compatible with human rights'. The Attorney-General and Victorian Equal Opportunity and Human Rights Commission may intervene in a court or tribunal that is applying the Charter to put submissions on behalf of the government and the public interest. According to the normal rules of court and common law princi-

ples applying to interveners and *amicus curiae*, community and other groups may also be given leave to intervene.

Where legislation cannot be interpreted in a way that is consistent with a human right, the Supreme Court may make a declaration of inconsistent interpretation. The use of this title for the declaration rather than ‘declaration of incompatibility’, as used in the ACT and UK Human Rights Acts, is significant. It indicates that in Victoria the Court is not so much holding that Parliament has enacted legislation that is incompatible with human rights as that the Court has taken a contrary view to Parliament on interpretative issues such as the content of the relevant right or the application of the limitations clause in section 7. This may make it less difficult for Parliament, after reviewing the declaration, to maintain its own contrary interpretation. A declaration of inconsistent interpretation does not strike down the law nor alter its application. Instead, the Supreme Court must cause a copy of the declaration to be provided to the government. The responsible minister then has six months to prepare a written response to be laid before Parliament. Parliament may decide to amend the law or to leave it in place without change.

Conclusion

The Victorian Charter of Human Rights and Responsibilities changes that State’s legal system at a fundamental level. It alters the processes of government, such as the rules by which laws are made. While it is not a guarantee, the Charter does make it more likely that old laws will be applied and new laws made in a way that is consistent with the protected human rights. It is based on the idea that that government should operate fairly in dealing with people from across the community.

The focus of the Charter is upon ensuring that democratic rights are taken into account at the earliest stages of the development of law and policy in areas ranging from housing to child protection. This recognises how the decisive point in achieving protection for human rights is not in court after a breach has occurred, but in government in the development of

policy and in Parliament with the making of a law. At these early stages, the Charter provides a Victorian yardstick against which policy and laws can be assessed.

This preventative aspect of the Charter means that rights principles will be taken into account not just in courts but throughout government. Indeed, the role of protecting human rights under the Charter will be exercised far more frequently by government than the courts. Victoria Police, for example, will have day to day responsibility for applying the human rights in protecting the community from crime and safeguarding the rights of suspects. They, like courts, will apply human rights in interpreting the laws that define their role and powers. In this and other areas, such as mental health and child protection, the Charter will require that the work of government be undertaken fairly with due regard to our common democratic freedoms.

In many ways the Victorian Charter is modest. It also has some important limitations. It does not disturb accepted principles of parliamentary sovereignty and does not confer the powers associated with many Bills of rights, like the power of courts to have the final say by striking down inconsistent laws. The Charter also fails to grant a new right to damages and, importantly for many people, does not include the full range of rights recognised in international law, especially economic, social and cultural rights. Criticism can fairly be levelled at the Charter on the basis that it does not provide everything that might be hoped for from a comprehensive protection for human rights.

While the Charter is imperfect, it is only intended as a starting point. The law is designed to be the beginning of a journey to better protect freedoms in Victorian law. It is a first step that will provide valuable insights for government and the community as to how effective the law can be in protecting human rights. This step will demonstrate the limitations of any law in seeking to affect social outcomes, including some of society's most pressing problems. The Charter will reveal how

any effective strategy for better human rights protection must also pay close attention to political culture and leadership, the media and community education and attitudes. Without reinforcement from these quarters, the positive impact of the Victorian Charter of Rights will be blunted.

While the Victorian Charter has changed the law, it is designed to have a broader impact. There are benefits that the Charter may bring to the community generally. First, the Charter increases the scope for remedies for people adversely affected by government decisions where such decisions breach human rights. The remedies enable decisions to be reviewed and even reversed. There will also be the possibility for injunctions to prevent breaches continuing. Such remedies can be expensive because they involve litigation in courts, but they do offer a means not only to vindicate rights in test cases but an option that can be useful in negotiations with government.

Second, the Charter affects government priorities, including as to the allocation of scarce government resources. It is notable that in response to the Charter the Victorian government in its 2006–2007 budget allocated \$6.5 million over four years for initiatives including a community education program, human rights training for agencies like Victoria Police and support for the Human Rights Law Resource Centre to assist their advocacy work in relation to disadvantaged Victorians. Apart from such a direct monetary outcome, the Charter also has a more indirect impact in influencing decisions made between competing funding priorities. In such cases the Charter can give greater legitimacy and force to outcomes consistent with human rights than might otherwise have been the case.

Third, the Charter is a useful advocacy tool. Used effectively, it gives greater prominence to human rights issues such that they are taken into account more seriously not only within government but also in the media. Instead of the having to rely upon international standards that are often perceived to be illegitimate, people will be able to invoke a clear set of civil and

political rights that have the backing of the Victorian Parliament. Similar laws have proved to be an effective rallying point in other nations such as Canada, where non-government organisations have used their Charter to shape law-making and the work of government, in litigation and to influence public opinion.

Finally, over time the Charter will contribute through education and other avenues to the promotion of important social values like as respect for cultural diversity. By recognising the democratic rights of people across the community, it recognises their inherent dignity and value. There is evidence that this can also have an impact at the individual level. This was demonstrated by a 2003 study of the Americans with Disabilities Act 1990.⁷ Researchers interviewed people with disabilities and examined their life histories. They found that the new law was having a profound effect, but not in terms of court actions. Indeed, none of their interviewees had brought such a case. Instead, they found the law affected ‘the way people talk and think, usually in social contexts far removed from the courts’.

By granting basic rights to people with disabilities, the Act: ‘played a crucial role in their lives. Rights transformed their self-image, enhanced their career aspirations, and altered the perceptions and assumptions of their employers and coworkers — in effect producing more inclusive institutional arrangements.’ The study demonstrated how the legal protection of rights enhanced the culture of rights protection at the individual and community levels. This is the most significant outcome that the Charter could achieve. After all, the most important way that human rights are protected is usually not by institutions of government or in the law but by how they are respected in the relationships between people in their everyday lives.

It is by changing cultures and practices in government and the community that the longer term impact of the charter will be felt. While the charter is drafted to focus on the human rights problems of people who are currently affected by the actions of government, it promises also to make an important contribution to the human rights of coming generations by

establishing a better and more just framework for the protection of human rights generally and for the better education of people about their rights and their responsibilities to others. Indeed, it is likely that it will be future generations who will gain the greatest benefits from this law because they will live and work in an environment where the full, long-term effects of the Charter are felt.

Endnotes

- 1 Menzies, R. (1967). *Central power in the Australian Commonwealth*. London: Cassell.
- 2 ABC Radio. (2000, February 18). *AM*. Available at <<http://www.pm.gov.au/News/interviews/2000/AM1802.htm>>
- 3 See Lynch, A., & Williams, G. (2006). *What price security? Taking stock of Australia's anti-terror laws*. Sydney: UNSW Press.
- 4 Burdekin, B. (1994). Foreword. In P. Alston (Ed.), *Towards an Australian Bill of Rights* (p. v). Canberra: Centre for International and Public Law; and Sydney: Human Rights and Equal Opportunity Commission.
- 5 See Brennan, S., Behrendt, L., Strelein, L., & Williams, G. (2005). *Treaty*. Sydney: The Federation Press.
- 6 Human Rights Consultation Committee. (2005). *Rights, responsibilities and respect: The Report of the Human Rights Consultation Committee* (pp. 26–27). Melbourne: Celsius Design, Melbourne.
- 7 Engel, D., & Munger, F. (2003). *Rights of inclusion: Law and identity in the life stories of Americans with disabilities*. Chicago: University of Chicago Press.



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