

The Victorian Charter of Rights and Responsibilities and Scrutiny in Victoria

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Introduction

The genesis of the *Victorian Charter of Rights and Responsibility* lies in the *Justice Statement* issued by the Victorian Attorney General Rob Hulls in 2004. The statement spanned a wide range of matters and the future direction of law reform. It also proposed a public discussion on a Victorian Charter of Rights.

In April 2005 a four-person committee was established chaired by Professor George Williams of the University of NSW. The committee toured the state and met with a broad cross section of people. They specially targeted people who knew little or nothing about human rights.

After six months they concluded that the majority of Victorians wanted their human rights better protected in law. The process led to a report entitled *Rights, Responsibilities and Respect*. It includes a draft of a *Charter of Rights*. With only minor modifications it was enacted by the Victorian parliament in July 2006. It has come into force as of the 1st January 2007 while new obligations on public authorities was delayed until January 2008 to allow the opportunity to train staff and to review existing laws, policies and practices.

The Scrutiny of Acts and Regulations (SARC) is a joint investigatory committee of the Parliament of Victoria. It has members from the Government and Opposition and from the two houses. Under the Human Rights Charter the Committee is required to consider and report to Parliament on every act and statutory rule in the context of the Charter and say whether any provision in the Act or regulations is incompatible with the Charter-

History of Human Rights

So what are human rights? As the Charter notes in the preamble,

"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."¹

Human rights are therefore inherent rights of humans and not granted by Government. According to this idea, human rights trump all other values such as custom, tradition, and hierarchy and are the inalienable rights of humans. Human rights have three qualities they are natural, equal and universal.

The concept of human rights has its origins relatively recently in the 18th Century European Enlightenment. It was clearly articulated in the American Declaration of Independence, which declared "all men as equal." However the greatest impact on

¹ Preamble Charter of Rights and Responsibilities.2006

western thought was the French Revolution's *Déclaration des droits de l'Homme et du citoyen* (Declaration of Rights of Man and Citizen) 1789

The articulation of such a declaration of "les droits naturels, inaliénables et sacrés de l'homme" (the natural, unalienable, and sacred rights of man), in 18th Century society was revolutionary.

Even though many people remained excluded - including people without property, slaves and women. However it remains surprising that people living in societies built on slavery, subordination and a belief in a divine order could imagine that men and in some cases women could be equals.

In a recent book by Lynn Hunt *Inventing Human Rights*, she argued that these 18th Century individuals developed a new sense of sympathy or what we in the 20th Century call empathy for the autonomy and well being of other people.

Lynn Hunt argued that empathy was also a result of a greater sense separateness and autonomy of human bodies. So that people became to respect the boundary between their body and that of the other. Your body is yours and my body is mine. The use of the handkerchief demonstrated a greater respect for body integrity between the individual and the other. People began to use food utensils and previously acceptable behaviour like throwing food on the floor was replaced by repulsion. She argues that a new sense of the other developed over that period. The reading of novels she claimed helped contribute in a development of empathy across class, sex and national lines.

" Torture ended because the traditional framework of pain and personhood fell apart, to be replaced, bit by bit, by a new framework, in which individuals owned their own bodies, had rights to their separateness and to bodily inviolability, and recognised in other people the same passions, sentiments and sympathies as in themselves."²

The Victorian Charter

The American and French declarations unleashed a logic that expanded rights to all sorts of individuals such as those of minority religions, slaves and women. Through the 19th Century the idea of rights became increasingly attached to particular nations and ethnicities. They thus lost their universal and equal quality. It took two world wars to restore the importance of the struggle for universal human rights with the 1948 Universal Declaration of Human Rights.

The Victorian Charter is part of this tradition of natural human rights and it seeks to protect the rights that are the most important to an open and free democracy. Generally they have been taken from the *International Covenant on Civil and Political Rights*, although some were modified or omitted. The two most important departures from the covenant are the modification on the right to life and the exclusion of the right to self-determination.

These rights must be considered in the context that the law includes a review and possible change in four years and then eight years.

This would enable the inclusion of a broader range of human rights as well consideration of other issues after reviewing the actual operation of the Charter.

² Lynn Hunt *Inventing Human Rights* Morton, 2007

These reviews demonstrate that the Charter is not designed to establish an unchangeable set of human rights. Some critics see the fact that the Charter is a law and not constitutional simply as a weakness. As a law it can be modified or even repealed by Parliament. The question is whether any future government will have the political will to get rid of the Charter and that will depend how well it becomes imbedded in our community.

Being a law is also a strength as it allows for incremental change -articulating further human rights and modifying others. So we don't end up with legacies such "as the right of the people to keep and bear arms", which is in the second amendment of the US constitution and remains an impediment to comprehensive gun reform.

Another strength is that the Charter allows for the extension of rights by prescribing at least two four year reviews. The first review specifically has to review the act and look at whether further rights be incorporated including the right to self-determination and rights contained in the *International Covenant on Economic, Social and Cultural Rights* should be included in the Charter.

Let me briefly touch on some of the major features of the Victorian Charter –

- Protects rights that are seen as important in an open and free democracy
- Applies only to individuals not organizations
- No rights are absolute
- Section 38 makes it illegal for any public authority to act in a way that is incompatible with human rights or fail to give consideration to a relevant human right
- Under the Charter a breach of this obligation can give rise to remedies. But the Charter does not create new causes of action but recognises the existing causes of action through the courts are possible.
- Courts must interpret as far as it is consistent with their purpose all statutory provisions. In a situation in which a court cannot interpret a law in a way that is consistent with human rights it may make a declaration of inconsistent interpretation
- The law is not struck down if it is found to be inconsistent, but is sent back to Parliament. The Minister has six months to prepare a written response, which is laid in Parliament.

The Role of Parliament

However for the Charter to work it is important that the broader community has its own developing sense of human rights. Laws should be debated in Parliament and judged according to the value the broader community places on human rights. This would strengthen the law making process through the work of parliamentary committees, community interaction and the political system.

The rights in the Charter are also not absolute. The rights are limited to individuals; they deal with Victorian laws and the Victorian public sector. The Charter provides an important role for the Victorian Parliament in balancing conflicting rights and the public interest.

Section 7(2) of the Charter provides that 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.

The Role of Parliamentary Scrutiny

The role of Scrutiny of Acts and Regulations Committee (the Scrutiny Committee) is critical to this process because it informs the Parliament of human rights after consideration of the laws and regulations. The Scrutiny Committee SARC can do this in a very public way through public hearings and in its published alert digest. The Scrutiny Committee SARC also allows public access to this process and provides a level of transparency.

Ultimately it will be the Parliament that will make crucial decisions on behalf of the community on how to best balance rights against each other, protect Victorians from crime and how to distribute funds for competing demands. Ensuing the broader community is aware and involved in debates around human rights is a legitimate role for SARC.

In balancing rights it is vital that there emerges a culture of empathy for the other. The Charter is not just a list of issues for Government agencies and the executive to tick off. There will also be tensions and some have already emerged with the work of the Scrutiny Committee in the first few months of the Charter.

In setting out 7(2) (a) to (e) the Charter explicitly outlines how Parliament is to balance rights with other community interests. This provision provides transparency for the community. When a bill is introduced into the Parliament it will have to be accompanied by a Statement of Compatibility, which sets out the reasons why the bill complies or fails to comply with the Charter. If the Minister or senior public servants want to justify the provisions of a bill they have to argue why rights may be limited or abridged in the particular circumstances.

SARC has a role in considering human rights issues and it has the ability to maintain a dialogue both with the broader community and with the executive. SARC can have public hearings on contentious bill. As we undertook with an amendment to the Infertility Treatment Bill - a bill that would allow therapeutic cloning.

This gives the community a window into policy making while providing Parliament better information about the effect of new policy on minority, vulnerable or at risk groups in the community.

SARC maintains a dialogue with the executive through the Alert Digest and ministerial correspondence - which is published in its entirety in the alert digest

Human Rights in recent bills

It does not follow that SARC will accept the arguments in the Compatibility Statement. This was demonstrated in a recent bill on income splitting in the Emergency Service Superannuation Scheme. The bill used:

" the definition of 'spouse' under the Commonwealth Act (is) to ensure consistency with the Commonwealth Act ...

The Bill does not enable contribution splitting between same-sex partners who live with their partner on a genuine domestic basis while facilitating contribution splitting between heterosexual married or de facto couples...."

SARC, " concluded that the amendments are incompatible with the Charter the Committee has considered whether even the strongest and most cogent section 7(2) analysis (reasonable limitations) can ever conclude that a law which discriminates on the basis of sexual orientation is justified

The Committee then considered the question of the circumstances that would have to exist before 'the exceptional circumstances' threshold could ever be crossed so as to engage the 'override provisions' of the Charter...."

The override provision allows the Parliament to override the rights in the charter for five years in exceptional circumstances. The Minister's reply indicated that while he disapproved of the definition of spouse, he had legal advice that meant that ensuring consistency with a Commonwealth Act was sufficient grounds to make a bill compatible with the Charter.

There were also concerns about the compatibility statement for the Infertility Treatment Amend Bill 2007, which claimed there were no human rights issues.

"In respect to this Bill, the Committee considers that the Parliament would have been better informed with at least a brief discussion concerning the pivotal question of when human rights may be limited within the meaning of section 7(2) of the Charter.

SARC believes that if it considers a statement inadequate it will draw this to the attention to the Minister.

SARC further indicated to the executive that in reviewing Compatibility Statements they will be considered as being equivalent to an explanatory memorandum.

The Compatibility Statement is therefore a good guide as to whether the government department or agency has undertaken a proper human rights impact assessment.

SARC also has a relatively new power that gives it the authority to report on a bill up to 10 sitting days after Assent. This gives SARC a further opportunity for hearings and community consultation, if in the opinion of the Committee, the bill has been rushed through.

Conclusion

The Charter recognises the power of the Parliament to balance rights and community interests and even allows Parliament to override the rights listed in the Charter.

The rights model Victoria has established a dialogue within and between various arms of Government and the broader community. It seeks to avoid litigation and allows for incremental additions. To protect Victorian rights demands a vigilant parliament with strong scrutiny but also a strong and organised human rights constituency in the community.