

General

Victoria's charter: Is it right for the nation?

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The operation in Victoria of a charter of human rights provides the first clues about how such a scheme would work at a national level.

Victoria is in the spotlight after the politically charged debate about a Bill of Rights was reignited last week when the Rudd Government announced the appointment of Jesuit lawyer Frank Brennan to lead a nationwide consultation on how new laws to protect human rights might be framed.

As opponents, worried about turning power over from the elected Parliament to unelected judges, and supporters, citing Australia's isolation among Western democracies on the question of legislative human rights protection, staked their familiar terrain, The West Australian conducted an investigation into Victoria, which became the first State to introduce a statutory charter of human rights in 2006.

The investigation suggests the Victorian charter, described by one of its framers as "a light touch model" and understood to be similar to that proposed by most supporters for new Federal laws, has been neither as effective as its supporters hoped nor as harmful as its detractors feared.

While still new in a legal context, the charter has among other things been successfully invoked by a single mother to avoid eviction from public housing and by a blind person to have voting papers for a secret ballot printed in braille. A pet project of Victorian Attorney-General Rob Hulls, the charter enshrines in legislation the 20-plus rights in the International Covenant on Civil and Political Rights.

These include uncontroversial rights such as equality before the law, protection from torture and the right to freedom from forced work.

But the charter also includes the right to the presumption of innocence and the right to protection from retrospective criminal laws, protections that could call into question, for example, WA's reverse-onus drink-driving laws or aspects of the Howard government's anti-terrorism laws.

Crucially, the Victorian legislation expressly prohibits a person from taking legal action over a breach of the charter. Nor can damages be awarded as a result of a breach.

“As a result, there has been no flood of litigation,” said University of NSW constitutional law expert George Williams, who was involved in drafting the Victorian charter. “You can count the number of cases that have gone before the courts on one hand.”

Rather, the charter works by forcing Parliament and government agencies to consider human rights standards when drawing up legislation, policies and procedures.

Victorian Government agencies must produce a “statement of compatibility” when developing policies and delivering services.

In the courts, judges must give regard to the charter when interpreting existing laws and parties before the courts can invoke the charter when they are bringing an existing course of action.

A court can also “flag” legislation it believes is incompatible with the charter to be referred to Parliament for reconsideration, but Parliament is under no obligation to change the law.

“(The charter) seeks to establish a conversation between the various arms of Government about human rights,” said lawyer Phil Lynch, director of the Melbourne-based Human Rights Law Resource Centre.

The Victorian legislation is based in turn on Britain’s Human Rights Act, enacted by Tony Blair’s Labour government in 1998. Ironically, British Justice Secretary Jack Straw said last week there was a growing sense the British Act was a “a villains’ charter” relied upon by convicted terrorists to avoid deportation and prisoners to challenge their punishments and the Government has proposed a comprehensive review.

Prominent Melbourne defence lawyer David Galbally said in reality, the charter had so far had almost no effect on the administration of criminal justice in Victoria.

“A lot of what is referred to in the charter is in fact enshrined in the Crimes Act, the Bail Act or our Young Persons Detention Act,” he said. “I think one of the significant parts is the right to privacy, which we do not have as a common law right in Australia.”