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## Victoria's charter a blow to democracy

Janet Albrechtsen Blog | October 10, 2008 | [102 Comments](#)

IT HAD to happen. Sooner or later, the Victorian Charter of Rights would be revealed as the weapon of first resort for those opposed to laws duly enacted by the elected representatives of the Victorian people.

Having so far lost the democratic debate over the Abortion Law Reform Bill which passed through the Victorian Upper House on Friday, Catholic Health Australia has signaled its intent to head off to the courts to overturn Parliament's decision. The CHA claims that the law breaches the human rights of doctors who are conscientiously opposed to abortion by requiring them to refer women elsewhere.

Whatever your views about abortion, there is a much larger issue at stake. Since its introduction in 2006, this is the first – but it will by no means be the last time - that the Charter of Rights will be used by litigants who ask unelected judges to overturn the democratic decisions of Victorians.

Abortion is an emotive issue on both sides of the divide. Last week, thousands of people rallied outside the state's Parliament to oppose Victoria's new abortion laws which removes abortion from the Crimes Act and allows women to abort their babies up to 24 weeks during their gestation. And there are many reasons for objecting to the new laws. Former Treasurer, Peter Costello told The Australian a few weeks back that making abortion legal as a matter of course up to 24 weeks – given that many babies born at less than 24 weeks survive to live healthy lives - will mean that “in one part of a hospital babies will be in humicribs being kept alive and in some other part it will be legal to be aborting them.”

Doctors have also expressed their alarm. In an open letter to upper house MPs, IVF pioneer John Leeton, psychiatrist David Clarke and bionic ear inventor, Graeme Clark, have called for a panel to decide late-term abortions and for the cut-off time to be reduced from 24 weeks to 20 weeks gestation. Supported by the Australian Medical Association, the three doctors also say that the new abortion law forces doctors to act against their conscience by demanding that doctors opposed to abortion refer women to other doctors.

These same concerns over conscience were raised by Catholic Health Australia. Writing in the Herald Sun, Martin Laverty, CEO of Catholic Health Australia, objected to the same anti-conscience provision. It is indeed an odd situation where MPs are given the right to vote according to their conscience on abortion but doctors who are conscientiously opposed to abortion are required to refer women to doctors with no such objections.

But whatever your views on the abortion laws, the vexed issue has so far been settled democratically. There is a third and final vote but if the bill passes into law unamended then the people have finally spoken. And that is as it should be. However, the debate has also exposed the Achilles heel of Victorian democracy. Having lobbied MPs – and lost – Catholic Health Australia can have another shot at killing off this law – via the courts. As Laverty says, section 14 of the Victorian Charter of Rights protects every Victorian's “right to freedom of thought, conscience, religion and belief” and says that a “person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.” And CHA has signaled its intent to use the Charter to strike down those sections of the abortion law which offend Catholic beliefs.

Few should be surprised. The Charter sits there as a hyper-law, ready to be activated by litigants unhappy with democratically enacted laws. Perhaps Victorians understood that the Charter would be used to second-guess decisions of their Parliament. If so, they will have no problem with Victoria's new democratic deficit which gives unelected judges the final say on controversial social issues.

More likely, Victorians were misled by Charter advocates who have long denied the Charter would transfer of power from the legislature to the state's courts. That now stands exposed as a blatant and deliberate deceit. That transfer of power to courts is the real purpose of the Charter of Rights. While those who have championed the Charter – sections of the judiciary, the law associations and human rights activists – have long expressed disdain for the ability of Australia's democracy to deal with human rights abuses, their motivations are not always pure.

As alluring as it is to hear smart men and women promote the protection of our human rights, it always pays to follow the power, the money and the winners. Judges who support a charter of rights are also supporting the wholesale transfer of power to make laws to them.

As US academic, Jason Pierce, has demonstrated in his ground-breaking interviews with senior members of the judiciary, many judges think politicians are too stupid to be left to decide important issues. Depicting themselves as guardians of the greater good, they see a charter as the perfect mechanism for them to legislate their preferred social agendas from the bench. Great if you share their views. But a lousy deal for those of us who don't and prefer that contentious social issues be settled by a democratic institutions.

Lawyers love charters of rights for one simple reason. Money. While you won't find mention of a human right to

income anywhere in the Victorian Charter, it's there in the subtext. As one senior prosecutor told The Sunday Age earlier this year, Charter litigation will flood the courts and provide many defence lawyers with "a lifelong right to an income that they probably don't deserve."

And that brings us to the Charter's other winners. Those behind bars love a Charter of Rights. Former NSW premier Bob Carr has canvassed the growing body of perverse rulings in the United Kingdom. Heroin-addicted prisoners have claimed thousands of dollars in compensation by claiming that cutting short their drug rehabilitation treatment was a breach of their human rights. Police refused to remove gypsies who illegally occupied the private property of a factory owner for fear of breaching their human rights. And on it goes.

Charters are championed most passionately by those on the Left side of politics. It's no coincidence. They would prefer the easy task of finding a sympathetic judge ready to implement their progressive agendas from the bench rather than doing battle with tedious democratic processes and the common sense of the people.

But how sweet is this? Conservatives in the Catholic Church may be the first to use the Charter to bypass democracy and challenge the abortion laws so dear to the progressive agenda. This is exactly why Young Labor delegates voted against a charter of rights at their annual conference in June.

They were concerned about a charter being used by conservatives claiming a right to property overturning environmental laws. Or the right to life being used to undermine abortion.

How prescient of the Young Labor men and women if the CHA uses the right to freedom of belief in the Victorian Charter to challenge the new abortion laws.

While I'm firmly in the camp that regards the new Victorian abortion laws as abhorrent because they legalise the killing of a baby that could survive outside the mother's womb, the Victorian Charter is nearly as bad. It kills democracy.

**Over to you ...**

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