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Charter of Human Rights: More punch than expected?

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**Instead of impacting on the law in a secondary manner, the rights enshrined in Victoria's Charter of Human Rights may have a legal force of their own.
By Professor Mirko Bagaric and Peter Faris QC.**

Victoria is the first state in Australia to enact a Bill of Rights. The Victorian *Charter of Human Rights and Responsibilities Act* 2006 (the Charter) was assented to on 25 July 2006 and the main part came into force as of 1 January 2007.[\[1\]](#)

The rights in the Charter are mainly derived from the International Covenant on Civil and Political Rights (ICCPR) 1966, which Australia ratified in 1980.[\[2\]](#) The Charter sets out more than 20 groups of rights, including the right to life (s9); freedom of movement (s12); freedom of expression (s15); the right to liberty and security of person (s21), and a swag of rights in criminal proceedings (s25). The Charter was modelled on similar documents in the UK, New Zealand and the ACT.[\[3\]](#)

The catalyst for the Charter was the recognition that Australia is the only common law country that does not have a comprehensive legislative regime for protecting human rights and the desire for greater weight to be given to human rights.[\[4\]](#)

Despite the seminal nature of the document, it has largely gone unnoticed in the legal community. The central reason for this is the orthodox view that its impact on the law will be modest.

The drafters of the Charter, and it seems Parliament, intended the Charter to alter human rights law in a very limited manner. In essence, it is assumed that the main impact of the Charter will be to serve as an interpretative tool, used to encourage other statutes to be interpreted in a rights-embracing manner. Thus, conventional wisdom maintains that human rights will not be conferred on Victorians in a positive manner, but incrementally in a derivative manner by ensuring that they are not violated by other statutes.[\[5\]](#)

However, the manner in which the Charter has been drafted means that it may have a far wider ranging impact than most commentators realise. In this article we suggest that there is more than a tenable proposition that the Charter has already given legal force to the rights set out in it. This means that the Charter rights are in force now and do not merely impact on the law in a secondary manner by guiding the interpretation of other statutes.

If this proposition is correct, the door is now open for Victorians to assert a large array of legal rights in Victorian courts.

The orthodox view of the Charter

The way in which the Charter is meant to change Victorian law is set out in s1(2) of the Charter. It provides that:

“The main purpose of this Charter is to protect and promote human rights by –

- (a) setting out the human rights that Parliament specifically seeks to protect and promote; and
- (b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and
- (c) imposing an obligation on all public authorities to act in a way that is compatible with human rights; and
- (d) requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and
- (e) conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration”.

The operation of sub-ss1(2)(b)-(d) is relatively clear, and their impact is, even when taken cumulatively, modest. Sub-section 1(2)(b) (which is reinforced by s32(1)) establishes a new interpretative methodology in Victoria. This literally and effectively means that every interpretation of a Victorian statute that has previously been undertaken is contestable. Every Victorian Act must now be interpreted in a human rights embracing manner. Thus, the Charter is in fact a meta-statute, in that it hovers above and infuses all other statutes.

While this sounds like a momentous change, it is not. Most of the rights in the Charter are not dealt with or touched on in other statutes, and even where a statute is found to violate Charter rights (because it cannot be interpreted consistently with the Charter), the statute is not invalidated.

Instead, in such circumstances the Supreme Court is given the power to make a declaration that a statutory provision cannot “be interpreted consistently with a human right”: s36(2). Once a declaration of inconsistent interpretation is made, Parliament will then consider whether the offending statute should be changed to become Charter compliant. Importantly, a declaration of inconsistency does not create legal rights or give rise to any civil cause of action: s36(5).

Similar considerations apply in relation to the special obligations imposed on public authorities which are set out in s1(2)(c). While Parliament wants public authorities to take Charter rights seriously, s39(3) expressly states that a person is not entitled to be awarded any damages because of a breach of this obligation.

Finally, the statements of compatibility mentioned in s1(2)(d) are not binding on Parliament. A statement that a Bill will violate Charter rights does not impugn the validity of the subsequent Act: s31.

If the impact of the Charter is confined to these matters, it will obviously be quite limited. In effect, Charter rights would not have a life of their own. They would mainly operate in a derivative manner, sometimes shaping the operation of other statutes which deal with human rights. Even then, they do not trump those other statutes.

The expansive view of the Charter

Literal reading

The above account represents the orthodox view in relation to the impact of the Charter on the law.^[6] The fundamental reason that the Charter, despite its grandiose overtones, is assumed not to redefine a large part of Victorian law is that the rights set out in ss8 to 27 do not have legal force independent of their impact on other statutes or public authorities.

In particular, it is assumed that the Charter does not change the common law so far as it relates to the protection of human rights.^[7] To this end, it is noteworthy that the common law does not provide systematic protection of human rights. In fact, it barely broaches this issue. The main rights that are protected by the common law are the right to a fair trial and Indigenous property rights.

However, the assumption that the Charter does not give legal force to the rights set out in it is arguably wrong. As noted above, s1(2)(a) of the Charter provides that it sets out the human rights that Parliament seeks to protect and promote.

When an Act of Parliament sets out a rule, norm, principle or, as in the case of the Charter a right, the effect of that process is that the rule, norm, principle or right *ipso facto* becomes a legal rule, norm, principle or right.

Acts of Parliament are legal documents. The norms in them have legal force. Hence the presumption in relation to the Charter is that the human rights set out in the Charter are now legal rights and therefore have legal force.

Moreover, state Parliaments have plenary power. The Victorian legislature can pass valid laws on any matter whatsoever, subject to the federal law inconsistency limitation expressed in s109 of the federal Constitution. It has the power to pass laws giving legal force to human rights. This is incontestable.

In relation to some of the Charter rights, such as the presumption of innocence (s25(1)), the Charter entrenches the common law and hence the rights are not new in content, although they now have a stronger (statutory) basis.

However, most of the rights embodied in the Charter were not recognised by the common law or other statutes (such as cultural rights (s19) and the freedom of thought, conscience and belief (s14)) and hence are for the first time given legal force by the Charter.

Thus, a literal interpretation of the Charter suggests that it is not confined to altering other Acts of Parliament. The Charter is an Act of Parliament and by its own terms has a legal effect, aside from the manner in which it interacts with other statutes.

Achieving the purpose of the Charter

The Charter expressly recognises that human rights are not sufficiently protected in Victoria and are so important that they must have a legislative foundation. This is underlined by the preamble in the Charter which provides:

“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 ... ”.

Furthermore, s35(a) of the *Interpretation of Legislation Act* 1984 (Vic) states:

“In the interpretation of a provision of an Act or subordinate instrument ... a construction that would promote the *purpose or object underlying the Act* or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object”. [*emphasis added*]

The purpose of the Charter (which is to promote and protect Charter rights) cannot be achieved unless the effect of the Charter is to give legal force to the rights set out in it, independent of the interaction of the Charter with other statutes.

As noted above, most of the rights set out in the Charter are not dealt with in other statutory provisions in Victoria. Unless the Charter is interpreted to give legal force to these rights, legal recognition of human rights is a matter of chance, depending on whether the statute law in Victoria has previously dealt with the matter. This is the antithesis of taking human rights seriously.[\[8\]](#)

In determining the impact that the Charter has on the common law, there is scope pursuant to s35 of the *Interpretation of Legislation Act* to consider documents and reports underpinning

the Charter. As noted above, the second reading speech and the Human Rights Consultation Committee report suggest that Charter rights should not have an expansive operation.

However, material extraneous to an Act cannot be used to distort or emasculate the clear meaning and effect of the statute or parts of it. This would make the law effectively unknowable, thereby undermining the rule of law, which is one of the central ideals which the Charter purports to promote.

To this end, the High Court in *Catlow v Accident Compensation Commission* held:

“Whether or not extrinsic material is considered in interpreting a statutory provision, it is clear that the meaning attributed to the statute must be consistent with the statutory text. If the meaning which would otherwise be attributed to the statutory text is plain, extrinsic material cannot alter it”.^[9]

Charter rights not watered down by read-down provision

Given that nothing in the Charter states that the rights set out in the Charter do not have legal force, there is no scope for watering down the impact of the Charter by resort to other material.

The Victorian Parliament is certainly competent to enact a statute which has no legal effect and does not legally alter, in terms of creating legally enforceable rights and remedies, the subject matter of the statute. For example, s1A(3)(a) of the *Constitution Act 1975* (Vic), which relates to the recognition of Aboriginal people, states that “The Parliament does not intend by this section (a) to create in any person any legal right or give rise to any civil cause of action”.

However, no such limitation is expressed in the Charter in relation to the rights set out in ss8 to 27. To the contrary, the Charter expressly states that it sets out the human rights that Parliament seeks to protect and promote. Accordingly, it seems that those human rights are now legal rights. Nowhere in the Charter does it state that these rights are not to have legal force.

Special and particular issues arise in relation to the manner in which Charter rights intersect and relate to other Acts of Parliament. The dynamics of this are spelled out in Part 3 of the Charter. To this end, limitations on the enforcement of Charter rights which clash with other provisions in other statutes are set out in the Charter. These limitations only relate to the manner in which the Charter interacts with other statutes and have no impact on the manner in which Charter rights operate when they are not opposed to other statutory interests.

Limitation of rights clause rarely curtails rights

In some cases, the rights set out in the Charter will be limited by the limitation clause in the Charter. Section 7 states that:

“(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”.

This ostensibly imposes a balancing test that should be undertaken in determining the scope and limits of Charter rights.^[10] However, the limitations are inherently vague, invoking concepts such as freedom, dignity and democracy. These concepts are the very same ones that, according to the preamble, spawned the need to enact the Charter. Furthermore, abstract notions referring to the “nature” of rights and the “importance” of other goals provide little, if any, guidance concerning the concrete ideals by which rights should be restricted.

In most calculation of rights, important countervailing considerations include wider community interests such as security and economic viability. The Explanatory Memorandum supports the contention that laws which aim to protect the community good in relation to such matters as public safety are justified in a free and democratic society.^[11]

These considerations are, however, diluted greatly by ss1(2)(b) and by s32,^[12] which set out the interpretative technique that must be applied to all statutes. It states:

“So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights”.

This section underpins the wide-ranging nature of the Charter. It makes it clear that its scope extends to all Victorian legislation and in a profound manner at that. Human rights are to be accorded not to the extent that is reasonable to do so, but where it is possible to do so.

This strong preference in favour of granting human rights obviously applies to not only other pieces of legislation, but also the Charter itself. This means that the limitation clause itself must be interpreted in a manner that is compatible with human rights.

This is likely to lead to unintended and perhaps perverse outcomes. Yet this is not a consideration to which decision-makers can give considerable weight when applying the Charter. The balance between individual rights and other ideals is inherently difficult to strike. It involves weighing complex competing considerations, most typically the economic

and social cost of conferring the rights. Parliament has declared that this balance must now be tilted heavily in favour of the individual.

While this analysis applies most acutely to the balancing process between Charter rights and other statutes, it emphasises the strong preference that Parliament has in favour of rights over wider, often less tangible interests.

Parliament has declared that human rights must be given statutory protection, taken seriously by decision makers and accorded unless it is impossible to do so.

At the minimum, Charter rights cannot be defeated unless there are clear, non-speculative countervailing benefits which can defeat the right.

Conclusion

In balancing the concerns of individual litigants and wider community interests, Victorian law has taken a significant shift to favouring the individual – perhaps far more than most lawyers realise.

Some commentators may disagree with this wide-ranging social engineering process. However, in a democracy governed by the rule of law, such views, even if held by judges, obviously cannot override the wishes of Parliament and provide a basis for clipping back the rights enshrined in the Charter. Unintended outcomes from the Charter must be dealt with in the political, not judicial, arena.

In the meantime, practitioners would be best placed to familiarise themselves with the content and scope of the Charter. Its wide-ranging and often vague language provides the potential for conducting a plethora of test cases which could result in a considerable pragmatic increase in the human rights enjoyed by Victorians – or at least some of them.

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[1] This is close on the heels of the ACT Bill of Rights: *Human Rights Act 2004 (ACT)*. Some important provisions of the Charter, such as those imposing human rights obligations on public authorities and the capacity of the Supreme Court to issue statements of inconsistent interpretation, do not come into force until 1 January 2008.

[2] However, the Charter does not map all of the ICCPR rights. It does not include, for example, the right to self-determination.

[3] See the Human Rights Consultation Committee report, *Rights, Responsibilities and Respect* (2005), p.ii.

[4] See Parliament of Victoria, *VicHansard*, 4 May 2006, 1285-1289 (second reading speech).

[5] See Human Rights Consultation Committee report, note 3 above; second reading speech, note 4 above.

[6] See Human Rights Consultation Committee report, note 3 above; second reading speech, note 4 above.

[7] See especially, Human Rights Consultation Committee report, note 3 above, s50.

[8] It is important to note that this analysis, while constituting a rights explosion in Victoria, does not constitute a major change to the common law, given that the common law does not systematically protect human rights.

[9] (1989) 167 CLR 543 at 549-550, per Brennan and Gaudron JJ.

[10] The limitation clause is modelled on s5 of the New Zealand *Bill of Rights Act* 1990 and Article 1 of the Canadian *Charter of Rights and Freedoms* 1982.

[11] Victorian Bills Explanatory Memoranda, Charter of Human Rights and Responsibilities Bill 2006.

[12] Not in force until 1 January 2008.