AUDITING THE CHARTER OF HUMAN RIGHTS VICTORIA,
2006-2010

A report of an ARC Funded Research Project

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INTRODUCTION

A human rights activist walks into an Australian hospital and goes up to the nurse at the reception desk.

"I want to see the eye-ear doctor."

"There is no such doctor" she tells him. "Perhaps you would like to see someone else?"

"No, I need to see an eye-ear doctor," he says.

"But there is no such doctor," she replies. "We have doctors for the eyes and doctors for the ear, nose and throat, but no eye-ear doctor." "No help.

He repeats, "I want to see the eye-ear doctor." They go on like this for a few minutes and then the nurse says: "Listen ... there is no eye-ear doctor, but if there were one, why do you want to see him?"

"Because," he replies, "I keep hearing one thing and seeing another."


Whether the Charter of Human Rights has been a ‘success’ is the large question which I want to address here.

This is done mindful of a point made some decades ago by Chou En-Lai. On his 1972 visit to China, US President Richard Nixon asked Chou En-Lai, then premier of China to assess the impact of the French revolution which began in 1789 on western civilization. Chou’s reply was memorable and succinct: ‘too early to tell’.

Even more plainly with the effective full roll out of the new Charter only beginning in January 2008, it is far too soon to say from the vantage point of mid-2011 what kinds of effects the new Charter has had on the operations of the Victorian public sector, let alone on the broader community. Nonetheless as I want to indicate here we can begin to assess its impact. In what follows I have drawn the line at the end of 2010 partly because we need a terminus point however arbitrary and partly in recognition of the loss of government in November 2010 of the Labor government which had auspiced the Charter back in 2006.

As will become clear the fact that Victoria has adopted the core elements of the United Nations International Covenant on Civil and Political Rights as a form of domestic legislation is
a very important innovation. In this respect one state in the Australian federation has now acknowledged formally that at the least the idea that we have a right e.g. to freedom of expression or freedom of assembly constitutes both a claim on governments and a rationale for certain kinds of political action to be taken by governments and their officials. In this minimal sense as Beltz (2009:8-9) has noted adopting the Charter represents a decision to render the actions of government accountable to ideas about human rights. Equally as will become clear precisely what kinds of reasons the identification of a human right constitutes, or what kinds of actions governments and their employees are required to make by the Charter is far less clear or certain. That alone makes the task of assessing its value a somewhat more complex task.

At the least it is relatively easy to say why the Victorian Charter is in the Australian setting a bold exercise.

THE CONTEXT

As is well known Australia is the only modern liberal democracy in the world still without a bill of rights. It is not going too far to say that just as Australia has established an unenviable reputation as a 'welfare state laggard' so too do we have a reputation as a human rights laggard.

This status as a 'human rights laggard' has puzzled any number of commentators given the historical accomplishments of which we can be properly proud. The Australian colonies in the nineteenth century e.g. led the world with the early introduction of representative government followed by universal male suffrage which in turn was followed soon after by steps to give all adult women the vote by 1908. This record made Australia a democratic pace setter. In the nineteenth century as Noel Butlin pointed out in 1974, Australian governments also routinely undertook investment in basic services and infrastructure, generating high levels of employment, to produce what by the end of the nineteenth century was arguably the highest average standard of living in the world; international observers called this Australian 'socialism sans doctrine'. Establishing a national system of industrial courts which determined a minimum wage based on need (1907) helped establish Australia's status as a 'social laboratory' by the start of the twentieth century. As Diane Sisely observed late in 2007 these achievements reflected a distinctive Australian ethos centered on the idea of a 'fair go'.

1 The term 'bill of rights' is not to be construed narrowly. The term refers to two broad kinds of ways human rights can be specified and protected. One approach involves inserting into a constitution a catalogue of rights. Epp (1996) argues that this typically confer significant legal status and gives effect to guarantees of rights. Examples of constitutional bills of rights include the United States Bill of Rights (1791), the Canadian Charter of Rights and Freedoms (1982) and South Africa's Bill of Rights (1996). The other way of identifying and protecting rights involves parliaments enacting legislative statements of rights which can be subsequently amended by the legislature). Examples of statutory bills of rights include New Zealand's Bill of Rights (1990) and the United Kingdom Human Rights Act (1998).
Our reluctance to embrace a ‘bill of rights’ is a puzzle which has provoked the curiosity of some of our finest contemporary legal scholars like Hilary Charlesworth and George Williams.

Firstly these scholars remind us not to overlook the long history of public discussion about the merits of formally identifying a range of human rights in Australia. This goes back at least to the pre-Federation discussions at successive Federal Conventions in the 1890s when leading colonial politicians debated the value of adopting a bill of rights or some equivalent instrument to both define and protect an array of human rights. As Charlesworth (2002) reminds us, colonial politicians engaged in drafting a constitution for the new Commonwealth of Australia in the 1890s for example, ended up resisting attempts to insert guarantees of rights in any constitution adopted for the new Commonwealth of Australia which came into effect in 1901. They were well aware of and responsive to widespread, popular and bi-partisan white racist sentiment which had already led some colonies like New South Wales and Queensland to pass laws that enthusiastically discriminated against Chinese migrants and indentured Kanaka labourers who had been ‘blackbirded’ i.e., forcibly kidnapped from their Pacific Island homes. Politicians like Deakin, Higgins, Forrest and Barton were concerned that anything like a bill of rights could be used to overturn the legal basis of what became after 1901 the settled policy of ‘White Australia’ (Charlesworth 2002). We should never forget the very first piece of legislation introduced and passed in the first session of the new Commonwealth Parliament in 1901 was the Immigration Restriction Act which created the mechanisms whereby Australia would remain a bastion of white supremacy into the 1960s.

And yet resistance to embracing a formal declaration of rights in Australia has been as longstanding as public discussion about it. It seems to reflect a mixture of community sentiment and persistent opposition by Australia’s political and legal elite to the very idea of formally establishing a constitutional or statutory basis for defining our human rights (Williams 2006: 883-4).

As Williams and Charlesworth point out, though ‘white Australia’ was slowly dismantled in the 1960s and 1970s, every effort to introduce national ‘bills of rights’ in the past three decades has failed. Commonwealth Attorney-General Lionel Murphy introduced a Human Rights Bill in 1974 that went nowhere after a burst of controversy. In 1983 and 1984, the Hawke-Keating Labor government drafted Australian bills of rights which lapsed when it seemed that opposition to them would prove insurmountable. In 1988 the Commonwealth government tried but failed to amend the Australian Constitution in various ways to protect certain rights (Charlesworth 1993). Most recently, the Law Council of Australia debated a draft Australian Charter of Rights and Freedoms in 1995-6, but the draft likewise failed to win parliamentary support. Proposals to introduce bills of rights have also been considered by a number of Australian states. In 1988, the Victorian Parliament debated the adoption of a legally unenforceable Declaration of Rights and Freedoms as a guide for the legislature, but the Bill eventually lapsed (Moran 1990). In 1998, a committee of the Queensland Parliament
recommended against Queensland adopting a bill of rights (Queensland Legislative Assembly 1998). Most recently, in 2001, the New South Wales Parliament’s Standing Committee on Law and Justice made a similar recommendation for New South Wales (NSW Standing Committee on Law and Justice 2001).

The opponents of bills of rights have used many arguments to thwart these reform exercises. They have argued that it is wrong to place the protection of rights in the hands of unelected judges, claiming this will reduce the power of a democratically elected legislature while enhancing the power of an ‘unelected’ judiciary (Campbell 2001; Allan 2003). (As we will see this objection is completely irrelevant to the Victorian Charter). Some opponents have argued that bills of rights will encourage frivolous litigation, or are not needed in a truly democratic society. Others argue that human rights are more effectively secured either by specific statutes or by specialized institutions established by parliaments (Allan 2002, 2003). Many of these arguments were relied on in August 2009 by former Prime Minister John Howard in a major attack on the very idea that Australia needed a bill of rights (The Age 27 August 2009). As is well known this view is not found only among some liberal politicians: another former political leader this time from the Labor Party, Bob Carr has made many of the same points in his campaign to thwart the introduction of a bill of rights.

Advocates for bills of rights have responded by arguing that our parliaments have failed to protect human rights or to undo persistent discriminatory practices. There is e.g. abundant evidence that some Australians face persistent discriminatory treatment which affects their capacity to be safe, to be respected, to secure full time employment or to have access to valued community goods others take for granted. Those groups include women, indigenous people, people with disabilities, gay men lesbian women and transgendered people, and children and young people, and people with criminal records. Some headline VEOHRC (2008: 21-4) data catches this point:

- Women with dependent children are much less likely to be employed than men with dependent children, and women continue to experience a gender pay gap of up to 18.4 percent.
- People with disabilities are far less likely than people without a disability to complete year 12, go to university or find work. It is impossible for people with disabilities to fully participate in society unless they can fully access the built environment and public transport which a third of people with disabilities report difficulties using or accessing
- Full time employment in 2001 for Indigenous people was much lower than that for non-indigenous people in all age groups and geographic regions. Nationally, 41.5 percent of Indigenous people were in full time work compared with 60.2 percent of non-Indigenous people while Indigenous people are less likely to complete year 7
- HREOC’s Isma Inquiry into the experiences of Arabic and Muslim Australians indicated

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2 It says a lot that the VEOHRC’s (2008) Discussion Paper submitted to the Equal Opportunity Review omitted discussion of children and young people per se, and people with criminal records in their discussion of systemic discrimination. Children and young people are acknowledged but only in the curs of discussions of other groups like indigenous or culturally and linguistically diverse communities.
that they had experienced some form of racism, abuse or violence at work or at school (66 percent compared with 86.9 percent of all students)

- Nearly two in five of NESB had experienced discrimination in the workplace (three times as likely as those born in Australia)
- 44 percent of those from gay, lesbian, bi-sexual and transgender and intersex communities reported verbal abuse and 16 percent reported physical abuse because of their sexuality, figures that are largely unchanged since 1998 (VEOHRC 2008 21-24).

Scholars argue that the courts can play a positive role in promoting human rights (Klug 2000). They point to research on the effects of introducing bills of rights in other countries as evidence that they do not give rise to serious problems of frivolous or vexatious complaints. Rather as some British writers who have followed the introduction of the Human Rights Act (1998) have argued, such legislation may actually lead to better public policy-making or to more effective delivery of public services to members of the community (Lord Chancellor 2002; UK Audit Commission 2003). Proponents of bills of rights will also point to the important symbolic value such instruments play as statements of community values. They suggest that these instruments can play a significant role in enhancing critical scrutiny of long-established laws as well as requiring governments to accord a higher profile to human rights considerations (Bynes 1999).

Against this historical backdrop of debate and controversy, and in spite of the fact that we still do not have a national bill of rights, parliaments in both the Australian Capital Territory (2004) and in Victoria (2006) decided to pass legislation introducing 'charters of human rights'. These decisions represent a striking break with what had begun to seem like an Australian 'tradition'. Even granting the fact as some critics point out that these two Charters identify only a limited range of civic and political rights, the introduction of statutory bills of rights in these two jurisdictions constitute major innovations in Australia's constitutional arrangements.

How far-reaching, even 'radical' these two exercises look in 2011 is suggested by how little progress has been made in other jurisdictions since 2006. Other legislatures in Tasmania and Western Australia thought likely to follow Victoria in 2007-8 have declined to do so. The new Rudd Labor Government ran a national consultative process in 2008 using a committee headed by Professor Frank Brennan, S.J., to examine the desirability of introducing a national bill of rights (Brennan 2009). In spite of the enormous level of popular support for introducing a national Bill of Rights revealed in the tens of thousands of submissions which the Panel received, the Rudd government decided that the proposal lacked 'mainstream support'. Sources close to the key participants tell how PM Rudd took Brennan the Panel Chair on a midnight walk around Lake Burleigh Griffin in Canberra to break the news that the Brennan Committee’s report would not be acted on because it lacked 'community support'. By this
Rudd meant that the NSW right of the ALP had vetoed any take up of the panel’s recommendations.

As a sop, the Rudd government launched the Australian Human Rights Framework on 21 April 2010 [Attorney General 2010]. This Framework spoke of:
- reaffirming a commitment to Australia’s human rights obligations;
- the importance of human rights education;
- enhancing our domestic and international engagement on human rights issues;
- improving human rights protections including greater parliamentary scrutiny;
- and
- achieving greater respect for human rights principles within the community. Practically the Framework committed the government to spending $12 m. on human rights education as well as introducing some modest ‘measures’. A month later Deputy Prime Minister led a coup that dumped Rudd as Prime Minister.

At the time of writing there are no plans by the national Gillard Labor government to do anything else to promote human rights. In Victoria a non-Labor government was elected in November 2010. The Baillieu government’s Attorney-General Robert Clark has made his antagonism to the very idea of a bill of rights like the Charter quite plain.

WHY AN AUDIT?

It was a matter of pure coincidence that as the Victorian government was introducing the first Charter of Rights in a major Australian jurisdiction that I was involved in establishing the Australian Centre for Human Rights Education (ACHRE) at RMIT University. ACHRE was set up at the behest of the UN National Committee for Human Rights Education. Established back in 1996 at the start of the UN Decade of Human Rights, that UN committee had received a very generous donation of money from a wealthy philanthropist, and it was that money which was used to establish the Australian Centre for Human Rights Education at RMIT in mid-2007. It would also receive very generous support from local philanthropic organizations like the Helen Macpherson Smith Trust and from the university itself.

The coincidental introduction and implementation of the Charter gave ACHRE a quite practical focus. Because charters of rights are generally understood to apply firstly to governments and their personnel, and because this is what the Victorian Charter explicitly emphasised, people working in ACHRE have had to think about what governments,

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4 The other measures include establishing a new Parliamentary Joint Committee on Human Rights to provide greater scrutiny of legislation for compliance with our international human rights obligations;
- requiring that each new Bill introduced into Parliament is accompanied by a statement of compatibility with our international human rights obligations;
- combining federal anti-discrimination laws into a single Act to remove unnecessary regulatory overlap and make the system more user-friendly; and
- creating an annual NGO Human Rights Forum to enable comprehensive engagement with non-government organizations on human rights matters.
politicians, policy makers and public sector workers think about human rights and whether and how they convert talk about human right into certain kinds of conduct on their part.

That question was in the air as staff at ACHRE began to develop human rights curriculum and to run workshops for some of the many thousands of public sector workers affected by the Charter. ACHRE was also committed to supporting the continued evolution of the Victorian Charter beyond its specification of civil, legal and political rights. ACHRE agreed to undertake an audit of the Victorian Charter with a view to providing the Victorian government with evidence about the effects of the Charter of Human Rights and Responsibilities Act 2006. In 2009 ACHRE successfully applied for funding by the Australian Research Council.

While it was agreed that establishing what effects if any the introduction of the charter has had on the work of government was a good idea, it was also accepted that a comprehensive audit of every ministry, agency or funded-NGO was simply not possible for all sorts of conceptual as well as logistical and practical reasons. Saying why this is so will help to say why some questions have been addressed and others not.

HOW TO AUDIT: KEY QUESTIONS

This research project has faced several major challenges.

Firstly the project team had to acknowledge the problems involved in attempting a comprehensive review. For a start the very idea of assessing the impact of the Charter on the 'work' of government involves understanding that the work governments do actually refers to a wide array of forms of action or intervention across at least five domains:

- politics
- law-making
- policy-making
- administration and management of personnel, plant, natural resources and finances
- delivery of services to clients

In some cases these categories are not well defined or well-bounded. This is especially so especially with respect to categories like 'politics' or 'law'. Secondly a domain category like 'law' or 'delivery of services to clients' actually embraces a vast spectrum of 'services' and 'clients'.

Thirdly, there are quite fundamental conceptual questions and difficulties associated with human rights talk which cannot be ignored or evaded. As recent work by Geuss (2001), Griffin (2008) and Beitz (2009) has argued, there are quite basic difficulties associated with human rights discourse and practice. These difficulties go to basic issues about whether 'the objects' called 'human rights' 'are in any familiar sense 'rights', and why certain standards should be rights but not others (Beitz 2009:2). As Beitz adds there is scepticism even among human rights
advocates associated with the indistinctiveness of the range of interests protected by human rights as well as the difficulty of seeing contemporary human rights doctrine as sufficiently universal. Others worry about what to make of the distinction between rights as if they lead an independent existence in the moral order, putting them at odds with their existence in international legal doctrine and political practice. Then there are the difficulties associated with specifying a right what kind of actions or interactions the specified rights are supposed to refer to and/or affect. Beitz (2009:9) reframes this question slightly when he asks "for what kinds of actions, in which kinds of circumstances [can] human rights claims ... be understood to give reasons".

Equally as Beitz has also shown we should no longer be in doubt that human rights are real in the sense that they now constitute forms of practice which can have both a doctrinal component as well as the form of various institutional mechanisms designed to protect human rights. Recognising that rights are forms of practice is especially useful if we wish to assess the effectiveness of the institutional forms of practice which they inform.

This of course also raises central questions about what constitutes evidence that an instrument like the Victorian Charter of Human Rights has -or has not- transformed some aspect of public life. That public life embraces the various forms of politics, law-making and policy-making as well as the administration and delivery of a wide array of services. We would also need to be clear about the criteria to be used to determine whether there has been beneficial or negative effects. To be clear: like all research projects, the people involved in the project have needed to be very clear about what was meant by the idea of 'human rights' and by what was going to count as evidence that the Charter is having 'positive' or 'beneficial' effects, and for whom.

This has meant among other things that we have needed to think hard about how we can establish what public sector workers in a particular agency know about the Charter or whether and how the introduction of the Charter or the injunction to 'Think Charter', has had any effect on their work. It is also quite likely for example that the things that would constitute evidence or transformation will need to change as we change the focus say from 'politics' to the 'delivery of services to clients'. For example let us say that we want to gather evidence that 'politics' has been transformed by the charter? Is that understood in terms of the number of times politicians engage publicly in more 'pro-rights' or more 'anti-rights' talk and where. Would we look to parliamentary debates, or to party platforms or to the attitudes of politicians or to the disposition of NGO's and lobbyists to promote or attack the Charter? In like fashion we would need to be clear about what sorts of things would count as evidence that human rights talk has changed attitudes to 'clients' or turned into some kind of action. We might eg., need to establish what kinds of attitudes were there to human rights or the Charter and what changes have taken place if any. Is it possible eg to speak about changes in workplace culture or to wondering what an applied culture of human rights look like in agencies?
Given the need to say and do something that is cognisant of these difficulties and that can contribute to the kind of public discussion that the introduction of the Charter quite properly raises and which the formal review of 2011 will require I have decided to focus on just a few basic questions. These questions in turn have informed the structure of this report.

Firstly any assessment of the Charter does need to take into account what its progenitors wanted or intended to be some of its beneficial effects. That is, while the Charter can be criticised for all sorts of things it has not done, if those criteria of success did not figure in the original design of the Charter the criticism is to that extent somewhat misplaced. We do not e.g., criticise a Chopin piano prelude by observing that it is not a Beethoven-scale symphony. Accordingly we need to ask what were the intentions of those who introduced the Charter? In Chapter One I ask what did the Bracks’ Government hope to achieve by introducing the Charter in 2006? This will require attending to both any formal declarations of intent as well as to the key design features of the Charter. It will also assist to establish as appropriate how and in what ways the Victorian Charter compares with relevant international exercises in the United Kingdom, Canada and New Zealand.

Secondly we do need to take into account the problems with rights talk itself. Research done for the Brennan Human Rights Consultation revealed a significant degree of confusion on the part of ordinary Australians both about what they knew of human rights and what aspects of human rights they valued. That confusion seems to parallel the higher order confusion found in the relevant juridical and philosophical scholarship. Among the difficulties any Charter of Rights faces is what Griffin has called the problem of ineffability or indistinctiveness which rights discourse sets loose. As James Griffin (2008: 14) has put it:

The term ‘human right’ is nearly criterionless. There are unusually few criteria for determining when the term is used correctly and when incorrectly, and not just among politicians but among philosophers, political theorists, and [judges]. The language of human rights has in this way become debased.

Beitz (2009:9) is inclined to agree. His survey of the normative analysis offered by philosophers identifies any number of problems with their account of human rights.

That problem will not be made to go away by well intentioned advocates for human rights insisting that they really do know what human rights discourse is all about. Those who support the progressive implementation of human rights discourse do need to be able to provide a clear account of what human rights is about and why it is valuable if they are to secure popular support and to reply to the strong vein of position to bills of rights which is found in Australia’s legal and political communities. In Chapter Two after surveying those difficulties I want to suggest that Beitz (2009) has made a valuable contribution when he suggests that we focus on the practice of human rights and ask ‘for what kinds of actions, in which kinds of circumstances [can] human rights claims ... be understood to give reasons’? This reframing I will suggest in combination with some work of Barry (2007) helps to tie down both the kinds of criteria that will matter as well as the kinds of activities which rights talk gives rise to and so
can assist in specifying the kinds of evidence that will matter in any audit process. As I will also suggest there are some reasonably well agreed on elements of human rights practice and implementation which will help to focus attention on some key aspects of implementation (see eg., Alston 1997; Donnelly 2003; Greer 2006).

Using that heuristic in combination with an assessment of some of the key design features of the Charter from which we can infer some of the central objectives, I will then begin to outline a preliminary assessment of the Victorian Charter.

In Chapter Three I focus initially on the performance of the Scrutiny of Acts and Regulations Committee (SARC) of the Victorian Parliament especially in their work of investigating and reporting on compliance of new legislation introduced into Parliament with the Charter (see Evans and Evans 2006). I then widen the focus to consider the role of the courts in promoting human rights practice. To do this I draw on work done by the Victorian Human Rights and Equal Opportunity Commission.

I then turn in Chapter Four to consider the effect of the Charter on the work of government agencies. To do this I focus firstly on a large question of how effective the commitment of the Charter to a promoting a culture of regard for human rights. I will suggest that some continued effort will need to be expended in embedding a regard for human rights in the daily practices of people working and in and for government. I then turn to the experience and perspective of one statutory agency. Based on interviews inside that organization I report on the way that agency experienced the introduction of the Charter and attempts by personnel in that agency to 'think Charter'. This research process also assisted in generating some data on the way workers in this agency perceived workers in other agencies engaging with the Charter.

I conclude with some remarks about what we need to think about if these first experimental steps in developing a Charter of Rights are to go anywhere.
CHAPTER ONE: THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

*United Nations Declaration of Human Rights* (10 December 1948)


If we are to carry out any kind of assessment of its value, we need to begin by describing the Charter, and establishing what the Bracks Government expected to achieve when it introduced the Charter in 2006.

Though it was hardly the work of one person, Rob Hulls, the Victorian Attorney-General (1999-2010) deserves a lot of credit for the passage of the Victorian Charter. No less deserving of credit were a number of influential bureaucrats, policy-makers and feminist activists, people like Diane Sisely, Helen Szoke and Joan Kilner who variously had urged on Attorney-General Hulls the merits of such a measure. Its passage through the Victorian parliament began in May 2004 with the release by Attorney General Hulls of a *Justice Statement* which made protecting human rights a priority and announced his intent to consult with Victorians about how best to protect human rights. In May 2005 the government released a *Statement of Intent* and announced that it was setting up a Human Rights Consultation Committee. That committee was chaired by Professor George Williams of the University of New South Wales (Williams 2006) and duly carried out a careful process of consultation. The Committee sought and received some 2,524 submissions, the vast majority of which recommended strengthening the legal specification and protection of human rights in Victoria. The result, as Hulls noted with justifiable pride in his Second Reading Speech, was the first such legislation passed by any Australian state. As he noted while it drew on the experience of the United Kingdom, New Zealand and the Australian Capital Territory, it also sought to reflect, 'the aspirations, values and circumstances of the Victorian community'. While it would be nice to agree with Hulls, the truth of this proposition is open to serious doubt (See Brennan 2009).

For if the Charter did indeed reflect 'the aspirations, values and circumstances' of Victorians we may well ask why would the Victorian government have thought it needed to introduce
such a piece of legislation. This observation catches one of the essential paradoxes or contradictions that sits at the heart of the drive to legislate for human rights.

As Anthony Woodiwiss (2005: xii) has observed:

... it has gradually become clear that issues such as what should count as a human right, the universality or otherwise of the present array of rights, and indeed the very idea of a common human humanity, are not simply matters of intellectual controversy but also matters of power, not simply matters of philosophy and law, but also matters of social structure and politics.

Woodiwiss has caught one paradox at the heart of human rights talk. As Woodiwiss goes on to observe, the very universality of the claims made in the foundational United Nations Declaration of Human Rights (UNDHR) of October 1948 has lead non-white people, women, sexual minorities, developing countries and non-western countries to discover from time to time that they have been excluded from the UNHDR. As he goes on to ask:

How then is it possible that human rights can be invoked both to deny and to criticise such exclusions? How can human rights provide the bases for both the exercise of such power and its critique?

Leaving aside the alleged universalism of human rights talk, the additional problem as Woodiwiss (2005: xv) notes, is that human rights ‘tend only to be enforced at the extremities of social life’. Yet to be truly effective any legal specification of rights ‘must mobilise the supportive elements and/or processes present within the social routines of everyday life’. It is in this sense that there is a problem accepting Hulls’ claim that the Victorian Charter reflects ‘the aspirations, values and circumstances of the Victorian community’.

For if there is already a sentiment of regard for the kinds of rights which such a Charter of Rights sets out to specify and protect, it might be thought that there would be no need for such an instrument. If on the other hand there is little if any actual regard for human rights in the social routines of everyday life, then there have to be questions asked about the capacity of such an instrument doing much either quickly or easily to create such an ethos.

These remarks aside and assuming that the things the Charter spells out are very far from being already embedded in the work practices of the Victorian public sector, let alone the wider community, there is value in addressing one simple question: what did those who drafted the Charter identify and sanction as key forms of practice that would make the identification and protection of a range of human rights a valuable and practical exercise?

THE VICTORIAN CHARTER OF RIGHTS, 2006-2010

In a simple descriptive sense, the Victorian Charter is an act of Parliament which identifies some twenty one civil and political rights and declares that these rights will now be protected with a specific focus on requiring government in Victoria to acknowledge and protect the human rights identified. To be specific the Charter enjoins a very large number of people
working for the state and local government to take into account these rights when they interact with each other or other people living in Victoria. Those entities include the Parliament itself, the judiciary, and the Executive or what are called 'public authorities' ie., government Departments (and their ministers and civil servants), statutory authorities and their work force, local councils and their workers and any organization that provide services of a public nature including for-profit and non-profit organizations delivering services under contract on behalf of the government. This affects everything from church agencies working on a contract basis providing educational, health or welfare service to companies that run public transport. The reach of the Charter is therefore potentially very large.

As for the human rights it has identified, the Victorian government has drawn on a conventional range of civil and political rights. These rights have been represented in a matrix as follows. (This should not disguise the somewhat arbitrary and even contradictory taxonomy suggested by the acronym). The Victorian government has used the acronym FRED (a mnemonic standing for Freedom, Respect, Equality and Dignity) to group these rights. These Under the rubric of 'freedom' for example the Charter identifies some eleven rights. These include:

- Freedom from forced work
- Freedom of movement
- Freedom of thought, conscience religion and belief
- Freedom of expression
- Peaceful assembly and freedom of association
- Property rights
- Right to liberty and security of person
- Right to fair hearing
- Rights in criminal proceedings
- Right not to be tried and punished more than once
- Protection from retrospective criminal laws

Under the idea of 'respect' the Charter speaks of such rights as:

- Right to life
- Protection of families and children
- Cultural rights including recognition that human rights have a special importance for the Aboriginal people of Victoria

As for 'equality' the Charter refers to:

- Recognition and equality before the law
- Entitlement to participate in public life (including voting)

Finally under the heading of 'dignity' the Charter spells out a commitment to such things as the
• Prohibition of torture and cruel, inhuman or degrading treatment
• Protection of privacy and reputation
• Humane treatment when deprived of liberty
• Appropriate treatment of children in the criminal process.

In this simplifying way the Charter seemingly gives characteristic expression to the 'legal positivist' tradition (Jones 1994) which treats rights as extrinsic to individuals and groups, preferring instead to say that the only rights which matter are those which governments and courts specify and protect by way of legislative or judicial processes. This is what Woodiwiss (2005: xi) means when he suggests that the term 'rights' refers to a 'legally enforceable set of expectations as to how others most obviously the state, should behave towards rights bearers'. Equally and characteristically the Charter confuses the matter somewhat in its opening Preamble by observing that the Parliament [of Victoria] 'enacts this Charter', and in so doing recognises 'that all people are born free and equal in dignity and rights'. The training material promoting the roll out of the Charter has confused matters in similar fashion by asserting for example that 'Human rights are the basic rights that belong to all of us because we are human beings' (DSE 2007:6).

Leaving aside the debate between e.g. 'legal positivists' and those who that rights are inextricably linked to the fact that we are humans, the question that forces itself to be asked is this: how is the introduction of the Charter expected or designed to work?

Those responsible for drafting the Charter envisaged the Charter working in a number of ways which relies more on dialogue, persuasion, the value of publicity and education and less, or even not at all on courts, sanctions or penalties. it is an example of what Hiebert (2006: 7) has called a 'parliamentary rights model' which in this case has been justified on the grounds that it ensures 'the continuing sovereignty of the Victorian Parliament'. As Carolyn Evans (2007) has put it, the Victorian government adopted the 'Commonwealth model'. Saunders (2003: 83) had used this term to identify three distinguishing features of the approach adopted by the Victorian government: the reliance on a statutory basis for identifying human rights rather than embedding this into a constitution; the inability of judges to strike down legislation or to award damages to people whose rights have been breached; and finally the retention by Parliament of the power to amend, alter or even abolish the bill of rights.

That notwithstanding and in the Australian context, the Victorian Charter is a relatively bold exercise, and one that may over time turn out to be as momentous an innovation in the basic

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2 By this Woodiwiss (2005: xi) means to specify two possible ways that people can be constituted as 'rights bearers'. On the one hand, 'Rights bearers have to be entities legally considered to possess 'personality' - that is legally deemed to be autonomous moral agents and therefore capable of taking decisions and accepting responsibilities, as in the case of adult persons, trade unions, corporations or states. However rights bearers may also be members of groups 'legally recognised as entitled to make claims to protection and at support on the basis of the principle of reciprocity because they have been denied the possibility of autonomy as a result of factors like age (children), race, gender, sexual orientation, poverty, mental or physical illness or indigenousness'.

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mechanisms of governance in Australia as the introduction of universal suffrage. Equally and especially in comparison with relevant bills of rights in the United Kingdom or Canada it is not an especially robust human rights instrument. Absent any sanctions such as a capacity for courts and tribunals to enforce the Charter obligations, it establishes for government, it relies on what has been called a 'dialogue model of rights'. Let me spell out what this is all about.

THE INTENTIONS

The Charter works first as a declaration beginning with an identification of the principles of human rights which it says defines a democratic inclusive society 'that respects the rule of law, human dignity, equality and freedom'. It is claimed that the Charter will work 'as a form of insurance to ensure that human rights are a priority for the government when it sets about making laws and decisions'. It is designed to function as a law and is designed 'to protect all people in Victoria' (DSE 2007: 9). This in turn leads to a listing of the rights that are identified and protected. These are the twenty one rights outlined above. This includes definitions and additional information that help to further specify the twenty rights.

Having declared that the Charter is a law and will work 'as a form of insurance to ensure that human rights are a priority for the government when it sets about making laws and decisions' the critical question is to ask by what means does the government intend to pursue that aim? Typically asking this question can be understood as asking firstly who is bound by the legislation and what are they obligated to do? Secondly we would also need to establish what if any sanctions might apply should the rights specified by the Charter be breached. Finally we would also need to establish if the Charter has provided for any remissions or 'let outs' from obligations it has imposed to be compliant with the Charter which may have the effect of reducing the government's obligations to be compliant with its own Charter.

OBLIGATIONS

The answer to the first question is that the Charter imposes certain obligations on 'the government' by which is meant the three elements of government, namely the legislature (or Parliament), the judiciary, and the Executive. If we take each of these seriatim we see the following.

Firstly the Parliament is required to consider the impact of all new legislation on those human rights specified in the Charter. This is done by requiring MPs or departments who are drafting legislation to prepare and table Statements of Compatibility for each new bill introduced into Parliament. This statement is required to establish the effect that the Bill is, or is not compatible with the Charter accompanied by a statement outlining the ways in which

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6 There is a good deal of debate about the meaning of this idea especially in Canada where the idea seems to have been initiated (See Hogg and Busnell (1997); See also Manfredi and Hall (1999) and McDonald (2004).
the Bill is, or is not compatible. The Charter eg., requires (in Part 1 (2) (d) that 'statements of compatibility with human rights ... be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility', the government has spoken about the 'requirement' that all of the existing array of statutory provisions represented by current Victorian laws and regulations need (as per S. 32 of the Charter) to be interpreted 'so far as is possible' in ways that are 'compatible' with human rights, 'international law as well as relevant' court judgements. That is S 32 of the Charter provides that 'so far as it is possible' all legislation must be interpreted in a way that is compatible with human rights but that notwithstanding this requirement any legislation that is not compatible with human rights is still valid.

As I have indicated this begins with the proposition that all new laws and regulations need to be checked for their 'compliance' with the Charter. This is also understood as the requirement that if laws and regulations can be interpreted in a number of ways including ways that respect human rights, then the Charter 'requires' that any interpretation that takes into account human rights is to be preferred. What is not immediately clear is what precisely words like 'possible', 'compliance', 'requires' or 'preferred' actually signify? As Evans and Evans (2006: 267) have indicated S. 32 of the Charter does 'not authorise those who interpret and apply the law to give effect to human rights in all circumstances', and further that if any statute is not compatible with the Charter it remains lawful and valid law. As Simon Evans (2005:7) has pointed out, while S.32 requires that people interpreting legislation do so in ways that are compatible with human rights, this section also provides for a qualification, namely that any interpretation also needs to take into account the 'purpose of the legislation being interpreted'. As the Explanatory Memorandum to the Charter noted this reference to statutory purpose

...is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.

(Part 1 (2) (e) 'confers 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'. Other than allowing for this, the Courts cannot invalidate legislation that runs contrary to the Charter. The only possible form of legal redress as per SS.33 and 36 ... is a declaration of inconsistent interpretation from the Supreme Court'. (This follows on from S 36 where the Charter refers to the capacity of the courts ie., the Supreme Court or the Victorian Court of Appeal issuing a 'declaration of inconsistent application'). This is only possible if there has been no override declaration made in the legislation; if such an override declaration has been made the Supreme Court cannot make any declaration of

7 Stern (2007: 5) notes there is a high level of ambiguity in the use of the word 'possible'. As she says 'possible may mean if the words are ambiguous a human rights compliant interpretation should be chosen or it may mean that if the unambiguous meaning of the legislation is clear, nonetheless the courts should strive to reach a human rights compliant interpretation.

8 Deebeljack (2007:13) notes this differs from the 'relevant section of the UK Charter of Rights (C 42 s 4) where the reference is to a 'declaration of incompatibility'.
incompatibility. There are finally no legal consequences if the Supreme Court does issue a
declaration of incompatibility.

The Charter only requires (in Part 1 (2) (d) that ‘statements of compatibility with human rights
... be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of
Acts and Regulations Committee to report on such compatibility’. As a reading of the Charter
suggests, however there are no sanctions to be applied if these things do not happen.
Indeed any statement of compatibility made about any Bill introduced into the Parliament is
deemed not to be binding on any court or tribunal, while a failure to comply with the need
to prepare a statement of compatibility is deemed not to affect the validity, operation or
enforcement of that Act.

All of this is consistent with the Attorney-General Rob Hulls has indicated, the Charter works by
setting up what has been called a ‘dialogue model of rights’:

It is a model which encourages and promotes dialogue about human rights between
all the institutions of government – the Parliament, the courts and the executive. It
ensures that human rights are taken into account when developing new rights and
policies. It ensures that the courts consider human rights when interpreting laws. And
above all else it promotes the need to respect and promote human rights across the
government and in the community.

The judiciary are likewise required to interpret all statutory provisions in ways that are
compatible with the Charter so far as at (Part 1 (2) (e) the Charter confers
... 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.

Finally the Executive is required to be compliant with the Charter. By ‘the Executive’ is meant
all ‘public authorities’. The use of the term ‘public authorities’ refers to all Ministers and public
service workers, all statutory bodies, local councils and Victoria Police as well as all
organizations which may include charities, churches, NGO’s and businesses which provide
public services on behalf of the government. By ‘compliant’ with the Charter it is intended
that public authorities are required to interpret ‘so far as is possible’ all of the existing array of
statutory provisions represented by current Victorian laws and regulations need (as per S. 32
of the Charter) in ways that are ‘compatible’ with human rights, ‘international law’ and all
relevant court judgements locally or internationally.

**LEGAL REMEDIES**

The second question we need to ask addresses the sanctions available to enforce the
Charter. It is important to recall what the International Covenant on Civil and Political Rights
(ICCPR 1966) which came into force in March 1976 says about this. The Civil and Political
Rights Covenant is the key international legal instrument from which the Charter is derived. The ICCPR clearly 'obliges States Parties to provide effective remedies for no compliance with the rights that it protects (Evans 2006a:11). How well does the Victorian Charter do in meeting this obligation?

It is important to note as a number of legal scholars (e.g., Evans 2006a; Evans 2006b; Debeljewa 2008) have done, that those who drafted the Victorian Charter went to some lengths to ensure that the Charter per se does not provide any legal remedies if someone believes that a breach of Charter rights has taken place. As Debeljewa (2007: 18) has put it, the remedial provisions under ss 38 and 39 of the Charter are 'weak'. She (2007: 10) has pointed out that from the start (as indicated in the 2005 Statement of Intent) the government made it plain that the principle of Parliamentary sovereignty would be upheld and that Victoria would look to the British model rather than the US model of rights embedded in the constitution and reliance on the courts. That message was reinforced when the Statement of Intent made it plain that the government would privilege education and dialogue over litigation. As Evans and Evans (2006: 274) observe, the Victorian government had no intention to allow for legal remedies for breaches of the Charter (Department of Justice 2005). In this respect the Victorian Charter is in breach of the International Covenant on Civil and Political Rights.

To be clear the Charter specifically excludes the possibility of any citizens pursuing a case for damages based on some alleged breach of the Charter (see Evans 2007: 4). This is in contrast to the UK Human Rights Act eg., where citizens do have a 'free standing right' to pursue a claim that the UK government has breached its Human Rights Act.) As Evan and Evans (2006: 281) observe, 'The Charter is clearly not a statute that gives dominance to legal remedies as an alternative between rights effective.' This extended even so far as to not allowing the Human Rights and Equal Opportunity Commission to take and handle complaints or to engage in any conciliation tasks. This is not to say that a citizen cannot seek damages, but only to refer to a pre-existing, non-Charter relief or remedy like that provided for by statutes like the Administrative Law Act 1978. The Charter also excludes courts from its definition of public authorities. That is the Charter excludes courts and tribunals from the definition of a 'public authority', except when they are acting in an administrative, as opposed to judicial, capacity. When acting judicially, courts and tribunals are not required to comply with section 38 of the Charter, which imposes duties on public authorities to act compatibly with human rights and give proper consideration to relevant human rights when making a decision. However section 6(2) applies the Charter to courts and tribunals when they acting judicially 'to the extent that they have functions under Part 2 and Division 3 of Part 3.'
in short if the Charter is strong in exhorting public sector employees to 'think' Charter, it is relatively weak when it comes to ensuring compliance on the part of the government.

This also goes to the way the Charter has defined the role of the Victorian Equal Opportunity Commission which became the Victorian Human Rights and Equal Opportunity Commission. The Commission has been given a number of roles in relation to the Charter. The Commission for example as per S. 40 of the Charter has the right to intervene in legal proceedings initiated by other parties where questions arise concerning the application of the Charter or the interpretation of another statutory provision in accordance with the Charter. The breadth of this power was acknowledged in the Explanatory Memorandum to the Charter:

Clause 40 establishes the Commission's unqualified right to intervene in proceedings involving the Charter ... Whether the Commission exercises the right to intervene is a matter for its discretion.\(^9\)

To undertake this function, the Commission needs to be aware of the matters before courts and tribunals where the Charter arises for consideration. The Charter has made this possible by requiring that the Commission must be notified by a party to any proceedings in the Supreme or County Court where a question of law arises regarding the application of the Charter or the interpretation of another statute pursuant to the Charter.\(^9\) In addition to this provision, section 36(4) also provides that the Supreme Court may not make a declaration of inconsistent interpretation unless satisfied that the Commission has been given notice that the court is considering doing so and has been given a reasonable opportunity to intervene or make submissions. The Commission is also required to submit an annual report to the Attorney-General which accounts among other things for the operation of the Charter, details all declarations of inconsistent interpretation during the relevant year, and details all override declarations. The Commission is also empowered to review statutory provisions and the operations of public authorities.

**EXEMPTIONS**

I turn now to the second question namely has the Charter provided for any remissions or 'let outs' from obligations it has imposed? It is clear that the Charter has provided for such 'let outs'. The Charter specifically gives the Parliament the right to make an 'override declaration' which basically says that an Act is lawful even if it has one or more provisions which are incompatible with the Charter. S 31 (1) of the Charter provides that:

Parliament may expressly declare in an Act that Act or a provision of that Act or another Act, or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.

This part of the Charter allows the Parliament to ensure that legislation which is not compliant with the Charter can nonetheless be valid at law. That is when an override declaration has

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\(^9\) Pages 28-9

\(^9\) Section 35(1)(a) Charter
been made that the legislation in question can be interpreted in the normal way that all statutory interpretation is done, the S 32 requirement in the Charter that a human rights interpretation be favoured is suspended. It also has the effect of preventing the Supreme Court from finding that a statute is inconsistent with the Charter.

In mitigation the Charter suggests (Part 31 (4), that, ‘it is the intention of the Parliament that an override declaration will only be made in exceptional circumstances’. As Evans and Evans (2006: 272) point out this provision for an override has:

... no counterpart in any other statutory bills of rights such as New Zealand or the UK. In the Canadian context, a similar proviso gives the national and provincial Parliaments the ability to legislate notwithstanding a determination by the courts that legislation is incompatible with the charter and is therefore invalid'.

Stern (2007) has pointed out that in this way the authors of the Charter clearly intended to signal their commitment to the idea that parliamentary sovereignty ultimately mattered more than a regard for human rights, because the Charter allows the Parliament to legislate in ways that are contrary to fundamental principles of human rights. As Evans and Evans (2006: 272) note, there is nothing to stop any government from treating the requirement that there be ‘exceptional circumstances’ as an exercise in spin except as they say for the political consequences. They add that those consequences ‘are likely to be slight unless the human rights values of the Charter become part of Victorian political culture’.

We can with Evans and Evans (2006) summarise the intentions of the Charter in these terms. Firstly it seeks to engage all branches of government requiring in particular that those drafting legislation take responsibility to be aware of the rights impact of that legislation. The Charter works also by setting out a clear set of human rights and a clear standard against which legislation is to be assessed a role which is given to the Scrutiny of Acts and Regulations Committee, to focus on when considering proposed legislation. It emphasises the role of the Parliament in ensuring the legislation that it passes complies with human rights by way of processes of deliberation and scrutiny. The Charter does not provide for legal remedies in instances where someone believes that a breach of the Charter has taken place. The Charter does not allow courts to strike down legislation requiring only that Ministers alert the Parliament when the courts find that legislation cannot be interpreted in a way that is consistent with human rights. The Charter also allows the government in ‘exceptional circumstances’ to issue an override declaration when making legislation which allows the Parliament to ensure that legislation which is not compliant with the Charter can nonetheless be valid at law.

**DIALOGUE MODEL**

As Williams (2006: 901) has noted the Charter sets out to ‘foster a dialogue both within and between the arms of government as to the consistency of laws and government on the enacted civil and political rights’. What this means only is that the dialogue model encompasses all of those design features already adumbrated including the requirement at S
32 of the Charter that 'so far as it is possible' all legislation must be interpreted by the Executive or 'public authorities' as well as by courts and tribunals, in a way that is compatible with human rights. As we have also seen this includes various design features that enables the government to seek exemptions from or make override declarations about legislation that is not compatible with human rights ensuring that such legislation is still valid.

As has already been noted the Victorians decision to adopt a dialogue model drew on the Canadian experience. In saying that however it needs to be acknowledged that the Canadian experience with a charter of rights has been very different to that operating in Victoria. For one thing the Canadian Charter is embedded in the Canadian Constitution. Secondly the Canadian Charter while affirming the principle of Parliamentary sovereignty enables courts to strike down legislation. Between 1982 and 1997 Canadian courts made some 65 decisions to strike down Canadian legislation (Hogg & Bushnell 1997: 80). They did so on the grounds that there was some incompatibility with the Canadian Charter (Hogg & Bushnell 1997). As Bushell and Hogg (1997: 48, 82) put it the dialogue model refers to a situation in which 'a judicial decision striking down a law on Charter grounds is followed by some action by the competent legislative body'. Central to the Canadian idea of dialogue is the notion that:

Legislative action is a conscious response from the competent legislative body to the words spoken by the courts ... The legislative body is in a position to devise a response that is properly respectful of the Charter values ... identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded (Hogg & Bushnell 1997: 79-80).

In the Canadian case Hogg and Bushell claim that a legislative response followed the court action in about 80 per cent of the cases, and in most cases involved parliaments amended the legislation to bring it into line with the Canadian Charter. Hogg and Bushell's work has sponsored a good deal of discussion and analysis with critics claiming that they have given expression to a judicial-centric account by tacitly arguing that the courts get it right and the legislature gets it wrong. (Manfredi & Kelly 1997; Morton & Knopp 1992), Bushell and Hogg have replied that they make no such supposition.

Apropos the Victorian Charter, Debeljak (2007; 2008) who has made the most detailed analysis of the dialogue model in the Victorian Charter argues that four elements together make up the Victorian approach. They are (i) the open textured statement of rights, (ii) the non-absoluteness of rights, (iii) the judicial remedies available, and (iv) the mechanisms available to the parliament to respond to judicial assessments. Debeljak (2007: 25) argues that taken together these elements 'illustrate how the limits and override mechanisms adopted in Victoria can contribute to dialogue'. Her argument relies on making virtues of most of the things others might think were serious problems. She claims that human rights instruments have to be vague and indeterminate because:
... rights are indeterminate, the subject of irreducible disagreement, continuously evolving and as tools to critique governmental actions, rights are intended to orient discussion rather than prescribe institutional arrangements processes and outcomes.

This claim is asserted and nowhere argued for by Debeljjack. As I discuss in the next chapter any number of writers (Woodiwiss Dzouinas Griffin 2009; Beitz 2010) are inclined to agree that there is a degree of ineffability. Equally this has not been generally used as a mark of favour it also ignores the point that about the specification of some rights about others there is no dispute like the right of citizens to vote or the right not to be tortured.

Debeljjack also asserts that because the Victorian dialogue model allows that rights are not absolute, that this is another merit of the Victorian approach. That is, because rights are indeterminate, irreducibly debateable and constantly evolving, and because human rights are 'not ends in themselves', we need a plurality of institutional perspectives provided for by the dialogue model. Granting that plurality of perspectives is a good idea this still does not seem to absolve any government seriously concerned about human rights to provide for some remedies when there is a clear breach of one or more human rights. That is, it is not clear why she moves from the proposition that those features she has identified (indeterminacy, debateability and so forth) should inform a dialogue model to the idea that it is also acceptable that governments can routinely decide not to make the regard for its own charter of rights a mandatory and sanctionable matter. Her (2007:27) proposition that where there is an obligation on all the arms of government to dialogue 'when conflicts over rights arise ... [and that this] should provide better answers to conflicts over rights' seems to rest on nothing more than a mixture of futility and naivete. That is it seems that Debeljjack is trying to make a virtue out of the fact that as per S 32 of the Charter, the Victorian Parliament can under S 36 reverse or modify a legislative provision following a judicial declaration of incompatible application. Equally however the legislature can override such a declaration, or simply override or ignore S 32 and 36 altogether. Debeljjack argues that this provides for dialogue and also structures that dialogue. However whatever force this arguments has is vitiated somewhat when Debeljjack (2007:29) allows that because the Executive is the first to contribute to the dialogue, 'the Executive is in a prized position because it sets the agenda by initially assessing the parameters of the rights debate and thereby potentially influencing the legislature's and judiciary's analysis of the issues', seems to involve a restoration of some political realism into what had largely been an abstracted argument.

Debeljjack also seems to want to make a virtue out of the fact that the Charter has conferred severely limited powers on the judiciary. She argues again that this contributes to the dialogue model. She (2007:35) says in effect that the dialogue model will confer benefits because it will promote an 'honest, robust and respectful exchange of institutional perspectives' which will lead to a 'more complete understanding of the competing values, interests and issues at stake' and this 'should allow better resolution of conflicts to emerge.' She has made this case having acknowledged that it was never clear why the Victorian government, having made it impossible for the courts to overturn legislation on the grounds of incompatibility with the
Charter, should also have made it possible for the Parliament i.e., the government of the day, to choose to override a specified right which has the effect of preventing the courts from even making a non-enforceable finding of incompatibility with the Charter.\footnote{The issuing of an override is subject to certain qualifications: it is to be used only in extraordinary circumstances and is subject via sunset clause to review every five years.}

We can agree with Debeljock that ultimately the success of the Charter will depend on parliamentarians and governments taking rights seriously as a constraint on government action. Acknowledging that Debeljock was writing even before the Charter came into effect in January 2008, it is only fair to ask how well has her analysis of the dialogue model stood up since 2008? To do this we need to ask questions like: how often in a Ministerial declaration about the compatibility of new legislation with the Charter has a Minister/Department notified SARC that it some aspect of that Bill is not compatible with the Charter and what has been the outcome of this declaration? How often has an override declaration been made? How often has the Supreme Court made a declaration of inconsistency? Drawing on a body of evidence has a dialogue model characterised by an ‘honest, robust and respectful exchange of institutional perspectives’ happened? Those questions will be addressed in Chapter three.

However before we turn to these more empirical questions we need to address the concerns many scholars and commentators have expressed about the indeterminacy and inaffability of human rights talk.
CHAPTER TWO: THINKING ABOUT RIGHTS

... the modern vocabulary and grammar of rights is a multi-faceted instrument for reporting and asserting the requirements, or other implications, of a relationship of justice from the point of view of the persons who benefit from that relationship ... It provides a way of talking about what is just from a special angle: the viewpoint of the other(s) to whom something is owed or due and who would be wronged if denied that something.
John Finnis 1980: 205

There is general agreement that a lot of talk about human rights is at best unclear, at worst meaningless. Geuss (2001: 144) was crisp to the point of brutality when he noted that the idea of a human right 'is an inherently vacuous concept'. Costas Douzinas (2001: 21) has written how 'the whole field of human rights is characterised by paradoxes and aporia'. Douzinas adds that the many confusions of human rights theory stem from the semiotic and semantic variability of the term itself. Douzinas (2007: 8) also points to the way the very idea of 'human' is a 'floating signifier' making human rights 'a thin, underdetermined term'. Charles Beitz (2009: 2) has said simply that so much human rights practice is puzzling because it is unclear firstly whether the objects of human rights are in any familiar sense 'rights', or what responsibilities attach to human rights let alone what reasons should motivate us to care about them. Finally James Griffin (2008) has put the same point quite sharply, pointing out how so much contemporary talk about human rights is variously 'vapid, unclear, or confused'. He adds that the nature of human rights that we have inherited 'suffers from no small indeterminateness of sense' because the term has been left with so few criteria for determining when it is used correctly, that we often have a plainly inadequate grasp on what is at issue.

This is an important problem given that promoting human rights requires that anyone wishing to promote or protect human rights is able to do so in ways that are both accessible and credible.

As I will argue here there is much to support these critical observations: it is plain that a lot of rights talk is confused. That this confusion and variability exists seems to have a lot to do with the failure to pay attention to something J.O. Urmson, (1968: 10-11) suggested when he said that if you want to know how some assertion about matters like 'human rights' can 'be reasonably arrived at or defended', it is:

... necessary to determine the general character of such assertions, to make it explicit what sorts of claims in what sort of field they make ... we need to be clear what sort of claim is being made.
This is also what Griffin (2008: 92) means when he says that for 'the discourse of human rights to be improved' the 'criteria for correct and incorrect use of the term must be agreed'. This requirement underpins his decision to 'derive human rights solely from certain values constitutive of human nature which involves stipulating conditions like normative agency, autonomy and liberty'. This can be done e.g., by asking when people, agencies or governments assert that there is a human right to privacy, or to vote (or to X) what sort of claim is being made?

In this Chapter I want to pay some attention to the ways a lot of talk about human rights is unclear or worse. That this is so for many ordinary Australians is evidenced in the research done by Colmar Brunton (2009) done for the Brennan National Human Rights Consultation. If that research is credible, the good news is that 75 percent of Australians seem well disposed to talking about rights, but are also very confused. Confusion however was rife. 58 percent of those surveyed said individual rights should never be sacrificed to the greater good of the community but 55 percent said the safety of our society was more important than individual rights! Equally most respondents felt that there were some people and groups who did ‘fall through the cracks’ and had less positive experiences but 57 percent of respondents also agreed or strongly agreed that there are ‘so many rights given to minorities’ that ‘the government is forgetting to protect the values of mainstream Australian society’. In this respect we also see some quite basic discriminatory attitudes at work. Respondents to the survey most strongly felt that people with a mental illness (75 percent), the elderly (72 percent) and the disabled (71 percent) required more protection than they currently get. Likewise more respondents felt that Indigenous (57 percent) and non-Indigenous (53 percent) people in remote areas required more protection than did Indigenous people in urban areas (33 percent). However only 51 percent felt that children needed more protection while asylum seekers were the only group which as many respondents felt should get less protection (30 percent) than they currently do as felt they should get more (28 percent). Finally only 32 percent felt that gay and lesbian people needed more protection of their human rights. This confusion and welter of attitudes which as I indicate shortly affects politicians as well, does not bode well.

Implicit in this my approach is a simple idea: we need to be much more explicit about our ethical vocabulary and to use that vocabulary in public spaces, workplaces and households. It ought to be clear to many of us that what passes for contemporary public opinion or deliberative processes in our workplaces is done without much reference to ethical ideas.

Apart from attending to this task of clarifying what is often missing in action or unclear and confused, we have also to acknowledge the consequences of the ongoing contest between philosophers and legal scholars, each wishing to privilege a particular way of thinking about human rights.
Each of these ways is different. The insistence that we choose either a philosophical-normative approach or a legal-jurisprudential approach is unhelpful; both approaches constitute different but overlapping ‘practices’ (albeit different kinds of practices). I will argue the need to bring together the philosophical-normative approach and a legal-jurisprudential approach to establish a minimal consensus about how to talk about and protect rights. It will be useful to develop an overlapping consensus about linking a normative approach to rights which talks about the goods which rights promote with a regard for the impact of legal and policy-based practices. The point of doing this is to enable different ways of promoting human rights to be got on with. This is important currently in Victoria given that the legal approach to human rights does not have a strong statutory basis on which to proceed, while the promotion of an ethically framed regard for human rights seems to have barely begun.

As John Finnis (1980: 205) has argued, this is both necessary and feasible given as he says, that ‘the explanatory justification of rights’ as well the resolution of many conflicting claims about rights cannot be done using just a legal version of rights talk (Finnis 1980: 205). Rather we need to grapple with a far more basic ethical vocabulary which we use to answer questions like what is the right thing for me to do? ’what is the good life?’ or ‘what is a just society?’ As Finnis (1980: 205) observed:

... the modern vocabulary and grammar of rights is a multi-faceted instrument for reporting and asserting the requirements, or other implications, of a relationship of justice from the point of view of the persons who benefit from that relationship ... It provides a way of talking about what is just from a special angle: the viewpoint of the other(s) to whom something is owed or due and who would be wronged if denied that something.

To the pursuit of an overlapping consensus which treats the law and ethics as working together, we can also add the approach Belitz has proposed. Belitz, acknowledging the basis for scepticism about human rights which the confusion and vacuity of human rights talk has set loose, proposes to focus on the way human rights talk works in the field of human rights practice. He (2009: 9) argues that if we treat human rights claims as ‘reason-giving for various kinds of political action’, we will better:

... understand the concept of a human right by asking for what kinds of actions, in which kinds of circumstances, human rights claims may be understood to give reasons.

Let me start however by acknowledging that a lot of modern rights talk is problematic.

ON CONFUSIONS AND PARADOXES

Douzinas (2007:9-13) has illustrated something of the historical and conceptual diversity that makes up the current field of human rights talk. He shows that there are at least six different ways in which people now use the language of human rights. Each of these ways of thinking about human rights is drenched in history, in the play of power, politics and social interest.
Firstly Douzinas suggests that human rights are a legal category or claim, the creation initially of early modern legal systems and now embodied in various domestic and/or international legal or treaty frameworks. As such and as Hohfeld (1919) pointed out, rights claims are broadly relational. That is, rights claims involve individual entitlements and obligations in a relationship typically between a ‘right holder’ and others who are ‘duty bearers’. For example a property right involves both a ‘right holder’ (i.e., a person or a group who has a right to own property) and a ‘duty bearer’ who is obligated to act or refrain from acting in ways which infringe that right and a specified legal obligation typically falling on a state or legal institution to protect that right should a duty bearer fail to act appropriately. The study of such rights claims belong to the doctrinal and institutional discipline of the law, and is especially congenial to ‘legal positivists’ who treat as ‘real’ only those things spelled out in and by legal systems. What of course remains unclear is the nature of the relationship between those ordinary rights long spelled out and or accepted as such by common law, and those rights denominated as human rights.

Secondly, human rights can also be moral claims which may or may not be recognised by a legal system. Douzinas says they make claims to a minimum standard of treatment which people claim as an entitlement, and establish a moral framework to evaluate the performance of states and their policies and laws. This sense of a human right is captured in the claim made by someone living under an oppressive regime who claims a right to freedom of political expression when the state in question does not recognise such a right. Douzinas suggests this is where the ‘real’ and the ‘ideal’ get very confused quickly, instancing declarations like Article 1 of the UN Declaration of Rights which asserts that ‘all human beings are born free and equal of right’ which is plainly not descriptively true in a world marked by radical inequality and un-freedom but can be read as a prescriptive claim, namely that ‘all human beings ought to born free and equal of right’. This category of human right belongs to moral and political philosophy.

Thirdly, human rights are a topic in jurisprudence which itself as Douzinas remarks has a history. That history originally grounded talk of rights variously in nature, revealed religious scripture or in anthropological claims about the nature of humans. The intellectual pedigree of human rights comes out of what he calls an:

... unlikely combination of Classical [i.e., Greek and Roman] natural law, Jewish and Christian theology, the ideas of the Enlightenment, modern rationalism and post-modern multi-culturalism.

Unfortunately as Douzinas argues, recalling Hannah Arendt’s (1951) early and powerful formulation of the same point, these claims have lost much of their force or their legitimacy as states have come to only recognise rights they are prepared to identify and protect. In consequence as rights become matters which politicians are prepared to recognise, groups like refugees or the stateless, who lack a state to protect them have very limited, if any human rights. The result is a further layering of contradiction or paradox inherent to the
category of human rights, with liberal jurisprudence for example all too often appearing to function as ex post facto rationalizations of the effects of power.

Douzinas also points fourthly to the way human rights work as ‘ideology with a moral inflection’. This is captured vividly in the very modern way states like America deploy a language of rights in the pursuit of their own foreign policy ends. This kind of rights talk was manifest in 1991 when US President George H.W Bush Sr. announced his government’s commitment to promoting a ‘new world order’ committed to the principles of justice and fair play, while chastising various ‘rogue’ regimes like China, Iraq and North Korea for their human rights abuses. In this way Bush conveniently ignored America’s record human rights abuses in foreign policy interventions perpetrated for example in Nicaragua - which in that case brought America before the World Court of Justice in 1988 on a variety of charges of human rights abuses.

Fifthly, human rights talk is part of what Douzinas treats as the debased contemporary vocabulary of claims by those who live in advanced Western consumer societies. He instances the kinds of claims like, ‘I have a right to X’ as being effectively a highfalutin way of saying, ‘I want or desire X’. This kind of rights claim indicates, ‘that the public recognition and satisfaction of individual desire have become major ways for the subjective, economic and ideological organization of late capitalist societies’. As Douzinas puts it colourfully:

The only human rights violation most human rights experts, international lawyers and diplomats have ever experienced is being served a bad bottle of wine at their working lunches (2007: 14)

Finally, there is the sense in which human rights talk continues to be a major strategy for speaking truth to power and resisting the dictates of power or dissent from the intolerance of public opinion. Yet even here there is always says Douzinas, a paradox about this way in which rights talk is actually able to contest the play of power. The French Declaration of the Rights of Man and Citizen (1789), for example declared the higher status of natural rights while ushering in the age of the omnipotent sovereign. The commitment to sovereignty was expressed in Article 3, which declared, ‘The principle of all sovereignty rests essentially in the nation’, a principle which conjoined with the principle that the law is the expression of the general will (as outlined in Article 6) made possible the legal imposition of the Jacobin Terror of 1793. And even as this Declaration celebrated the universalism of humanity, it also upheld the interests of the rising bourgeoisie, by declaring in Article 17 that:

Properly being an inviolable and sacred right, no-one may be deprived of it except when public necessity, certified by law obviously requires it, and on the condition of a just compensation in advance’. (Hunt 2007: 222).

What Douzinas forcefully reminds us in short is this: those who wish to deploy a language of human rights do so within a discursive field characterised by a lack of clarity. The result can be a good deal of confused thinking.
As one example of this I turn to one conventional exercise by James Nickel (2010) who set out to 'clarify' how we might think about human rights. Nickel starts off by saying that human rights are ‘international norms that help to protect all people everywhere from severe political legal and social abuses’. Straightaway it is unclear whether this statement is to be understood as a prescription or as a description of what actually happens. (Some minimal awareness of what goes on in our world (eg., Power 2004) suggests that the initial proposition must be more a prescription of what would be nice to have happen rather than a description of what happens). It is more likely that Nickel meant to say that ‘Human rights are international norms intended to (or perhaps which it is hoped will) protect all people everywhere from severe political legal and social abuses’.

Nickel then suggests that human rights include ‘the right to freedom of religion, the right not to be tortured and the right to engage in political activity’. However it is not quite clear what this list actually means until Nickel adds:

... these rights exist in morality and in law at the national and international levels. They are addressed primarily to governments, requiring compliance and enforcement (my stress).

The proposition that humans rights ‘exist in morality and in law’ is unhelpful. This is because if we accord due recognition to his use of the existential verb (ie., ‘is’) this statement implies that there is something existentially real about rights in the same fashion as a sentence which reads, ‘There is a dog there’, or ‘The Smith book is on the bookshelf’. It is not clear that Nickel has fully grasped the significance of this. Worse Nickel’s claim that human rights are both moral claims and legal regulations simply muddies the water. Observing that a given instrument of statutory law like a Charter of Human Rights ‘creates a right’ is quite different from observing that someone has made a moral argument in favour of recognising that eg., a human right to freedom of religion is a good idea. That is, we are talking about two different orders of ‘existence’. This initial confusion is amplified in the discussion of the ways human rights ‘exist’ which follows.

Nickel claims that human rights are existentially real, because the first and most obvious way in which human rights exist ‘is as norms of national and international law created by enactment and judicial decisions’. Granting that however Nickel then allows that the other idea ie., that human rights ‘exist as norms’ is open to at least three different treatments or understandings.

Firstly as Nickel admits, many people have wanted to find a way to support the idea that human rights ‘exist’ on a richer and deeper basis than simply existing as a legal statement embodied eg., in a Charter of Rights. This he notes has sponsored the idea that human rights are more than what this or that government declares by law to be a human right. It has led to claims that rights are in some sense natural to our human status and that:

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... people are born with rights, that human rights are somehow innate or inherent in human beings. One way that a normative status could be inherent in humans is by being God-given. The U.S. Declaration of Independence (1776) claims that people are ‘endowed by their Creator’ with natural rights to ‘life, liberty, and the pursuit of happiness.’ On this view, God, the supreme lawmaker, enacted some basic human rights.

This we might say is an echo of the oldest of ideas about human rights namely that human rights are in a special sense of the word best understood as ‘natural rights’ given to us by the God of Jews, Christians and Muslims. This proposition as Nickel allows is tendentious in the extreme if you do not happen to be a faithful member of these religious communities and believe among other things that there is a God able and willing to confer rights.

In addition Nickel acknowledges that some proponents of rights unhappy about the stipulation of needing to believe in a rights-conferring God, have claimed that human rights are empirically real because they are embedded in ‘... actual human moralities’. This idea is more like a philosophical anthropology of the kind developed by John Finnis (1980). This is also represented as a natural rights story but one grounded in what Finnis calls the empirically observed world of human societies. As Nickel puts it:

It appears that all human groups have moralities, that is, imperative norms of behavior backed by reasons and values. These moralities contain specific norms (for example, a prohibition of the intentional murder of an innocent person) and specific values (for example, valuing human life.)

In effect a different approach to a natural rights view of human rights which does not rely on the existence of a ‘God’ would say that human rights exist apart from divine or human enactment as norms accepted in all or almost all actual human moral orders found in all sorts of human communities. The difficulty that this claim throws up of course is that anyone making such a claim would need to make some empirical effort to demonstrate that such a consensus existed in all or almost all societies.

Finally Nickel acknowledges the repeated efforts by philosophers to construct a robust discursive basis for rights. In this sense human rights exist when philosophers and others construct good or true arguments in their favour:

On this account, to say that there is a human right against torture is ... to say that there are strong reasons for believing that it is almost always wrong to engage in torture and that protections should be provided against its practice.

Nickel almost immediately however observes that, ‘One problem with this view is that existence as good reasons seems a rather thin form of existence for human rights’.

Indeed. What Nickel has ended up demonstrating as part of his exercise in clarification is that the existential status of human rights, far from being both clear and simple is much as Douzinas has argued it is, namely confused and unclear. It is simultaneously grounded in law, in religion, in philosopher’s arguments and grounded in the actual morality of diverse
societies. And then the confusion gets worse as Nickel goes on to advance several other propositions about the existential status of rights. Firstly it seems Nickel wants to add that human rights are chiefly political norms ‘dealing mainly with how people should be treated and not moral norms’ applying to interpersonal conduct. This he then immediately overturns by allowing that ‘a human right can exist as a shared norm of actual human moralities’. He adds to that confusion by arguing that human rights are chiefly ‘much more concerned with avoiding the terrible than with achieving the best. Their dominant focus is protecting minimally good lives for all people’. However human rights are also ‘high-priority norms’ because Maurice Cranston held that human rights are matters of ‘paramount importance’ and their violation ‘a grave affront to justice’ (Cranston 1967). And if human rights are rights, Nickel says they are not necessarily so ‘in a strict sense’. At this point the hapless reader might well be inclined to agree with Jeremy Bentham and his peremptory dismissal of rights talk as ‘nonsense on stilts’.

The chief effect of this exercise in clarification has been to sow endless confusion demonstrating if nothing else why Griffin was right to suggest that our talk about human rights ‘suffers from no small indeterminateness of sense’.

OTHER PROBLEMS WITH HUMAN RIGHTS?

Enough has been said to indicate why modern rights talk seems to be characterised by semiotic contradictions and analytic confusions. It is this apprehension which has led some scholars and critics to complain that this may well explain why the attempt since 1945 to construct a world order based on a regard for human rights has been so fraught. As writers like Douzinas and Woodiwiss have argued from the start it seems that not all human rights were taken equally seriously nor all members of the global community equally able to determine the shape of a world order based on human rights. They have argued that unequal power and the inherent contradictions of rights talk have conspired to thwart the promise of a truly global consensus about human rights.

In historical terms the first wave of ‘blue’ rights i.e., civil and political rights orientated to the idea of freedom, have been overtaken by ‘red’ rights i.e., social and economic claims animated by the idea of equality of conditions and by ‘green rights’ signified by attention being given to rights to self-determination, and increasingly to the claims made on behalf of environmental sustainability.

Always at issue were fundamental differences even antagonisms between the advocacy for civil and political rights and those seeking to identify and protect an array of social, economic and cultural rights.

Though it oversimplifies matters somewhat, one way of seeing the basis of this antagonism is to recall the distinction made by Isaiah Berlin (1969) between ‘negative liberty’ and ‘positive
liberty'. In the simplest sense 'negative freedom' referred to a right to be free from state tyranny, coercion or interference by others. Positive freedom referred to the right to be free to enjoy a decent, long healthy life. If we keep this simple distinction in mind we can see how it was to play out as a political idea in a post-1945 world shaped by the Cold War struggle between American 'democracy' and the Soviet Union's 'socialism'.

Though it adds a lot to our understanding of the issues at stake and therefore merits discussion here, Berlin's account of the two freedoms did not have much practical effect. Arguably the greatest liberal theorist of the century, Berlin treated what he called 'negative liberty' as the indispensable foundation for the good life. In a simple sense Berlin distinguished between being free from coercion or restraint and being free to achieve autonomy or the good life. Yet as John Gray (1996: 5-37) shows Berlin's position is extremely nuanced.

Berlin was clearly suspicious of all claims to promote 'positive' freedoms and clearly preferred a 'negative' account of freedom conceived of as the absence of constraints imposed by others. In part this reflected Berlin's deep scepticism about the capacity of any kind of philosophical analysis to resolve the basic nature of our condition, namely that as humans we live in communities where we confront an inevitable and not negotiable plurality of ideas about what the good life looks like and how we should live it. Those who promoted 'positive' freedoms he feared were committed to various kinds of rationalist and single minded ideas about the good. They expressed as Marxist ideas, or market liberal utilitarianism - or whatever. Equally Berlin treated the human capacity for choice itself as the 'basic freedom' (or what Kant called 'willkür'). This is why Berlin also allows that 'both kinds of freedoms are both perfectly valid concepts', and that 'positive liberty is essential to a decent existence (Jahanbegloo 1992: 41). Yet he held to the idea that negative liberty was ultimately a more secure way of holding to the insight that ultimately we need to preserve the capacity for choice given that there is no ultimate way of reconciling different ideas about the good whether by calculative metrics or rational arguments. As he (1969: 130) put it:

Negative liberty is something the extent of which, in a given case is difficult to estimate ... The extent of my freedom seems to depend on a) how many possibilities are open to me... Possibilities of action are not discrete entities like apples which can be exhaustively enumerated: b) how easy or difficult each of these possibilities is to actualise, c) how important in my plan of life, given my character and circumstances these possibilities are when compared with each other; d) how far they are closed and opened by deliberate human acts; e) what value not merely the agent but the general sentiment of the society in which he lives, puts on the various possibilities. All these magnitudes must be 'integrated' and a conclusion necessarily never precise, or indisputable drawn from this process. It may well be that there are many incommensurable kinds and degrees of freedom and that they cannot be drawn up on a single scale of magnitude (my stress).
While Berlin's account is a rich and important one it had little impact in the world of ideas and politics. Yet we can say that in a crude way, the difference between 'negative freedom' and 'positive freedom' sat at the center of the post-1945 cold war between the USA and the Soviet Union. The USA made much of the Soviet commitment to abrogating core civil and political rights; the Soviet Union made much of the negation of social or economic freedom characterised by poverty and high rates of mortality arguing that a free press was all very well and good, but it was essentially irrelevant to starving peasant farmers.

In a fundamental sense there is indeed no way of avoiding the basic contradiction that was the heart of this debate. For all practical intents and purposes the advocacy for civil and political rights after 1945 invariably centred on the sacred liberal right to own property, while the redistributive ideal that animated those concerned to promote greater economic and social equality clearly required some move by states to redistribute economic resources like land or capital held in 'private' hands. This fundamental conflict has as Douzinas (2007: 24) argues, endlessly stymied attempts by the United Nations to draft a common international bill of rights.

This conflict is just one of a number of basic conflicts or contradictions that have helped to shape the evolution of human rights discourse into our own time. As Anthony Woodiwiss (2004: xiii) insists, we need to ask given that:

... human rights are rooted in our common humanity, why do they remain controversial especially among intellectuals on the left and in many parts of the developing world?

He answers his own question in part by suggesting:

The most current obvious answer would be to point to what many consider to be the unfortunate association between human rights and the 'coalition of the willing' that presently occupies Iraq - a coalition unilaterally willing to deploy massive military force and therefore to intentionally sacrifice uncounted (literally) thousands of innocent lives in the defence of human rights of those some innocents...

Woodiwiss proceeds to develop the larger point that many groups since the United Nations issued its Universal Declaration of Human Rights (1948) have drawn attention to the way they have been excluded from the terms of that Declaration. As Woodiwiss argues, the emergence of a discourse of human rights took place as a consequence of a shift in the traditional way of speaking about rights as either 'natural rights', or the 'rights of man' to talk of 'human rights'. That shift as Lyn Hunt (2007: 22-3) shows took place through the eighteenth century as talk of 'natural rights' and 'the rights of man' jostled with early talk, for example by Voltaire ca., 1763 of 'human rights'. That a decisive shift had taken place was evident in Franklin D. Roosevelt's famous declarative speech of 6 January 1941, the so-called 'Four Freedoms' speech which set the scene for the later UN Declaration of Human Rights. In that speech Roosevelt (cited Woodiwiss 2005: 87-8) made a ringing declaration that:

... we look forward to a world founded upon four essential human freedoms.
The first is freedom of speech and expression—everywhere in the world.
The second is freedom of every person to worship God in his own way—everywhere in the world.
The third is freedom from want, which translated into world terms means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world.
The fourth is freedom from fear, which, translated into world terms means a world wide reduction of armaments to such an extent and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any nation—anywhere in the world.
That is no vision of a distant millennium. It is a definite basis for a kind of world attainable in our own time and generation...

In terms which possibly few noted at the time, Roosevelt then added a gloss:

Since the beginning of our American history we have been engaged in change, in a perpetual, peaceful revolution which goes on steadily, quietly adjusting itself to changing conditions without the concentration camp or the quicklime in the ditch.
The world order which we seek is the cooperation of free societies working together in a friendly civilized society... freedom means the supremacy of human rights.

Woodiwiss goes on to make two points. Firstly at 'the deepest discursive level' he suggests that there is 'uncertainty about what such a world would have to look like for even the aspirations represented by the present array of human rights to be realisable'. Secondly, and as an empirical proposition, he points to an ongoing struggle since 1945 between an increasingly parochial American reading of the discourse of human rights representing human rights as an ostensibly universalist proposition, and a 'much more literally cosmopolitan discourse' coming from many groups and countries stressing a reciprocal view of human rights which Americans have found convenient to deride as manifestations of cultural relativism.

In effect the play of power and the fact that western ie., American resources and influence drove the actual development of the UN Declaration of Human Rights, and did so in ways that failed to take account of the interests or values of the rest of the world community has contended any efficacy that the promotion of rights might have been expected to secure. The UN Declaration of Human Rights as:

... the founding text of international human rights law represents another instance of the pre-emption of the possibility of a global consensus by a western one... the UNDHR replicates the discourses paradoxical character in that it too has turned out to offer protection only on the basis of the acceptance of inequality, this time on a global scale (2005:91).
To be clear, American influence has meant that human rights were situated within a clear hierarchy. The effect was that civil and political rights trumped social, economic and cultural rights. The civil and political rights covenant spelled out a clear duty on states to respect and ensure to people all of the civil and political rights identified while the economic and social rights covenant merely asked states to try to progressively realise the covenanted rights.

Two other things may be added to embellish the point that the contemporary status of human rights discourse is contradictory and/or confused. One relates to the resurgence of a laissez-faire liberal legal discourse, the other goes to the weak or nonexistent legal remedies available to people or groups facing the abuse of their human rights.

The resurgence of various strands of neo-liberalism has had a major impact on the way legal scholarship regards human rights. In particular we can note the work of members of the Law and Economics movement like Ronald Coase (1960) and Richard Posner (1981). Their work has reinstated a fundamentalist version of a rampant individualism embedded in market mechanisms and logics at the expense of any idea of social reciprocity. The idea of ‘social reciprocity’ here entails the recognition that we live in society and depend on relations of reciprocity and mutuality for our individual capacities to lead flourishing lives. The essential point made by Prime Minister Margaret Thatcher when she declared that ‘There is no such thing as society’, was not to deny the empirical reality of ‘society’ but to affirm the supremacy of individual autonomy, choice and effort at the expense of recognising that ‘I’ depend on lots of often invisible ‘you’s’ to have education, health care, employment and to lead a decent life.

As neo-liberals like Coase and Posner for the Law and Economics movement have argued with increasing rhetorical effect over the past decades, the traditional premises and practices of conventional legal systems, including the idea of a large array of rights needs to be transformed in such fashion as to allow the market maximum play. All that the law needs to do is uphold the basic property rights and ensure free competition and this will literally solve all human problems. On this account a truly ‘just society’ will be one based entirely and fundamentally on free market principles. For Coase (1960) for example the market can only work effectively if literally everything from the air we breathe to the water we drink, is owned privately and is brought into the market relations established between buyers and sellers. As Woodiwiss (2005: 101) points out, on this account if anything remains ‘unowned’ as property, it counts as an ‘externality’ which has to be either paid for if damaged, or worse has to be entrusted to the state which will then proceed to levy taxes in order to protect it. Remodelling the law as a purely market activity will likewise have equivalent benefits such as reducing the scale, cost and complexity or running a legal system. As Woodiwiss argues, this ‘marketisation’ of human rights has given rise to moves dominated by the USA to construct juridical mechanisms on a global scale which privilege a new kind of ‘global constitutionalism’ which protects perhaps even enhance corporate power and wealth. This is evident for example in the formal mechanisms and rules set up by entities like the World Trade
Organisation, the World Bank, the IMF and the increasing array of free trade agreements such as the one Australia entered into with the USA since the 1980s. These arrangements have the effect in David Schneiderman's (2000: 758) words, of restructuring the state and institutionalising political forms that emphasise market credibility and efficiency while limiting the processes of democratic decision making:

By limiting state action with regard to key aspects of economic life, the new constitutionalism confers privileged rights of citizenship and representation on corporate capital, while at the same time constraining democratic processes.

This concern to strengthen these kinds of governance arrangements run in parallel with the continuing weakness of legal remedy when human rights abuses occur. When human rights abuses occur, it is plain that the international legal framework to provide effective legal remedy has been at best weak or pusillanimous. At the core of this problem is the brutal reality that the most significant sources of human rights abuses are governments and their agencies, and governments have been extremely reluctant to surrender any aspect of their sovereignty that would enable serious and sustained intervention by an international juristic agency to prevent those human rights abuses. Samantha Power (2003) has made the striking point that not once has the UN or the USA, the most powerful state on earth between 1945 and 2000 moved to either declare that 'genocide' was underway let alone intervene to try to prevent the score of major assaults on people's lives which reference to genocidal projects in Pakistan, China, Nigeria, Rwanda, Kosovo or Darfur signify. (It is significant that the American regard for upholding its sovereignty has meant it has yet to sign the UN Covenant on Genocide). For the most part the UN itself has relied on mechanisms like regular reporting on human rights abuses. Equally the 1950 European Convention on Human Rights (ECHR) has established a system of remedies allowing aggrieved Europeans the opportunity to bring cases before the European Court in Strasbourg.

HOW TO THINK ABOUT HUMAN RIGHTS

Does this argument so far imply that we should give up all talk about human rights or cease advocating for regimes of practice oriented to some conception of human rights? I think not, Beitz has said what matters on this question when he argues that despite all these difficulties we will still be better off with a framework of rights talk and practice than without.

Nor do I think that we should seek to privilege a regard for human rights only in philosophical reasoning or in the law or by referring to the field of human rights practice. Rather if we are to make any progress in making human rights a feature of our society, we need an overlapping consensus that draws on each of these domains. That entails getting clarity about what defines or constitutes a human right. I think that two things need to be thought about.
Firstly whether this is always spelled out or not, human rights have something to do with securing human goods. It is clear as Beitz says, that we have some good reasons to regard the practice of human rights as valuable. Beitz (2009:9) makes a good case for treating human rights in connection with our ethical ideas about human goods. To be very clear there is an ethical dimension to human rights doctrines and discourse. That ethical dimension provides as it were certain action guiding reasons. This means that we always need to establish as Beitz (2009: 45) insists that we do, the kinds of reasons that constitute the basis for making human rights the object of a particular kind of action (Beitz 2009:11).

Those reasons will have something to do with protecting important human interests and human goods typically against state sponsored neglect or oppression or various kinds of collective or organisational thuggery. Because of the work of contemporary philosophers like Griffin (2008) Sen (2009) and Kateb (2011) we can say what those norms and goods look like.

It should be added that to insist on this requires us to say to politicians, policy makers, lawyers and activists that it is not enough to simply assert that an individual or a group has a certain human right by stomping their feet. It is important to identify the goods which the protection of that rights will secure. This is currently not a common aspect of public life or deliberative practices in a place like Australia. Here the use of an ethical vocabulary is too often simply left unspoken. Or else it becomes part of a tacit code where asserting that ‘x is good for the economy’ or ‘doing y is in the national interest’ will have to suffice as an ethical proposition.

Secondly, we can agree with Beitz when he adds that apart from having an ethical dimension human rights also constitute a kind of human practice. To be specific human rights are a ‘global practice that is both discursive and political’. Beitz says that to think in terms of a practice is to acknowledge that human rights are a real aspect both discursively and politically of most societies. This means we can pay attention to the forms of practice which can have both a doctrinal component as well as a variety of institutional mechanisms that have evolved to protect human rights. This is especially useful if we wish to assess the effectiveness of those institutional mechanisms.

I want to discuss these two propositions starting with the idea that we can find in certain descriptive evaluations of human beings a basis for action. In what follows I can only summarise the considerations that seem most important without supplying the buttressing of argument that would take several books to provide.

HUMAN RIGHTS INVOLVE HUMAN GOODS

If we ask on what ethical basis are we to ground human rights, Griffin (2008) Sen (2009), Beitz (2009), Nusbaum (2011) Dworkin (2011) and Kateb (2011) all agree that we can best do so by grounding human rights in a description of what it means to be human and what is required
for living a good life in common with other humans. Equally there is an emphasis on the value of freedom, something which marks out the role played by the liberal tradition.

This emphasis on freedom is central to the liberal tradition shared by modern writers like Isaiah Berlin (1959), Bernard Williams (2006), John Gray (2002) and Amartya Sen (2009). These liberals believe that we live in a world where we humans tend not to agree about either the ethical ideas that matter or the facts about the circumstances we confront. Gray (2002:139) adds that this is a very good thing because, 'the diversity of ways of life and regimes is a mark of human freedom, not of error.' However as Grayling (2011) has pointed out, this does not necessarily entail acting as if the truthfulness of various moral claims is irrelevant or a misguided criterion; to say that 'all normative claims are equally true' is as self-denying and contradictory a proposition as saying that 'there is no such thing as truth'. In neither case can we take these propositions seriously. Recently Dworkin (2011) has argued even more vigorously against the moral scepticism Berlin and Gray have supported, claiming that the liberal sceptical view about moral truth 'is based on a misunderstanding, and that moral and political judgments can be true or false'. (He also allows that 'we must still recognize that arguments about which are true and which false cannot easily be resolved' (2010).

Even if Dworkin is right, the plurality of ideas about the circumstances we face and the goods we wish to pursue, present us with a persistent challenge to find ways of getting on together. To achieve this we need a capacious framework of ethical ideas that speak to our interest in defining the elements that make a life worth living and yet which are sufficiently inclusive that no one could fail to reasonably accept them. This is the task which writers like Griffin and Sen have taken on as they consider what it means to be a human person.

To be human e.g., Griffin says (2008: 32) involves noticing initially that we are different from other animals because we have a conception of ourselves and of our past and future. Many of us reflect on our lives, assessing the choices that can make our lives better or worse before acting on the basis of those thoughts and assessments. To be human also involves understanding that we are persons able to do these things. Griffin says that human rights protect our capacity to achieve our personhood or humanity. Human rights matter because protect our capacity to be an agent, possessing enough autonomy to be able to do these things freely i.e., think, choose and act.

It is also clear that the idea of personhood needs to take account of what Griffin (2008:37) has called 'the practicalities'. By 'practicalities' e.g., Griffin only means we need a solid grasp of our nature, the nature of society and the world. These practicalities refer to the mixture of internal and external factors which diminish or enhance people’s capacity to live well. To be able to do things like reflect, choose and act well we must be able to make real choices based on having enough knowledge to make good choices. (We cannot choose to fly like a bird e.g.). It is no less important to accept as part of grasping what Griffin calls 'the practicalities', that not every human will have the capacity to reflect, choose and act well.
and to do so autonomously. For example babies and infants do not have it, but children increasingly have it; profoundly brain damaged people do not have this capacity and many organizations like corporations and universities set out to deny it to their workforce.

Thirdly being a person is to lay claim to being a certain kind of being who has a fundamental quality called dignity. Dignity signifies that each of us has unique value and that we have no equivalents.

Fourthly being a person is also about the capacity to choose how to live and being able to do so, a capacity understood as an end in itself. This idea is often referred to be philosophers as having agency or being an agent. Being an agent means possessing the capacity to make choices about the valued ends of our lives. Griffin (2009: 45) calls this ‘normative agency. Sen agrees about this core idea about being human. Sen (2009) calls it ‘processual freedom’.

Like Berlin and Gray, Sen accepts as a basic premise that we live in a world where there are multiple, possibly even incommensurable ways of evaluating the elements that make up a good life or that put content into our idea of justice. As Sen (2009: 395) puts it:

Judgments about justice have to take on board the task of accommodating different kinds of reasons and evaluative concerns. The recognition that we can often prioritise and order the relative importance of competing considerations does not however indicate that all alternative scenarios can always be completely ordered, even by the same person. A person may have some clear views on rankings and yet not be sure enough about some other comparisons.

It is upon this fundamental recognition that Sen (2009) argues for a conception of freedom which accepts both a plurality of values, while worrying about people’s actual capacity to both choose freely and be able to pursue the valued ends that matter;

in assessing our lives, we have reason to be interested not only in the kind of lives we manage to lead, but also in the freedom that we actually have to choose between different styles and ways of living. Indeed the freedom to determine the nature of or lives is one of the valued aspects of living that we have reason to treasure (Sen 2009: 239).

Sen says that being a person involves the capacity to reflect on our lives as well as assessing and selecting from among the goods that matter to us that can make our lives better or worse. This is why freedom is valuable. Freedom matters for several reasons. First if we have freedom, we have more opportunity to pursue the goods that we value. This is the ‘opportunity’ aspect of freedom. Secondly freedom ought to mean that we are free from constraints imposed by others to identify and choose the goods that matter to us. This is what he calls the ‘process’ approach to freedom.12 We need not only to be free procedurally to make these assessments

12 Sen uses three scenarios to identify the distinction between the opportunity aspect of freedom and the process aspects of freedom. John wants to stay at home one night rather than go out. That is his clear and freely chosen preference. In Scenario A, John stays at home as he has intended to do. In this case he has

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but as Sen and Nussbaum have noted we also need to have the actual 'capability' to act on those choices. That is why freedom both as a process and freedom as capability (i.e., having the actual means to act out our choices) matter so much. This informs the distinctive emphasis given to capabilities by Sen and Nussbaum.

We might intuit that talking about and acting to protect our human rights might be connected to these freedoms and capabilities. As Beitz (2009:64) has noted, the 'personhood' and 'capabilities' approaches to grounding human rights normatively and descriptively share a lot of common ground. These include a common insistence on what makes us human and the emphasis on effective freedom and normative agency. From this comes the core idea that that there ought to be minimum provision to enable people to choose the valued ends that matter. Nussbaum agrees observing that:

The common ground between the Capabilities Approach and human rights approaches lies in the idea that all people have some core entitlements just by virtue of their humanity, and that it is a basic duty of society to respect and support these entitlements (Nussbaum 2011: 62)

The shared features of being human including the idea that dignity is a central capability creates the entitlement to have that capability protected as a right.

Nussbaum like Sen, talks a lot about human capabilities understood as those goods and opportunities for living which should be protected by human rights. As Nussbaum has noted, talking about capabilities is not a theory about human nature and does not therefore read out capabilities from innate human nature:

Rather it asks among the many things that humans beings might develop the capacity to do, which ones are the really valuable ones which are the ones that a minimally just society will endeavour to nurture and support (Nussbaum 2011:28)

Consequently human rights involve a:

exercised the 'opportunity' aspect of freedom and has exercised the process aspect of freedom because no-one else has stopped him from so doing. Under Scenario B however a gang of thugs enters his home and drag him out into the street and insist on pain of death that he stay out all night. In this case he has been denied both the opportunity and the process aspects of freedom. He has been denied the opportunity to stay at home and he has had not enjoyed processual freedom. In Scenario C the same gang of thugs invade his home and on pain of death tell him he is not to leave the house. On this scenario he gets to exercise his preference i.e., the opportunity to stay at home, but has lost his process aspect of freedom. In this case he gets to do what he wanted to do but not under circumstances in which he was able to exercise his free choice free of constraint. This says Sen points to an important consideration when thinking about the value of freedom. Can we only think about opportunities in terms of whether or not we and up in the circumstances we have chosen. What e.g., of the possibility that there are other significant alternatives that we might have considered -but did not? Take Scenario C: the difference between it and Scenario A is that in Scenario C John comprehensively lost the opportunity to choose between other options, a choice which in Scenario A he still possessed. That is in Scenario C John has lost an important aspect of freedom, namely the capability to choose between more than one option. Sen says this points to the value of distinguishing between a narrow view of freedom in terms of the 'culmination outcome' and what he calls a broader or 'comprehensive' view of freedom. In effect we need to ask whether we assess a person's capability to lead the kind of life they value in terms of what they actually end up with (ie the 'culmination outcome') or adopt a broader view that takes into account the process whereby they can choose between actually available possibilities which they could also have chosen. What Sen calls a 'comprehensive outcome' approach to freedom necessarily takes into account people's actual capacity a) to choose between various valued ends and then b) be able to pursue those ends.
... morally justified claim that a person has simply by virtue of being a human adult and independent of membership in a particular nation, or class, or sex, or ethnic or religious or sexual group (Nussbaum 1997: 292).

The idea of capability itself is tied to the idea of human dignity because the core capabilities support human dignity. It is integral to our thinking about human rights because it emphasizes the idea of a fundamental entitlement grounded in a simple yet fundamental idea of basic justice.

Sen and Nussbaum argue that a person’s well-being or ability to lead a good life both requires and is best assessed in terms of the achievement of valuable actions and states of being which they call ‘functionings’ which are what the realisation of ‘capabilities’. Capability means as Nussbaum (2011:25) insists, that we have the opportunity to select. She uses the difference between of a person who is starving because they are caught up in a famine and a person who is fasting as a way to grasp the difference. They both:

... have the same type of functioning where nutrition is concerned, but they do not have the same capability because the person who fasts is able to eat and the starving person has no choice.

Among the core functionings is the capacity to reflect freely about those things that will secure the valued ends that matter. This is the core freedom i.e., the freedom to choose. Yet the point of focussing on capabilities is its reliance on a conception of freedom as ‘effective choice’. As Sen and Nussbaum have insisted, we need to be free to choose well and we need to be able to make good choices which are actually achievable. Nussbaum goes on to argue that there are a number of basic capabilities which include life itself, having bodily health, possessing bodily integrity, being able to think and imagine, being able to have valuable emotions, being able to make ethical choices and judgements, being able to form valuable relationships with others, being able to show concern for other species, being able to play, and finally being able to have control over one’s environment (Nussbaum 2011: 33-4).13

Like Griffin (2008) I have argued that a conception of personhood and dignity enable us to derive most of the basic human rights. For example we have a right to life without which no personhood is possible. We have a right to security of person because it gives us the possibility to choose freely and achieve the goods that matter. We have a right to a voice in political processes something most of us would regard as a key exercise in autonomy. We also have a right to freedom of expression and to assembly because these are also exercises in autonomy. We have a right to basic provision and education to enable us to choose and enjoy the goods we value for ourselves.

13 These ‘capabilities’ share an affinity with Finnis’ account of the human goods which includes life (which takes in Nussbaum's three categories of life, bodily health, and bodily integrity), knowledge, play, aesthetic experience, sociability of friendship, practical reasonableness and religion (Finnis 1980: 85-90).
In short this descriptive-evaluative basis of what it means to be human provides us with a basis for talking about human rights. This matters because it helps to determine those human rights which will be both effective and socially manageable and acceptable when claims are made on others about the human rights that will secure those qualities of personhood or the capabilities which Nussbaum has identified. Butz (2009) is right to say that any practice of human rights is ethically oriented. By this he means only to refer to ‘a set of norms for the regulation of the behaviour of states together with a set of modes or strategies of action for which violation of norms’ may count as a reason compelling enough for actors to agree to take action (Butz 2009:11).

This also points to the value of a small but useful clarification suggested by Brian Barry (2006) in the course of discussing what social justice entails. Barry suggests that we should treat ‘rights’ as part of a triad of claims that we make on each other. We can make claims he says variously for ‘rights’, for ‘opportunities’ and for ‘resources’. This presentation clearly assumes that these are not the same things. What then are the differences between ‘rights’, ‘opportunities’ and ‘resources’?

Barry says we can treat rights as part of a statement of claim when we assert eg., that ‘X has a right to education’, or ‘X has a right to vote’, or ‘X has a right to peaceful assembly’. Barry says that when we assert such a claim we are saying that it is no longer acceptable to deny to X access to education, the exercise of a vote or the ability to assemble peacefully. That is having a right means only that the rights bearer in question cannot be prohibited from having the thing or doing the thing the right refers to. As Barry (2005:19) puts it:

A woman’s right to appear in public dressed as she chooses and in the company of anybody she like is simply the absence of any such prohibition (of the kind common around the world) on doing such a thing. Again the right to make a contract or a will is the absence of any prohibition on exercising a certain kind of legal power.

Though he does not say much in defence of this proposition, it seems that he wishes to both clarify the content of a rights claim and to do so in ways that avoids any inflated claim or anything that implies an excessive claim. The kind of excessive claim Barry has in mind treats a statement like ‘I have a right to education’ as effectively unlimited in its reach and one which if exercised in this fashion may even have the effect of diminishing others people’s claims to have an education.

The point of framing rights claims in this somewhat restricted and ‘negative’ fashion is further clarified when we consider the matter of opportunities. Opportunities are matters about which we might wish to discuss in terms of how equitably a range of relevant opportunities are distributed within a given community. We can also think about opportunities as enabling or necessitating a second kind of demand that might be made on others in the community or government. The point of the idea of claiming opportunities is made clear from examples offered by Barry. Having a right to education does not matter much eg., if schools charge
fees which parents cannot afford even though no one is denying them access to the education system. Equally having a right to abortion does not mean much for women if they do not have the opportunity to access safe, dependable and affordable abortion services. As Barry says:

Opportunity means that an opportunity to do or to obtain something exists if there is some course of action lying within my power such that it will lead if I choose to make use of that opportunity, to my doing or obtaining the thing in question. (Barry 2006: 20)

In effect we not only need to demand rights but also demand opportunities.

Opportunities are often complex matters. Barry makes this plain when he talks about the opportunities needed if someone who is wheelchair-bound is able to access a lecture theatre. To start with this does not mean only that there should not be any laws prohibiting access to a given building or institution. It also means that there ought to be physical means for accessing a space like a lecture theatre like ramps or elevators. People with disabilities can make demands for these sorts of opportunities. But in some cases even that may not be enough:

Even if the lecture is wheelchair accessible that means only that it will be physically possible for me to get a place in the theatre once I arrive. I still have to arrive (Barry 2006: 20).

In effect opportunities often tend to come in somewhat complex arrangements. In each case what is involved in securing opportunities needs to be sorted out on a case-by-case basis.

Finally we may also need to demand that resources be made available. It is after all resources which can convert opportunities into activities or states of affairs which enable people to achieve the valued ends they care about. The category of resources is very heterogeneous. Some resources are external to us like money, land, or cars while others are internal to us like the kind and quality of education and intellectual capital we have had available. As with ‘opportunities’ there are basic questions about the justness involved in the distribution of resources, especially those that are external to us and directly shape our capacity to choose among a range of valued ends and to lead good lives. Some resources we can try to arrange to make more available on a more equitable basis while other resources may be harder to evaluate using ideas about just distribution. It is not immediately clear how we should think about resources like having parents who have a large vocabulary, have plenty of books and other cultural resources available to them who encourage a home environment that values curiosity, the value of being well informed and how to think. The point perhaps is that more of us need to follow the lead set by the Victorian government (2009) when courtesy of its Early Years Learning and Development Framework for Children from Birth to Eight Years set out to encourage the idea that:

Every child has the ability to learn and develop. Having high expectations is especially important in achieving better outcomes for the most vulnerable children. Some children require additional supports and different learning experiences and opportunities
to help them to learn and develop.

Those who drafted the plan then urge all those groups working with young children:

- commit to high expectations for all children’s learning and development;
- ensure that every child experiences success in their learning and development;
- recognise that every child can learn, but that some children require quite different opportunities and supports to do this;
- work with families to support children’s learning and development at home and in the community.

In this way Barry proposes a somewhat more analytic approach to thinking about what is entailed when saying that people have rights, and may need both the opportunities and resources to translate the statements about rights into more effective political and policy interventions. In this fashion we can begin to see more clearly what kind of activities will flesh out the often abstracted idea that we have rights. It is this sense that we can now consider the practice of human rights which adds to and complements the evaluative-descriptive argument mounted so far.

HUMAN RIGHTS AS A PRACTICE

Beitz says we need to acknowledge that human rights are a practice (or ‘an emergent practice’) because it is now a fact that international human rights requires:

... that states are responsible for satisfying certain conditions in their treatment of their own people and that failures or prospective failures to do so may justify some form of remedial or preventative action by the world community (2009: 13).

As a practice it has both a doctrinal component as well as various institutionalised mechanisms that have evolved for the protection of human rights. Among those mechanisms we might note the various kinds of juridical processes as well as various reporting processes. As Beitz notes it is an interesting fact that even in the United States, one of the serious human rights laggard because its formal regard for human rights has been notoriously weak, domestic courts have found that even ‘aliens’ have a right to have cases heard by US courts when a violation of human rights is alleged (Beitz 2009:13). Let me note quickly some of the key features of the doctrinal and institutional mechanisms that make up human rights practice.

The doctrinal basis has its modern origins in the passage of the UN Universal Declaration of Human Rights (UNDHR) of December 1948. The UNDRH acknowledges the normative basis already discussed namely that one of the grounds of human rights is the ‘inherent dignity’ of human beings. (As Beitz (2009: 20)) has noted this proposition was simply asserted without further elaboration). Central to the UN Universal Declaration of Human Rights is the proposition that international recognition of human rights is essential to the protection of the
equal dignity of all human beings while respect for human rights would also be a condition for global peace. The Universal Declaration of Human Rights was followed by a good deal of work and a lot of political conflict set loose as the UN designed what became two international Covenants, including the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) designed to serve as binding international conventions. Together the UN Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights constitute the 'International Bill of Rights'. They engage rights to protect liberty and personal security, a range of political and civic rights in civil society, and a broad range of economic, social and cultural rights.

They have been followed by a plethora of other conventions. Together these provide a framework for what has become the practice of human rights. It is plain from the language used in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights that the designers of the International Bill of Rights had in mind from the start a juridical model of implementation in mind. It was clearly expected that human rights would be embodied in domestic legislation and enforced by domestic courts leaving the UN to function the international auditor who would monitor compliance at the local level (Beitz 2009: 32). For example the Covenant on Civil and Political Rights (Art. 2) requires states who have signed onto the Convention 'to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant'.

As scholars like Donnelly (2003), Nowack (2003) and Greer (2006) have shown, what has actually happened is a good deal more complex. Human rights as a practice has tended since the 1960s to involve a mixture of juridical and political action with a clear bias in favour of political interventions. The judicial model has only been partly implemented. For example the European Union has established a European Human Rights Court. Europe may well have set the standard to date with the its Human Rights Court able to invalidate the legislation of member states if non compliant with the European Convention on Human Rights. However there is no equivalent international Court of Human Rights. What has actually evolved globally is a complex layering of international, governmental and non-governmental agencies that monitor report and try to influence governments everywhere to be more compliant with the stipulated international Bills of Rights. What emerges as Beitz (2009) has shown are various kinds of human rights practice which includes accountability, inducement, assistance, domestic contestation, engagement and compulsion.

Accountability refers to the use of reporting and auditing processes carried out by UN human rights agencies (like the UN Human Rights Council) usually in partnership with domestic governments and selected NGO's. This involves 'treaty bodies' in reviewing and auditing the periodic reports that states parties are required to carry out documenting their compliance. For example in Australia the Attorney-Generals Department produces a draft
report on Australia's compliance with the UN Convention on the Rights of the Child every three years. This draft report is then reviewed by a number of NGOs before the Australian government considers the feedback from the NGO's and submits a final report on its compliance with the Convention on the Rights of the Child to the UN Human Rights Council.

Inducement involves the judicious use of incentives to governments to comply with human rights standards. Typically this has involved the management of access to valued resources like foreign aid or cultural resources, in effect making such access conditional on demonstrated compliance with human rights standards. Assistance can look a lot like inducement but recognises that many poorer countries will need assistance offered through agencies like UNDP to enable them to protect human rights.

Domestic contestation and engagement involve interventions by international agencies and NGO's as they put pressure on governments to comply with human rights standards. Efforts by Amnesty International over decades to 'name and shame' regimes engaging in the use of illegal detention, torture or the death penalty are a classic example of this process. It can also involve NGO's offering support to local political campaigns.

Compulsion involves the most dramatic attempts by the international community to force compliance with human rights. For examples of such interventions we can point to military interventions in Somalia (1991-3), Bosnia (1996), Kosovo (1998) and East Timor (1999). Humanitarian interventions can also involve everything from the use of blockades to economic bans on trade. Equally as cases of intervention like the UN engagement in Bosnia (1996) as well as Rwanda (1995) suggest the results of such interventions can be humiliating: in both cases UN ground forces were on duty in Rwanda and Bosnia as major crimes against humanity were committed in full view of these forces who were forbidden by the UN in each case from intervening (Power 2004).

Taken collectively these modes of juridical and political intervention constitutes a 'practice' because we see here a:

... a set of rules for the regulation of the behaviour of a class of agents, a more or less widespread belief that these rules ought to be complied with, and some institutions, quasi institutions and informal processes for their propagation and implementation (Beitz 2009: 42)

It is says Beitz, less a regime and more an emergent discursive practice. It has too many weaknesses and escape clauses in regards to adjudication and enforcement to be regarded as a regime. It also remains as he says, very much more about aspiration and a site of political criticism and mobilisation than a predictable site of enforcement.

Even so it is clear that as a practice it serves to intervene in three ways. Firstly the practice of human rights establishes a requirement that governments protect vital individual interests against threats like political oppression or terror that can cause persons serious harm. As Shue
(1996) points out this requires protecting the underlying interests of citizens subject to the state’s jurisdiction against threats from state agents. This might require e.g. that governments respect the underlying interests of all citizens in the conduct of the state’s official business. In Victoria e.g., VHEORC has argued that the objectives of Victoria’s Equal Opportunity Act should express recognises the connection between the Charter and the Equal Opportunity Act, given that the Charter is explicit in its recognition of equality, stating that every person has the right to enjoy her or his human rights without discrimination and to effective protection against discrimination.’ This should also entail a need to aid those who are involuntary victims of deprivation or discrimination. Secondly the practice of human rights applies initially to the political institutions of state (i.e., the constitution, laws and general public policies) by e.g. ensuring that very basic rights like the right to vote are promoted and protected. Finally human rights have become matters of international concern featuring in diplomatic processes.

To summarise then, human rights provide a strong and defensible ethical framework for securing the condition for humans to live a life of dignity and freedom. Human rights has also become a fact because it constitutes a definite kind of ‘global practice that is both discursive and political’. It is in this sense that even advice to ‚THINK CHARTER’ takes on an aspect of human rights practice. As one Victorian government training manual observes:

... to make the Victorian dialogue model work, it is important that the courts, the parliament and public authorities understand the Charter. This is why education is important. It is envisaged that every employee of a public authority will ‚THINK CHARTER’ and consider human rights in all aspects of their work. (DSE 2007:10) (My stress).

This enjoining of public sector workers ‘to actively THINK CHARTER’ and to think of this as the major change ‘you need to make to the way you work’, clearly signals that implementing the Charter has been defined as a cultural project. It is with that in mind that we can turn to the things that have happened in Victoria since the Charter was introduced.

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14 The preamble of the Charter identifies foundation principles, the first two of which are: (i) human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom; and (ii) human rights belong to all people without discrimination and the diversity of the people of Victoria enhances our community.
CHAPTER THREE: THE CHARTER IN ACTION: MEASURES OF SUCCESS

They have rights who dare maintain them.
James Lowell 1844

We have before us a whole new jurisdiction. We, as the judiciary of Victoria, have before us the opportunity to take the common law, foreign jurisprudence and every ounce of our intellectual capacity to develop the first Australian jurisprudence of human rights law. It is a moment of excitement and exhilaration but also one of trepidation and reservation.

Chief Justice Marilyn Warren 2007

Victoria’s adoption of core elements of the United Nations International Covenant on Civil and Political Rights as a form of domestic legislation in its Charter of Human Rights and Responsibilities in 2006, introduced an important innovation. But what was the nature of that innovation and how effective has it been?

The authors of the Charter back in 2005-6 were keen to ensure that it worked as ‘as a form of insurance to ensure that human rights are a priority for the government when it sets about making laws and decisions’. Attorney-General Hulls made what seemed to be a ringing endorsement about the value of human rights:

It ensures that human rights are taken into account when developing new rights and policies. It ensures that the courts consider human rights when interpreting laws. And above all else it promotes the need to respect and promote human rights across the government and in the community.

Yet the mechanisms contained in the Charter to ensure that these objectives were met are to put it at its most benign quite modest. The authors of the Charter seem to have privileged the arguments tirelessly repeated by Australian opponents of bills of rights that such instruments typically give too much power to courts. The result is a Charter eg., which does not provide effective legal remedies to citizens who believe their human rights have been abrogated. It is a Charter which does not allow Victorian courts any capacity to have legislation that breaches human rights to be withdrawn and recrafted. Indeed it is a Charter that does not even require the courts when engaged in judicial business to be compliant with the Charter.

The Charter also gave the Executive and the Parliament the capacity to seek exemptions from the Charter or to simply override the Charter. The Bracks’ government only insisted that whenever it became apparent that new legislation or policy measures were incompatible with the Charter, the relevant parties should engage with each other as part of the ‘dialogue model.’ The actual nature of the mechanisms provided for protecting human rights of course has not stopped the opponents of bills of rights from insisting that the Charter gives too much power to the courts and has undermined parliamentary democracy. Nor has it stopped critics like James Allan (2011) from claiming that all talk of human rights is, as Bentham famously put it, ‘nonsense on stilts’.

In regards to this particular point, the critics have some grounds for concern. I have shown that there are many problems with thinking about human rights, and that we need to accept as James Griffin (2008) has suggested, that a lot of the contemporary talk about human rights is variously ‘vapid, unclear, or confused’. This clearly translates into certain cultural and political effects. As Evans and Evans (2006) noted, their interviews with members of parliament pointed to a mish-mash of ideas and evaluations of rights.

Some ... said that rights were very abstract and vague notions that couldn’t really be pinned down. Others gave an extremely minimalist definition of rights being ‘common sense’ or ‘common decency’ – boundaries that reasonable Australians would never transgress (and which thus did not need to be articulated or codified). A number linked rights with laws prohibiting discrimination, while others took a basic civil liberties approach that focused on the criminal justice system. A number referred to Australia’s international human rights obligations – some vaguely and others by naming the particularly treaties. For those who took this approach, the majority focused on civil and political rights as the core obligations with some dismissing economic and social rights altogether and others saying that they were important but not as important as civil and political right (Evans & Evans 2006: 12-13).

This kind of incoherence on the part of our politicians is probably to be expected. Yet as I have also showed philosophers like Griffin (2008), Sen (2009), Beitz (2009), Nussbaum (2011), Dworkin (2011) and Kateb (2011) give us reason to believe that we can confidently and credibly ground our regard for human rights in various kinds of practical reasoning. That discussion begins by saying what it means to be human, and what is required for living a good life in common with other humans. One clear implication of this is that we need to be much more explicit about our ethical vocabulary and to use that vocabulary in public spaces, workplaces and households when we engage in human rights talk.

I have also argued that we need to resist the idea that we must choose between a philosophical approach or a legal approach. Both approaches constitute different but overlapping ‘practices’. It is important to develop an overlapping consensus which begins with an explicitly ethical approach to rights by talking about the goods which rights promote, and then linking this to various legal and policy-based practices. The value of this approach is
that it recognises that human rights can be talked about by philosophers and lawyers: it also means that we can think about human rights as a definite kind of 'global practice that is both discursive and political'. In this way we can also point to the practice of human rights. As a practice human rights has both a doctrinal component as well as various institutionalised mechanisms that have evolved for the protection of human rights. Beltz (2009) e.g. has pointed to the various kinds of human rights practice which includes accountability, inducement, assistance, domestic contestation, engagement and compulsion. It is on this respect that we can evaluate the Victorian Charter by treating it as a discursive and political practice.

In this chapter I want to do several things. Firstly I want to establish something of the methodical approach to be adopted to evaluating the Charter by asking what criteria ought to be used to assess the success or otherwise of the Charter of Human Rights. I then want to apply those criteria to the Charter of Human Rights and Responsibilities to make some initial assessments. I propose to use the terms of the Charter itself. I do this on the basis of one assumption namely that we need to take into account the intentions of those who drafted by the Charter as the initial basis for assessing its success to establish some initial assessments of success of the Charter. I will deal first with the way the scrutiny of new legislation has been carried out by the Scrutiny of Acts and Regulations Committee. I then turn to consider the role of the Courts.

ESATABLING THE EVALUATIVE CRITERIA

What criteria are we to use to assess the Charter of Human Rights? It has been pointed out that there is a relatively straightforward basis for assessing the Charter. That basis rests on the case for addressing the prior question namely did the institutional and political mechanisms in place prior to the introduction of the Charter of Human Rights adequately protect human rights. Evans and Evans (2005: 2-3) have pointed out in much of the debate that has taken place in Australia about the value of adopting a bill of rights it has been frequently asserted and/or assumed by opponents of this idea, that the status quo was doing a perfectly adequate job. As Evans and Evans (2005) argue, what has been missing has been 'any serious and systematic attention' to the actual performance of parliaments in the protection of human rights. Their advice is to use the international Covenants (ie., International Covenant on Civil and Political Rights and the International Covenant on Social Economic and Cultural Rights) to provide an appropriate framework to assess the actual performance of Australian parliaments. To this extent their advice is consistent with Beltz' use of human rights as a form of international practice which understands that these covenants oblige the Australian government 'to ... take steps to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognised in the present covenant by all appropriate means'. Given that the Victorian Charter of Human Rights essentially installs the ICCPR as local legislation in Victoria it seems a reasonable course of action to treat the Charter itself as pointing to the appropriate standards for assessing the Charter - at least as an initial evaluative framework. This seems preferable to using some other set of criteria which
might be based on assessing it against other criteria and on what the charter is not like the idea that the Charter is wanting in important respects e.g. it has not installed the ICESCR as domestic legislation.

We can adopt this approach as the basis for an initial assessment. If we do this, we can say that three things stand out. Firstly, it seems that the Charter can promote human rights by requiring policy to be developed in light of the Charter subject to provisions allowing for exemptions and overrides from that Charter. The Charter can also promote human rights by drafting and passing legislation so that it complies with comply with the Charter subject again to provisions allowing for overrides and exemptions from the Charter. Finally, the Charter can also protect and promote human rights by providing remedies when rights are abused.

Accordingly, assessing the Charter requires us to (i) assess the extent to which policy making has been done in ways that comply with the Charter, (ii) the extent to which legislation has been drafted in line with the Charter, and (iii) the extent to which abuses have been identified and remedied. (To all intents and purposes, it is possible to treat (i) and (ii) as if they are the same).

Before the passage of the Victorian Charter, Evans and Evans (2006) investigated the extent to which parliamentary scrutiny committees identified human rights issues in legislation presented to parliament. As they pointed out, the mandates of such committees like Victoria’s Scrutiny of Acts and Regulations Committee under standing orders or statutory terms of reference, were among other things, to identify whether legislation trespassed unduly on personal rights or freedoms.

They set out to establish whether applying that mandate resulted in these committees identifying possible breaches of the International Covenant on Civil and Political Rights and drew attention to those breaches. In effect, they were trying to establish whether committees like Victoria’s Scrutiny of Acts and Regulations Committee was working effectively as de facto human rights scrutiny committees. As they reported, their analysis of the Victorian Scrutiny of Acts and Regulations Committee for the year 2003 showed that the Victorian Parliament considered 115 Bills in 2003. They noted that the Victorian Scrutiny of Acts and Regulations Committee identified some 45 Bills as raising

... possible breaches of ICCPR rights. The Scrutiny of Acts and Regulations Committee identified a rights issue (under its ‘trespass unduly on rights and freedoms’ term of reference, or otherwise) in 41 of those 45 instances. The high strike rate is probably not surprising. Most of the ICCPR rights issues presented by Victorian Bills fall within the civil liberties orientation of the rights-conception employed by Australian Scrutiny Committees: right of privacy, right to silence, presumption of innocence, appeal rights (Evans and Evans 2006:5).

Evans and Evans concluded that the Victorian scrutiny committee performed strongly in identifying a significant number of issues of compliance with the International Covenant on
Civil and Political Rights in 2003. At the same time they argued that 'if the objective of scrutiny was to give proportionate attention to possible breaches of ICCPR rights' then some changes in the approach of the scrutiny committee would be needed because the scrutiny committee had at best an 'indistinct human rights focus' (Evans and Evans 2006: 7).

We can say that since 2007 the passage of the Charter removed any possibility that the scrutiny committee would have at best an 'indistinct human rights focus'.

Under the terms of the Charter SARC was given formal responsibility to assess the compatibility of new legislation with the Charter. In what follows I provide a brief descriptive assessment of the way the Scrutiny of Acts and Regulations Committee of the Victorian Parliament has handled its responsibilities using their annual Register of Compatibility statements (SARC 2008; 2009; 2010; 2011). I also draw on the annual reports by VEOHRC on the operations of the Charter and their assessments of the Charter’s role in promoting an increased regard for human rights evidenced in the design of new legislation (VEOHRC 2008; 2009; 2010 2011a).

By way of overview it can be noted that by and large the Labor governments have broadly accepted the need to demonstrate compliance with the Charter. Since January 2007 e.g. when the Charter became operational, the Labor government has used the power granted it by the Charter to issue an override declaration on only two occasions claiming as required to do so that on both occasions this was warranted by ‘exceptional circumstances’. Equally government departments have supplied Statements of Compatibility as required by the Charter but have not issued many statements of incompatibility when putting new legislation to Parliament. However it is also plain that SARC has pointed to a number of issues with a substantial body of legislation which its members judged raised issues of compliance with the Charter. It is in this area that we see something of the contested nature of human rights with SARC seeming to want not to cause too much trouble for the government as it found on a number of occasions like the Graffiti Offenders Bill 2007 that clear breaches of human rights were reasonable.

YEAR ONE: 2007

VEOHRC concluded its first annual review of the Charter by claiming that because the Charter made transparent assessment of new laws against a human rights framework into a formal requirement, this had had a significant and beneficial impact. VEOHRC summarised its generally positive view of events by asking, ‘if it was not for the Charter, would the human rights dimensions of these 93 Bills have been identified, analysed and debated?’ VEOHRC

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14 Evans and Evans also interviewed members of the Victorian parliamentary scrutiny committee. They concluded that human rights only made a difference if the government did not hold a majority on the scrutiny committee and that scrutiny committees would better take account of human rights if governments did not hold a majority on the committee. One committee was said to be ‘stacked’ with Labor government MPs. One member reported that the work of scrutiny did not interest most MPs and suggested that scrutiny committees were a low-status committee posting.
answered its own question by saying that 'in all but a very few cases, the answer is clearly 'no'.' VEOHRC also claimed that Ministers and their departments had approached their new responsibilities to work with SARC 'in a considered manner, making a positive contribution to the human rights dialogue'. The sorts of considerations that weighed on VEOHRC's judgment were fairly easy to specify.

For example by the end of the first year of the Charter's operation, no bill submitted to the parliament had been accompanied by a Statement of Compatibility identifying any kind of incompatibility with human rights. Likewise no override declarations were enacted by Parliament. VEOHRC claimed that this reflected the spirit and intent of the Charter given that override declarations were only meant to be enacted in the event of 'exceptional circumstances'.

VEOHRC also noted that SARC was doing what it was charged with doing by identifying incompatibilities between the Charter and new legislation. For 2007 a total of 88 bills were tabled in Parliament. Analysis suggested in almost half of these cases SARC formed the view that there were either no issues raised of compliance with the Charter or the legislation actively promoted human rights. Another 21 bills raised issues of compliance. The Commission noted that in relation to these Bills, comments by SARC highlighted important issues that had not been specifically addressed in the statement of compatibility. On each occasion SARC judged that rights were either not limited or the limitation of rights was reasonable. In some 13 instances SARC was not impressed either by the statement of compatibility or saw issues needing further discussion and resolution. That is SARC reported differences of view with regard to 13 Bills. In these cases SARC wrote to the Minister requesting further information or discussion in relation to Charter compatibility.

- No engagement of human rights = 46 bills
- Engages and promotes human rights = 8 bills
- Possible engagement discussed, rights not limited = 12 bills
- Engages and limits human rights, however the limitation is reasonable = 9 bills
- SARC unhappy with the SOC and seeks further dialogue = 13

VEOHRC commended SARC for trying to ensure community involvement in the dialogue about human rights. SARC sought public comment on Bills in the course of reviewing Charter compatibility and in 2007 in relation to two Bills.17

Several caveats might be made. Firstly the generally positive assessment ignored the finding of Evans and Evans (2006) that back in 2003 when there was no Charter in place SARC had been assessing the passage of new legislation for compliance with the ICCPR and had found that in 43 cases there were issues of compliance. Secondly the Commission expressed concern that SARC's comments did not simply become an end in themselves, but were part of 'a robust,

genuine exchange on human rights. Though VEOHRC did not say why they felt impelled to make this comment, it seems that it had to do with the fact that while VEOHRC noted that SARC had raised concerns about the Charter compatibility of a number of Bills, it seemed that only one Bill appeared to have been amended in response to these concerns. The Commission promised to monitor this aspect more closely in 2008.

Thirdly this positive finding depends on the assumption that SARC’s responses to statements of compatibility were well-grounded especially when they concurred with the government view that there were ‘reasonable grounds’ for exemptions from the Charter.

It is not possible or desirable to review every one of SARC’s findings in respect of an apparent incompatibility between a Bill and the Charter. One Bill however did stand out. This is the Graffiti Prevention Bill 2007 which SARC expressed some major reservations about, and sought further deliberation on the issues it raised with the government but without success.

SARC drew attention to the fact that the Graffiti Prevention Bill appeared to conflict with the Charter on a number of grounds. The Bill in question discriminated against a specific age-based group by proscribing the sale of spray cans to any person under the age of 18 years. It also breached the right to freedom of movement for persons under 18 years of age. The Bill for example enabled police to prevent what was described in an extraordinary turn of phrase as ‘would-be graffiti offenders’ [1] from entering public spaces should a police officer think they might spray paint graffiti (VEO&HRC 2007, p. 64). The Bill also breached the right to privacy which asserts that people ought to be free from government intervention or excessive unsolicited intervention, a right breached for example by the Bill allowing police to lawfully stop a young person and prevent them from moving while they search them for evidence. Finally the Bill breached the right to a presumption of innocence. In each case the Department of Justice successfully claimed exemptions from the Charter.

The Department of Justice claimed that it was reasonable to discriminate against young people beginning with its intention to restrict the sale of a specific item, namely spray cans of point to any person under the age of 18 years. The Department of Justice used Section 7 of the Charter which reads:

A human right may be subject under law to such reasonable limits as can be reasonably justified in a free and democratic society based on human dignity and freedom, and taking into account all relevant factors ...(s 7(2) [VCHR Act 2006, p. 10).

The Department of Justice claimed that breaching the right to freedom of movement for persons under 18 years of age was ‘reasonable’. This was entailed in the Bill’s provision for preventing young people from legally entering certain areas while they possess or are suspected of possessing a spray can or related supplies.

The Department also claimed that it was reasonable to enable police officers, when they believed they have ‘reasonable grounds’ for suspecting a young person of possessing graffiti
paraphernalia or if they feared that evidence might be lost or destroyed if a search is delayed, to lawfully detain a young person and prevent them from moving while they searched them for evidence. A young person who appears to be over 14 and under 18 years of age can be searched (‘pat down search’). This exemption from a legal requirement that they protect the right to freedom of expression was ‘justified’ by reference to lawful restrictions reasonably necessary for public order, public health and public morality (see, section 15(3) of the Charter). Certain kinds of property rights and public order were also deemed to have priority and provide grounds for an exemption to the right to freedom of expression.

Exemptions were also sought and granted in regard to overriding the right to private property by reason of recognising a prior need to maintain public order. A police officer for example could seize spray cans and other related items if they have ‘reasonable grounds for suspecting that the young person has in their possession a ‘graffiti implement’ or evidence that it may be lost or destroyed.

Finally the Bill gave police the right to search without being required to show they had a ‘reasonable suspicion’ or some other legitimate reason to search. It overrides the traditional legal principle concerning the presumption of innocence. According to s25 (1) of the Charter, a person ‘charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law. The Graffiti Bill made it possible for young people under 18 to be stopped and searched by police and to have their possessions seized. The seizure of property without a finding of guilt is a penalty and as such an abrogation of the presumption of innocence.

This exemption was consistent with other parts of the Bill which enabled police to prevent what was described as ‘would-be graffiti offenders’ from entering public spaces should that police officer think they might spray paint graffiti (VEO&HRC 2007, p. 64). Prohibiting certain people from accessing public space is a penalty which means the young person is effectively given a sentence despite the fact there is no finding of guilt. In this way it abrogates the right to be presumed innocence until its proven otherwise.

In both cases an exemption was granted by referring once more to section 7 of the Charter. The justification for the exemption is said to ‘assist the prosecution in securing graffiti offenders because relevant and adequate evidence is ordinarily very difficult to obtain and consequently convictions are difficult to secure’ (VEOCHR, 2008:65-66).

The deeply prejudicial nature of the basis for seeking exemptions from the Charter is revealed if we ask what evidence and analysis was used to back up the claim for this exemption? The prejudicial nature of the exemption is also suggested when it is understood that no such abrogation of the presumption of innocence is conceivable in cases where police might well believe that an adult might be about to commit a crime-like rape or a financial fraud. Equally we see that securing a prosecution apparently overrides both the right of a young person to
be presumed innocent until proven guilty and their right to access public space in ways that would never be countenanced if the person in question was an adult.

In this way codifying the denial of rights to people under 18 years to access public space using an instrument ostensibly designed to enhance the human rights of minority group is a problem. To put the same point differently this pursuit of an exemption is clearly in breach of the point of the UN Convention on the Rights of the Child.

UNCROC itself has (at Article 2) enshrined the principle of non-discrimination based upon the notion of substantive equality.

Importantly, it not only provides that children and young people shall not be denied their rights based on their own characteristics or status (including race, gender, language, religion and disability), but also that they must not be denied their rights based on the characteristics or status of their parents or guardians.

Equally (at article 3(1) of UNCROC), the ‘best interests of the child’ are deemed to be a primary consideration in all actions concerning children. This is not intended to make the best interests of children and young people the only consideration in decision making; rather, it is intended to ensure dedicated, genuine and rigorous consideration be given to the best interests of children and young people. Essentially, it aims to ensure that the interests of children and young people are not ‘buried’ or left until last on agendas that are determined mostly by adults.

Article 12, which requires that relative to their age and level of maturity, the views of children and young people be given due consideration in relation to matters that affect them. This does not mean that their views are determinative of a particular issue; rather, it is about children having genuine involvement in, and an opportunity to influence decision-making processes.

It says a great deal that most Australians by a slender majority do not like the idea that children have human rights: in the 1998 inquiry of the Commonwealth Parliament’s Joint Standing Committee on Treaties, 51 per cent of submissions to the inquiry opposed the Convention.

As VEOHRC noted Using a human rights framework to articulate the rights of children and young people involves recognition of autonomy. Such recognition is not blind to the reality that age influences capacity and gives rise to particular vulnerabilities, but it does require that the

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starting point of decision making and conduct that impacts upon children and young people must be a genuine acknowledgement of them as being the holders of rights.

This presents a strong challenge to what might be categorised as the more traditional, welfare-oriented conceptualisation of children’s and young people’s rights. While a welfare approach is very comfortable with the obligation of adults to protect and safeguard children and young people, it grapples with the principle of autonomy. A ‘welfare approach’ is a welfare approach is problematic because it tends to allow those in authority to define their obligations and standards by reference to what they determine themselves as being able to do, and not what they are obliged to do in order to fulfill independently defined rights.

Although the Charter seems to promise much when it specifies a large number of rights and freedoms the capacity to seek exemptions presents a general problem. As we have seen here, this provision seriously affects the capacity of the Charter to protect the rights of young people. It seems that the Charter continues to allow for and indeed in some circumstances legalize age-based discrimination. As VEOHRC noted the UN Convention of the Rights of the Child could be used to illuminate the breadth and practical meaning of the provisions of the Charter which the Graffiti Bill clearly breached especially when it enabled police to prevent what was described in an extraordinary phrase as ‘would-be graffiti offenders’ (11) from entering public spaces should a police officer think they might spray paint graffiti (VEOHRC 2008: 64) or the right to privacy when the Bill allowed police to lawfully stop a young person and prevent them from moving while they searched them for evidence.

In a footnote earlier in this discussion I commented that in its discussion of the roll out of the Charter after 2006 VEOHRC did not specifically address or acknowledge the quite poor record of promoting the human rights of children and young people. However it is the case that in its 2008 Annual Report VEOHRC did address the rights of children and young people in a substantial discussion. In the course of that discussion, VEOHRC (VEOHRC 2009: 145) noted that:

Children and young people hold the same rights as everyone else, with some additional protections, and subject to some legitimate limits based upon their age and evolving maturity. As with other thematic conventions, the Convention on the Rights of the Child (CROC) does not articulate a different or ‘special’ category of human rights for children and young people; it articulates universal human rights according to the context and experience of children and young people.

VEOHRC adds that this is confirmed by the Charter that:

It is important to avoid creating the impression that they do not enjoy rights under the Charter in its present form – they do (VEOHRC 2009: 145).

VEOHRC also seems to acknowledge that attending to the rights of children matters because:

... there is value in elaborating on the protection of human rights by specific reference to those groups whose historical experience is one of rights infringement rather that rights realisation (VEOHRC 2009: 145).
This reflects the problem that while gross generalisations based on gender, race, disability and other characteristics are much less acceptable this continues to be acceptable in relation to children and young people' (VEOHRC 2009: 148). Too often as writers like Bessant and Watts (2009 have noted, the use of generational comparisons often lead to broad, prejudicial even harmful generalisations that are not challenged sufficiently. Reminiscent of phrases such as 'those type of people' and 'not like us', the phrase 'young people of today' to say nothing of apppellations like 'puberty packs' or feral adolescents can foster a view that children and young people exercising their rights (through, for example, gathering together and using public space) pose threats to public order and civility. These attitudes and views suggest that recognising and promoting the human rights of children and young people is about far more than changes to the law. Like all other advances in human rights, including the enactment of the Charter in its current form, progress is essentially about fundamental cultural change. Bernie Geary Victoria's Child Safety Commissioner, summarised the shift that needs to occur in the following terms:

There is a big difference between positively owning rights and being protected. It is incumbent on adults to protect children from abuse of their human rights, but children also need to be given an opportunity to actively own and enjoy rights. Adults should act as bridges between what children and young people want and need, rather than directors.\(^ {20}\)

In this respect there is a real risk that the Charter itself will compound popular prejudices about young people's moral status (eg., as not quite human or deserving of human rights and thereby deserving of the full protection of the law). In particular there is a risk that seeking exemptions as is permitted by the Charter will not only override young people's rights, but will make things worse by embedding and reinforcing prejudicial assumptions, many of them widely held in the community in current law and policy. In other words the mechanism for seeking and granting exemptions for the rights specified in the Charter clearly rely on and reinforce stereotypical beliefs about the adolescent or teenager as potential or likely delinquents or 'would-be graffiti offenders' (VEOHRC 2008). This in turn may compound the way these attitudes enter into the formation of self identity by young people as they are internalized by young people themselves.

The point is simple: paradoxically Victoria's Charter may well embellish the very problem it was ostensibly established to address namely the fact that young people were, and in many contexts are still not entitled to certain human rights that all other citizens are. This aspect of the Charter's operation in conjunction with the various regulatory practices already in place that over ride young peoples rights, combined with inequitable inter-generational power relations will mean that young people will not be any more able now to use legal and other protective

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19 A right already guaranteed to all Victorians, including children and young people, under section 12 of the Charter
20 Interview with Bernie Geary OAM, Child Safety Commissioner, 8 October 2008 cited in VEOHRC 2009:149
mechanism to defend themselves than they were before. Indeed the Charter contributes to the continued possibility of abuse of power. The conditions for producing docile bodies subject to the power and whims of adult-authority figures have been historically created through an amalgam of regulatory mechanisms and narratives about the adolescent. In this way the ‘lost generation’ becomes a tragic metaphor not only of the realities of harm and neglect but also for abuses that arises when potent power is accorded to some over vulnerable others. These long-standing presumption have for too long sanctioned an absence of respect which in turn has in some instances systematic enabled cultures of abuse and maltreatment of young people, in the guise of ‘welfare’ at the hands of their ‘carers’ (Briggs 1996).

TWO YEARS ON: 2008

In its report for 2008 VEoHRC concluded that ‘two years into this new aspect of legislative scrutiny, it appears that the Victorian Parliament is beginning to actively engage with the territory of human rights’. It argued that Victoria’s engagement with human rights ‘continued to evolve, with positive developments occurring during 2008’. It noted that SARC dealt with an expanded number of new bills (ie.98 bills) assessing all of them for compatibility with the Charter during 2008.

Apart from the fact that like the previous year no override declarations were enacted by the Victorian Parliament VEoHRC also claimed that in general, the statements of compatibility accompanying Bills were 'rigorously prepared, with a number of statements standing out for their accessibility ... and clarity.... This it said owed much to the work of the Scrutiny of Acts and Regulations Committee which ‘continued to approach its role diligently and thoroughly, delivering a high standard of scrutiny. SARC also provided more opportunities for community input into the human rights implications of Bills’. VEoHRC’s analysis of the legislative program for 2008 pointed in summary form to the following:

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<tr>
<th>Description</th>
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<tbody>
<tr>
<td>No engagement of human rights</td>
<td>16</td>
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<tr>
<td>Engages and promotes human rights</td>
<td>2</td>
</tr>
<tr>
<td>Possible engagement discussed, rights not limited</td>
<td>16</td>
</tr>
<tr>
<td>Engages and limits human rights, however the limitation is reasonable</td>
<td>19</td>
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VEoHRC also observed approvingly that ‘there was active parliamentary debate about the human rights implications of a number of bills’, suggesting that the Victorian Parliament as a whole was ‘beginning to engage with the implications of the Charter and human rights principles in relation to legislation.’ This acknowledged the fact that during 2008, some 18 bills generated active discussion about the human rights implications of those bills. Equally VEoHRC allowed that it was not possible to establish whether this number represents too few, too many or the ‘correct amount’.
Among the bills selected for detailed attention was the Summary Offences Amendment (Tattooing and Body Piercing) Bill 200. This bill again effectively made it legal to engage in age based discrimination by regulating the conduct of body piercing, tattooing and "like processes" in relation to young people. Both the government and SARC agreed that it was reasonable to restrict the availability of Tattooing and Body Piercing procedures in relation to young people, because these limitations which were 'potentially discriminatory' were reasonable because it promoted their health and well-being. It is always a worry when people wanting to prevent a whole class of people from doing something they may wish to pursue by using an age marker, defend their actions on the basis that this is only 'potentially discriminatory'; this is akin to saying that a woman in her third trimester is only 'potentially pregnant'. No evidence was led at the case made that the health risks associated with tattooing or body piercing were somehow greater for people under 18 than for older people. SARC contented itself by observing that the ban on all intimate body piercing on the part of 16 to 17 year olds 'may be disproportionate to the goal of protecting young people' and may lead individuals to pierce themselves or obtain services from non-commercial providers.

Even more serious concerns were raised about the Major Crime Legislation (Amendment) Bill 2008. This bill extended the definition of 'organised crime offence' to ensure that serious and organised crimes involving the abuse of children and paedophilic networks were brought within the reach of the legislation while prescribing procedures for revocation of coercive orders.

The members of SARC expressed concern that the government's statement of compatibility did not address the question of whether the extension of the coercive powers scheme conflicted with Charter human rights. In its Alert Digest No 9 of 2004, SARC identified numerous concerns about the scheme restricting privacy rights and rights in criminal proceedings.

SARC also referred back for parliamentary consideration those clauses allowing a court to determine certain proceedings on the basis of evidence that was being kept secret from a party and their lawyers. In some instances, this could result in the matter being determined without a fair hearing. The statement of compatibility did not address why less intrusive measures were not available. SARC indicated that it would write to the Attorney-General seeking further information as to whether less intrusive schemes in other jurisdictions could reasonably achieve the purpose of protecting confidential intelligence information.

As VEOHRC noted the Attorney General's response to SARC had not been tabled when VEOHRC was completing its annual review.

Finally VEOHRC acknowledged some major concerns about the government's extraordinary decision to extend the exclusion of the Adult Parole Board, the youth Parole Board from the reach of the Charter. The Commission argued that the government had failed in particular to provide sufficient information to explain why the functions of these Boards was so different to that experienced by many other public authorities as to warrant their exemption from the Charter.

THREE YEARS ON: 2009
2009 proved to be a more interesting year. VEOHRC observed somewhat benignly that the human rights dialogue was progressing ‘relatively positively’ in 2009. Departments had ‘generally tabled well-drafted Statements of Compatibility, some containing a robust analysis of human rights issues’. SARC had continued to ‘provide vital all-party scrutiny of Bills’. Parliamentary debates had made increasing reference to the Charter, ‘sometimes articulating complex and considered comment in relation to human rights issues’. VEOHRC also saw this as evidence that the ‘dialogue model’ was alive and well as members of the political community were making increasing reference to international jurisprudence in addressing whether and how legislative provisions may limit human rights, an encouraging development that the Commission said it would continue to monitor in 2010. VEOHRC also noted that back in 2008, it had urged that greater public consultation about the human rights implications of draft legislation be pursued. VEOHRC noted that a total of 29 Bills or legislative proposals had seen some form of public input in 2009 – including DHS/DH’s extensive consultations in relation to its review of the Mental Health Act 1986, during which more than 200 submissions were received. As in previous years no override declarations were enacted by the Victorian Parliament.

Formally in 2009 there were 109 statements of compatibility tabled of which 40 generated active exchanges involving differences of view. SARC itself 33 bills which it asked for ministerial responses.

On a more critical note the Human Rights Commission noted that SARC and some members of parliament had emphasised the need for Statements of Compatibility to more ‘rigorously address the elements of section 7(2) of the Charter when it is being asserted that limitations on rights are reasonable and permissible’. VEOHRC (2010:10) noted that in spite of the work of the Victorian Parliament’s Scrutiny of Acts and Regulations Committee (SARC), a number of Bills were ‘still being introduced into the Parliament without sufficient scrutiny and consultation’. (This occurred typically when the speedy passage of Bills precludes SARC from reporting on the compatibility of a particular Bill before it is subjected to a vote). This criticism was relevant to the controversial Summary Offences and Control of Weapons Acts Amendment Bill 2009 it pointed to ‘the failure to undertake community consultation prior to enacting legislation acknowledged as being incompatible with the Charter.’ VEOHRC also commented that while steady progress was ‘occurring across government, reports from departments indicate varying levels of integration of the Charter into departmental processes’.

However 2009 also saw the tabling of the first statement of (partial) incompatibility since the introduction of the Charter which triggered a major fuss erupted over the first statement of incompatibility concerning The Summary Offences and Control of Weapons Acts Amendment Act 2009 amending the Summary Offences Act 1996. The introduction of The Summary Offences and Control of Weapons Acts Amendment Act 2009 followed a lot of tabloid media discussion about safety on the streets. The legislation empowered police to direct people to
move on from an area if they were reasonably suspected of breaching the peace, endangering safety or damaging property, or if there was a likelihood of this occurring. The Act also amended the Control of Weapons Act 1990 to strengthen an existing power to search for weapons. Amendments allowed a search on reasonable suspicion to include the power to strip search. The amendments also give police a new power within temporarily designated areas to randomly search persons or cars for weapons without suspicion that someone is carrying a weapon. This power was not premised on police having first formed a 'reasonable suspicion' that a person was carrying a weapon but on there being a likelihood of weapons-related violence occurring in the designated area.  

The statement of incompatibility accompanying the Bill acknowledged that it was incompatible with the Charter to the extent that it would limit privacy rights in providing powers for police to randomly search persons (including children) and vehicles, even if the police had not formed a reasonable suspicion that the person or vehicle was carrying a weapon. These provisions would also be incompatible with the right of children to protection of their best interests (VEOHRC 2010: 119). A modest furor erupted over the Bill. Prior to tabling its own report, SARC accepted 34 submissions from a range of organizations in the government and non-government sectors. Criticisms of the legislation were also aired in Parliament.

VEOHRC took the view that the government had not demonstrated that the curtailment of rights through these increased police powers would result in a reduction in alcohol-related violence or knife-crime, or lead to any improvement in community safety. VEOHRC also took the view that while a case might have been made for such powers, the government did not undertake the kind of rigorous assessment of human rights issues that might have been expected given that this legislation was the first bill to be identified formally as incompatible with the Charter (VEOHRC 2010: 9).

Indeed VEOHRC noted that the Minister for Police and Emergency Services had acknowledged that various provisions of the Bill involved limitations on human rights that were not reasonable and justified even as he confirmed the government’s intention to push the legislation through. The Commission put the view quite strongly that the statement of incompatibility “lacked the necessary detail and level of explanation required by the Charter” (VEOHRC 2010:119). VEOHRC noted that “despite acknowledging certain incompatibilities, little explanation was provided and the statement did not appear to fully address the requirements of section 28(3)(b) of the Charter – namely, that the nature and extent of an incompatibility be disclosed”. It was a sorry episode testimony of nothing else to the capacity of tabloid news outlets managing a governments agencia on law and order issues at the expense of a proper regard for human rights legislation. VEOHRC poked through

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2The legislation allowed police to declare that an advertised ‘planned’ designation of a search area could be made where there had been more than one incident of weapons-related violence or disorder in the proposed area over the previous year or where weapons-related violence or disorder had been associated with a particular event or celebration and is likely to recur. ‘Unplanned’ designation of a search area dealt with situations where police received intelligence that it was ‘likely’ that violence or disorder involving weapons would occur in the area.
the ashes of this event looking for some saving grace finding it in the idea that at least the minister chose to 'be forthright about the Bill's incompatibility with the Charter' and 'did not seek to strain a section 7(2) analysis in order to assert that the relevant amendments comply with the Charter'. VEOHRC also approved of the fact that the Minister did not issue an override declaration (under section 31(1) of the Charter) which it said would have 'set a low threshold for such declarations in the future' (VEOHRC 2010: 120).

FOUR YEARS ON: 2010

In its final review of what proved to be the last year of the Labour government first elected in 1999, VEOHRC expressed its view that whilst the dialogue model was continuing to develop there were still occasions to worry. VEOHRC concluded e.g. that SARC, an all-party parliamentary committee to scrutinise legislation, continued to provide 'a sensible, balanced and transparent mechanism for assessing the human rights impacts of proposed laws and informing parliamentary debate.' In formal terms a total of 90 bills were introduced in 2010. There was no engagement with human rights or else the legislation promoted human rights in 48 cases. SARC also agreed that while there were possible limitations of rights these were reasonable in another 42 Bills. There were also 40 SARC requests for Ministerial responses to Charter issues with 31 Ministerial responses. Again the Victorian Parliament did not make any override declarations in 2010.

However VEOHRC commented that while the scrutiny process was functioning reasonably well, the need for speed sometimes trumped careful assessment of the human rights implications of legislation. VEOHRC pointed to examples where legislation, such as the Sentencing Amendment Act 2010, which 'was passed before SARC was able to provide its report to the Parliament'. There was also an example where SARC was asked to undertake a special inquiry in possible amendments to exceptions and exemptions in the Equal Opportunity Act 1995 (a reference from the Governor in Council), and the Government introducing changes to the legislation in March 2010 before responding to the SARC report.

In 2010, the Government also tabled another statement of incompatibility in respect to the Control of Weapons Amendment Bill with the Charter. This was the second such statement. The bill among other things relaxed the circumstances in which the Chief Commissioner may make a planned or unplanned designation of an area for the purpose of enabling weapons searches to be conducted in that area. The Chief Commissioner of Police was entitled to make an 'unplanned' designation if satisfied that 'more than one incident of unlawful possession, carriage or use of weapons, or of violence or disorder involving weapons, has occurred in the area in the previous 12 months', or that 'it was likely that such an incident would recur'. The 'unlawful possession, carriage or use of weapons' could therefore provide a basis for making the unplanned designation, rather than merely violence or disorder involving weapons'. The Second Reading Speech acknowledged that unplanned designations were therefore not limited to only the most urgent of circumstances. The Bill also relaxed the requirement that weapons searches of children or those with impaired intellectual functioning be conducted in the presence of a parent, guardian or independent third person. The statement of
incompatibility acknowledged that the Bill ‘exacerbated the ‘incompatibility of the control of weapons scheme with the right to privacy, the right to liberty and security and the right of children to protection of their best interests’ (VEOHRC 2011: 21).

In what seemed to be an exercise in looking for a silver lining with a magnifying lens when the Department of Justice observed that, while its Bill was partially incompatible with human rights: ... the Charter helped frame discussions within government in the development of the Bill and required that the Government publicly explain its reasons for departing from rights in this context. In this way, the Charter has had an impact in increasing government transparency and accountability.

The Minister’s explanation again pointed to the power of tabloid news outlets referred to here as ‘community opinion’. He argued that:

Whilst the random search powers introduced in late 2009, as used in planned designated areas, have been effective in the detection of offenders and in deterring others from offending, the community’s concern about the level of violence involving the use of knives and other weapons in public places has not abated. It is necessary to ensure that police are empowered to do everything that they need to do to prevent and deter weapons-related offending. Whilst the amendments in this Bill will not alleviate the incompatibility of the existing provisions, they are necessary to ensure the operational effectiveness of these critical police powers. The government strongly believes that effective and workable random search powers are important for preventative and deterrent reasons, including the protection of children.

Critics of the legislation like Liberty Victoria, the Law Institute of Victoria and youth legal services argued that that the bill was unwarranted and would be an ineffective adjunct to the Control of Weapons Act 1990 and pointed out that The Summary Offences and Control of Weapons Acts Amendment Bill passed in 2009 had already allowed for the designation of ‘planned’ and ‘unplanned’ search areas. The legislation allows for sweeping stop-and-search powers in those areas. Equally and prior to 2009, under the Control of Weapons Act 1990, the Crimes Act and other associated acts, the police had the power to deal with weapons/knife related crime. Those powers involved being able to search people with or without a warrant when there was ‘a reasonable suspicion’. Others raised concerns about the ability of police to search children including the use of strip searches, and the absence of any limit on the age of a child who could be strip-searched under the existing act, as amended. Again the Government pushed the legislation through without amendment apparently content that it had got the balance right between ‘community opinion’ and human rights.

More worrying was the way another major piece of legislation saw politics trump human rights enabling the government to legalise the practice of discrimination. This took place when the government introduced its Equal Opportunity Bill 2010 which repealed the Equal Opportunity Act 1995.
The politics around this Bill was both fierce and unrelenting. On the one side civil rights groups were astonished by the decision to legalise discrimination based on a person's religious beliefs or activities, sex, sexual orientation, lawful sexual activities, marital status, parental status or gender identity. On the other side the Catholic Church and the Boilieu Coalition Opposition (and now in government) denounced the legislation in both houses of Parliament. For its part the Catholic Bishops moved quickly to frame the inquiry as an attack on the right to religious freedom. In a Pastoral Letter from the Catholic Bishops [2009] pointed out that:

The exemptions protect the particular priorities that the Church gives to the importance of marriage and sexual ethics in establishing the security of families as the basic unit of society, and respect for human life from conception to natural death. It is important that religious people are able to uphold a theological understanding of gender and of sexual ethics and life matters and that they not be prevented from giving witness to those authentic values that are essential to community life.

As the Bishops also noted they ‘only’ wanted exemptions with respect to:

... seven attributes – religious belief or activity, sex, sexual orientation, gender identity, lawful sexual activity, marital status and parental status or status as a carer.

What was at stake was made clear in the Pastoral Letter when the Bishops noted firstly that:

... the religious identity of Catholic schools has a particularly formative role given that the formation of students is the purpose of the activity. Parents choose a religious education for their children in the expectation that the institution will educate their children according to the teachings and traditions of that religion.

The Bishops then criticised the argument made by SARC that it was unacceptable:

... for a church to refuse to employ a receptionist on the basis that he or she is in a de facto relationship [pages 113-114]. A receptionist in a religious school is in a position to influence the formation of students and if he or she were to be made known to the students a lifestyle matter such as that, which clearly contradicted the teaching of the Church, the religious identity of the school may be compromised if the situation were to continue.

The Opposition took much broader swipe at the legislation as it rejected changes like the Commission’s expanded investigatory and inquiry functions, the capacity of the Commission to issue compliance notices, the ability of the Commission to issue practice guidelines which could be considered by VCAT or a Court introducing a proactive duty for employers, businesses and others bound by the act to take what it refers to as ‘reasonable and proportionate measures’ to eliminate discrimination. Astonishingly the Opposition were critical of what it took to be a restriction of the freedom of religious belief exemptions for schools and other bodies to specified attributes apparently narrowing the exemption from employment discrimination to cases ‘where conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position’. The Opposition claimed that it would be almost impossible, “based on established cases”, for faith-based schools or other bodies “to demonstrate that any degree of conformity in either beliefs or lifestyle with the doctrine of the
faith [was] an inherent requirement of any position that exists to perform a secular function such as teaching maths or science’ (SARC 2011:31).

This Bill re-enacted and extended the law relating to equal opportunity and protection against discrimination, sexual harassment and victimisation. (It also amended the Racial and Religious Tolerance Act). In all sorts of ways this was important legislative reform. It acknowledged the close links between anti-discrimination and equal opportunity legislation and the regard for human rights embodied in the Charter. It acknowledged the force of criticism by scholars like Thornton (1990), Hunter (2002), Gaze (2002) and Charlesworth (2009) who have documented the longstanding problems with anti-sex discrimination and equal opportunity legislation in Australia like its reliance on complainants and the lack of capacity to address systemic discrimination. Charlesworth (2009) e.g. pointed out that:

... close analysis of case law has highlighted the narrowness and complexity of the Sexual Discrimination Act’s direct and indirect discrimination provisions, which together with its individual complaints-based model and ineffectual enforcement processes have emerged as major structural problems...

As she noted:

All these problems [have been] exacerbated by the increasingly narrow judicial interpretation of anti-discrimination statutes and of the International law on which they draw ... Empirical studies of the operation of the [Sexual Discrimination Act] suggest its implementation is also flawed -highlighted by growing formalism and a ‘creeping legalism’ with a concentration on procedural fairness that ignores the power disparity between complainants and respondents, as well as a more time-consuming and less transparent conciliation process than has historically been the case in the industrial relations jurisdiction ...

This is why the Bill clarified the role of VEOHRC giving it a clear mandate to enhance its research and educational roles. It also gave the Commission the ability to investigate serious systemic discrimination in the absence of individual complaints and the power to conduct a public inquiry with the consent of the Attorney-General ‘engaging directly with duty holders to reach enforceable undertakings and issuing compliance notices where systemic discrimination is found to have occurred’. These were important and major refinements to the older Equal Opportunity Act. So too was the clarification of what discrimination looked like and what the remedies should look like. The legislation provides that ‘direct discrimination occurs if a person treats, or proposes to treat, someone with an attribute unfavourably because the other person has the attribute’. [This clarification removed the ‘technical difficulties’ associated with the requirement in the Equal Opportunity Act. 1995 to ‘compare the treatment of the person with a person in the same or similar circumstances’]. It even made clear that taking special measures to address the disadvantage of a particular group protected by the Act was not discrimination.

Given all this, it is astonishing that the legislation also made it lawful for religious organizations,
religious schools and individuals to lawfully practice discrimination. The government argued that:

... framing the religious exception involves striking the balance between freedom of religion and freedom from discrimination.

While discrimination by religious bodies and religious schools would no longer be allowed on grounds such as race, age and impairment, discrimination would continue to be lawful on other grounds including religious beliefs, sex and sexual orientation when 'justified' by particular religious doctrines. What was at stake was the status of people whose religious beliefs or activities, sex, sexual orientation, lawful sexual activities, marital status, parental status or gender identity were deemed to affront some aspect of a religious organization's 'religious beliefs'. The government claimed that this:

... limitation of human rights was warranted because to be lawful the discrimination in question 'either must conform with the religion's doctrine or must be reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion. The addition of the word 'reasonably' in clauses 82(2)(b) and 83(2)(b) incorporates an objective element in the provision so that action must not only be necessary to avoid injury to the religious sensitivities of adherents of the religion, but also must be reasonable (Cited SARC 2011:26).

In South Africa the great human rights judge Albie Sachs noted (in Christian Education South Africa v Minister of Education (2000) 9 BHRC 53, [at (35)]) that there is a question in any open and democratic society based on human dignity, equality and freedom and where both the play of conscience and religious freedom have to be regarded with appropriate seriousness, as 'to how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not'. In Victoria it seems that the government took the view that the whole point and purpose of both anti-discrimination law and human rights law, namely to uphold the dignity of all humans including women single parents and gay and lesbian people could be trashed.

Firstly as Sachs noted, what was at stake was a question about the extent to which secular law applies to religious employers which impacts on a large number of employees. How large? It is quite difficult to say with any clarity or accuracy how many people Australian churches employ but there is certainly a large number affected. The Australian Productivity Commission (2010) eg., estimated in 2010 that there were some 890,000 people employed by Not-for-Profit organizations -not all of whom were churches. There were at least 40,000

22 The government noted that Clause 82(1) allowed discrimination in relation to the training and appointment of priests, Ministers of religion or members of a religious order. This limits the right to equality. However, it promotes the right to freedom of religion. Likewise it claimed that Clauses 82(2) and 83(2) allowed religious bodies and religious schools to discriminate on the grounds of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity, where this is required to avoid conflict with their religious doctrines or where it is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion. This limits the right to equality but protects the right to freedom of thought, conscience, religion and belief, important in a pluralistic society that values freedom of religion (SARC 2011: 26-7).
designated 'religious employees' to which we can safely add several hundred thousand employees working in the healthcare, hospital, education, and social service sectors who are employed by Church-based organizations. The Catholic Church alone is a significant employer with employees engaged in diocesan and parish administration, pastoral care and the provision of schools and universities, health and community services.

Secondly we are talking about a fundamental idea namely the idea that in a society committed to the rule of law a government has now outlined a set of human rights. To be very clear as a minimal idea the idea that there are now in Victoria human rights spelled out by an Act of Parliament means this: it is now unlawful to prevent someone exercising the relevant right. As Barry (2005:19) puts it:

... to say that people have a right to do something is to say only that they are not prohibited from having it or doing it. A woman's right to appear in public dressed as she chooses and in the company of anyone she likes, is simply the absence of any such prohibition ... on doing such things.

Or to assert that children have a right to formal education is to say minimally that no one lawfully is able to prohibit children from receiving such a formal education.

In Victoria this means that it is unlawful to try to prevent people from exercising their right to 'freedom of thought, conscience religion and belief' just as it is unlawful to deny to people their right to equality before the law. That of course is precisely what a few church groups are seeking to do namely deny to a substantial number of people (including divorced people, people living in de facto relationships and non-heterosexuals) their right to equality before the law.

Some have claimed to see an inherent conflict between two sets of rights. This is a puzzling claim. The Bishops representing the Victorian Catholic Church have claimed that there is some kind of theological problem involved in recognising or employing people like divorcees, people living in de facto relations or non-heterosexuals. When the Victorian Bishops claim that there is some 'theological matter' at stake, it is not clear what this means. Many leading Christians do not support seeking exemptions from anti-discrimination legislation by some churches. Anglican Bishop John McIntyre [2009] pointed to the theology at stake when he commented that it is:

... bizarre that the followers of Jesus Christ would oppose, and ask for exemptions from, a legal instrument that has at its heart a declaration of the dignity and value of every human life and the basic rights of every person. Jesus of all people, would champion an affirmation of fundamental human rights, which especially benefits marginalised groups in society and those least able to protect themselves. ... It is even more perplexing ... that ... [(]In Victoria, the churches are arguing for the continued right to be exempted from obligations under the Equal Opportunity Act that would require them to uphold
universally recognised human rights in matters of employment by church organisations.

Indeed it is quite clear that the Catholic Church opposes the very discrimination which its Victorian Bishops now wish to practice. We should not forget that the Catholic Church has consistently affirmed the dignity both of all humans and of all workers beginning in 1891 with Rerum Novarum by Pope Leo XIII, and continuing to recent times with Gaudium et Spes, Laborem Exercens and Centesimus Annus. To be really clear the Catholic Church itself outlaws the kinds of discrimination based on the relevant operational Apostolic Constitution. That Apostolic Constitution is called Gaudium et Spes. It says:

... every type of discrimination, whether social or cultural, whether based on sex, race, colour, social condition, language or religion, is to be overcome and eradicated as contrary to God’s intent.\(^{23}\)

Again the Australian Bishops’ Committee for Industrial Affairs (BCIA) issued a clear statement (Industrial Relations - The Guiding Principles) in 1993 to draw attention to fundamental principles of morality and social justice. This was set against the new industrial framework of workplace reform and enterprise bargaining. (ACCEER 2002). ACCEER (2002) eg notes:

At any level, Church organisations should develop policies that prohibit discrimination (direct and indirect) and harassment (physical, emotional, racial, religious and sexual). This includes working towards a balance of men and women in the workplace, and especially of women in leadership positions. This might require the adoption of policies and practices that are flexible and accommodate the demands of family and personal life.

THE CHARTER AND THE COURTS

In 2007 President Maxwell of the Victorian Court of Appeal in the course of an important case (Womens Hospital v. Medical Practitioners Board of Victoria) observed that there were three important ways in which international human rights law and jurisprudence could be relevant to Victorian law\(^{24}\). He noted that firstly statutes should be interpreted and applied, as far as language permitted in conformity with international human rights treaties. Secondly international human rights law could be used as a legitimate guide to the development of the common law. Finally the provisions of an international human rights treaty to which Australia is a party may serve as an indicator of contemporary values and the public interest. As President Maxwell also acknowledged the development of Australian jurisprudence informed by human rights principles was ‘still in its early stages’.

That this is so is suggested by the anomalies which the Charter has set loose and have already been noted in Chapter One. Among those anomalies is the way the Charter defines Victoria’s

\(^{23}\) Gaudium et Spes (Latin for Joy and Hope) is the Pastoral Constitution on the Church in the Modern World, was one of the four Apostolic Constitutions resulting from the second Vatican Council. Approved by a vote of 2,307 to 75 of the bishops assembled at the council. It was promulgated by Pope Paul VI.

\(^{24}\) Paras 75-77.
courts. The Charter treats Parliamentary committees, courts and tribunals as ‘public authorities’ for the purposes of the Charter only when they are acting in an administrative capacity. Otherwise when they are doing what they are supposed to do, they are excluded from the obligations imposed on public authorities. That is when acting judicially, courts and tribunals are not captured by the duty imposed on public authorities (at § 38 of the Charter) namely to act compatibly with human rights and to give proper consideration to relevant human rights when making a decision.

This means e.g. that when a court issues warrants or lists cases that court is fulfilling an administrative role and only then in this circumstance is it obligated to be compliant with the Charter. On the other hand when it is carrying out its normal judicial functions, like running a trial process to determine the guilt or innocence of a defendant charged with committing a criminal offence the decisions made by a judge through the course of that hearing is a judicial function and so is not bound by any obligation to be compliant with the Charter.

However at section 6, which deals with the application of the Charter to courts and tribunals when they are acting in their judicial capacity the Charter (at § 6 says):

(2) This Charter applies to—

(b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3

Here the Charter specifies the role of courts and tribunals when interpreting statutory provisions and determining whether or not to refer relevant questions of law to the Supreme Court. The Charter applies to the Supreme Court in relation to its discretion to make a declaration of inconsistent interpretation. The point of uncertainty and debate is the implication of the Charter applying to courts and tribunals ‘to the extent that they have functions under Part 2’. This is where a crucial ambiguity appears to lurk which has led VEOHRC (2009) to see three possible interpretations available. Part 2 of the Charter sets down and defines the rights that are protected by the Charter. Accordingly, the question that arises in relation to section 6(2)(b) is whether it puts obligations on courts and tribunals to:

- All the rights set down in Part 2 (the broad approach)
- Those rights set down in Part 2 that are inherently linked to, and potentially impacted upon, by the role of courts and tribunals (the middle-ground)
- Only those rights in Part 2 that are solely directed to courts and tribunals (the narrow approach (VEOHRC 2009: 123-4)

As VEOHRC noted it seemed that an early adjudication on this matter would resolve this question. However as VEOHRC (2009: 124) explained this did not happen. In 2009 a number of

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25 In early 2008, the Supreme Court was set to consider and make a decision on the meaning of section 6(2)(b). In the matter of Korte v. Min and Min. Both the Attorney-General and the Commission intervened in this matter; however the question lapsed and the Court was not required to express a view on section 6(2)(b). In a matter before the Mental Health Review Board, 09-002, the Board endorsed the narrow approach; however, the Board expanded the scope of the narrow approach beyond that proposed by a number of commentators to include the right to a fair hearing. This decision was appealed to the Victorian
cases before the Victorian Civil and Administrative Tribunal provided a response. VCAT held in the matter of Kracke v Mental Health Review Board & Ors [2009] VCAT 646 (Kracke), that the human rights in Part 2 of the Charter that potentially applied to courts and tribunals under section 6(2)(b) were those specified in sections 10(b) (in its reference to punishment), 21(5)(c), 21(6), 21(7), 21(8), 23(2), 23(3), 24(1), 24(2), 24(3), 25, 26 and 27. That is to say using VEOHRC’s taxonomy that VCAT upheld a slightly modified version of ‘the intermediate interpretation’ of section 6(2)(b). As VCAT noted this list was not intended to be definitive or final. Justice Bell as the President of VCAT, noted that ‘[t]he actual engagement and application of these human rights for courts and tribunals depends upon the scope of the right concerned and the facts and circumstances of the individual proceeding.’ This view was not tested or approved by the Supreme Court through 2009.

Notwithstanding the apparent lack of clarity and the odd definition of ‘public authority’ being used to constrain any capacity to bring Victoria’s judicial system into the modern era of human rights practice, VEOHRC maintained a cheerful optimism. In 2007 it bravely insisted that the Charter would affect the way the courts worked in a number of beneficial ways. VEOHRC insisted e.g. and without explaining itself that the Charter’s ‘procedural and compliance provisions’ matter as does the fact, likewise unexplained, that ‘a broad range of civil and political rights now forms part of the law of Victoria’. This VEOHRC (2008: 81) says is because:

From 1 January 2008, all Victorian statutes must be interpreted in a way that is consistent with the rights enshrined in the Charter (within the parameters of their purpose). There is an express mandate to consider international human rights law and jurisprudence when seeking to interpret Victorian laws consistently with Charter rights. The Supreme Court is empowered to issue declarations of inconsistent interpretation where it is of the opinion that a statutory provision cannot be interpreted consistently with the Charter.

The question is how much of this has actually happened. Granting that the Charter was not fully operational until 2008 which meant that the relevant procedural provisions of the Charter had not commenced operating until January 2008, there were no cases heard by Victorian courts in which Charter rights were raised explicitly.

However several matters that were dealt with in 2007, began to indicate the way the Charter might begin to have an impact in some court processes. How much these cases reflect an imaginative response by individual judges to the possibilities of using human rights frameworks is not immediately clear. For example, in the case of R v White [2007] VSC 142 (Supreme Court of Victoria 7 May 2007). Justice Bongiorno made reference to the Charter in suggesting that the experiences of one defendant were not compliant with the Charter though his thinking on this matter had no practical legal effect. The defendant who had been found not guilty of murder

Civil and Administrative Tribunal (see Kracke v. Mental Health Review Board & Ors and the decision was still pending at the end of 2008.  
24 Section 32(1) Charter  
25 Section 32(2) Charter  
26 Section 36 Charter
on the grounds of mental impairment and had been in custody since his arrest in 2005. The intention was that the defendant would be placed in an appropriate hospital. However, at the time of the hearing there was no bed available and one would potentially not be available for more than two months. This meant that the defendant would be confined in prison, even though he had been found not guilty. Justice Bongiorno noted the inappropriateness of imprisoning people who had been found not guilty on the grounds of mental impairment and that this was contrary to the spirit, if not the letter, of the Charter.

In another case (Tomasevic v Travaglini & Anor [2007] VSC 337 (Supreme Court of Victoria 13 September 2007)) the appellant was a self-represented litigant who sought leave to appeal out of time. In responding to this request, the presiding judge, Justice Bell gave consideration to his duty to assist a self-represented litigant. Justice Bell noted that the International Covenant on Civil and Political Rights formed the basis of the human rights set out in the Charter, particularly such rights as the right to equality before the law and access to justice. Justice Bell stated that:

Apart from the Charter, the ICCPR does not 'operate as a direct source of individual rights and obligations' because it has not otherwise been incorporated into Australian law. But unlike other international instruments to which Australia is a party, the ICCPR has an independent and ongoing legal significance in Australia and therefore Victorian domestic law, a significance which is not diminished, but can only be enhanced, by the enactment of the Charter.29

Justice Bell confirmed that international instruments such as the ICCPR could be used to inform the interpretation of statutes, the exercise of statutory and judicial powers and discretions, the application and operation of the rules of natural justice, the development of the common law; and judicial understanding of the value placed by contemporary society on fundamental human rights.

During 2008, a relatively small number of cases came before Victorian courts and tribunals involving consideration of and engagement with the Charter. That there were not many cases was partly explained by courts and tribunals not being presented with Charter-related submissions or arguments. The Commission received 35 notifications of court and tribunal proceedings involving a question of law in relation to the Charter and exercised its power to intervene in four matters. Concerns by some that the full operation of the Charter would generate an abundance of litigation were shown to be unfounded. No declarations of inconsistent interpretation were made by the Supreme Court during 2008; nor was there a referral of a question of law involving the Charter to the Supreme Court. Equally however Justice Bell as president of VCAT set about trying to provide some clarity about a method for interpreting statutes in accordance with s32 of the Charter. Early in 2009, Justice Bell outlined a process for interpreting legislation in accordance with section 32:

29 Para 60
When interpreting legislation having regard to the Charter, the questions are: whether the legislation limits human rights, having regard to its interpretation and their scope; if so, whether the limitation is justified under the general limitations provision in s 7(2); if not, whether it is possible to interpret the legislation compatibly with human rights under the special interpretive obligation in s 32(1); and if not, whether the Supreme Court should exercise its power to make a declaration of inconsistent interpretation under s 36(2).

Justice Bell proposed that four steps to be taken could include engagement, justification, reinterpretation and a declaration of inconsistence between the Charter and the statutes in question.

Later in 2009, the Supreme Court considered this issue in Re an application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381 (Major Crime). On this occasion Chief Justice Warren noted that there was no single way to approach the interpretive task raised by section 32. However she affirmed the direction provided in RJE v Secretary to the Department of Justice [2008] VSCA 265 (RJE) that 'the first step is to ascertain the ordinary meaning of the legislation according to normal principles of statutory construction and to determine whether a result may be reached without recourse to the Charter.' The Chief Justice went on to note:

Where a result cannot be achieved in the usual course of interpretation, and recourse to the Charter is necessary, a variety of interpretative methods have been applied. In RJE, Nettle JA endorsed the approach of Mason NPJ in HK SAR v Lam Kwong Wai for its simplicity. It is an approach I would apply and which will be significant later in my reasons as to the construction and application of s 7 of the Charter (Cited VEOHRC 2010: 125).

In effect Chief Justice Warren was exploring whether any limitation of protected rights was justified before undertaking 'human rights interpretation'. This decision is consistent with Justice Bell's four-step approach though it does not rule out other approaches.

In 2009, VEOHRC insisted that as in previous years Victoria's experience with the Charter continued to indicate that there was no cause for concern about an 'avalanche of litigation' that might 'upset the balance of power between an elected parliament and an unelected judiciary' (VEOHRC 2010: 123). Indeed if anything the evidence of the last two years made it clear that advocates, courts and tribunals were all taking a cautious approach to the Charter. As for the Commission, it received 52 notifications (up from 35 in 2008) of court and tribunal proceedings involving a question of law in relation to the Charter and exercised its power to intervene in five matters.

On just one occasion the Charter enabled a significant reinterpretation of a statutory provision. This occurred in the course of an application by a member of Victoria Police to question a person under section 39 of the Major Crime (Investigative Powers) Act 2004 (MCA). Under that act, a member of the police could apply to the Supreme Court for a coercive powers order if he or she suspected 'on reasonable grounds' that an organised crime offence had been, or was likely to be, committed. Once summoned under this legislation, witnesses are compelled
to attend and give evidence. The Major Crime Act prohibits the direct use of such testimony against the person giving evidence, but allows indirect or derivative use of that testimony.

Before the Court considered the application, it requested that Victoria Police make submissions in relation to the Charter, querying whether the indirect use of compelled testimony would limit Charter rights. VEOHRC intervened to make submissions on this issue and ultimately the Court accepted many of the Commission's arguments. Chief Justice Warren concluded that the ordinary interpretation of the coercive powers order provision breached sections 24(1) [fair hearing] and 25(2)(k) [protection from testifying against oneself] of the Charter, the scope of which require a derivative use immunity for compelled testimony. The decision resulted in a reinterpretation of the coercive powers order provision in the Major Crime Act. The provision was reinterpreted, consistently with that Act's purpose, to protect an individual compelled to give incriminating evidence from the tender of evidence against them that was ascertained or discovered as a result of their testimony.

2010 proved to mark a modest watershed in the life of the Charter. The highlight came when the Court of Appeal decided that the Drugs, Poisons and Controlled Substances Act was inconsistent with the Charter in the case of R v Mincilovic. R v Mincilovic [2010] VCSA 50. The case began in 2006 when Vera Mincilovic was arrested for drug trafficking after the banned substance methylamphetamine was found in her Melbourne apartment. Mincilovic denied the charge. Her partner who lived with her, later admitted he was in possession of the drugs for the purpose of trafficking. They both denied that Mincilovic had any knowledge of the drugs or the trafficking operation. However, under section 5 of the Drugs, Poisons and Controlled Substances Act, Mincilovic was deemed to be in 'possession of the drugs' because they were found on her premises unless she 'satisfie[d] the court to the contrary'. That is the onus of proof was on her. When she failed to prove otherwise, a Victorian County Court jury convicted Mincilovic of trafficking.

Mincilovic subsequently appealed the judgement and argued before the Victorian Court of Appeal that, in light of the Charter, the Drugs, Poisons and Controlled Substances Act should be interpreted in a way that is compatible with human rights; in particular, her right to the presumption of innocence. The Court of Appeal ultimately refused her appeal, saying that it was not possible to interpret section 5 consistently with the right to the presumption of innocence. (See VEOHRC 2011: 44). This case has been appeal to the High Court of Australia through 2011 with hearings scheduled for July 2011. This is the first time that the High Court has considered the interpretable mandate in an Australian human rights statute. If the decision is upheld by the High Court, the declaration must be provided to the Attorney-General within seven days after the finalisation of the appeal (in accordance with section 36(6)(b) of the Charter).

As VEOHRC (2011:43) noted a number of other cases decided by the courts and VCAT added some additional clarity and transparency about the scope and operation of the Charter. VEOHRC has cited one case which lead an agency to review its service delivery practices in order to address systemic issues like Castles case (Castles v Secretary to the Department of Justice [2010] VSC 310). This case has contributed to a broader consideration of policies and
practices around access to health services by prisoners. Likewise the Sudi case [Director of Housing v Sudi [2010] VCAT 328], lead to a review of policy for residential tenancies.

In 2010, the courts have also used the Charter to look at the interaction between the Charter and the common law. In areas where the common law is well developed, such as the fair trial rights guaranteed in criminal matters, it is appropriate for the courts to continue to apply the common law where the protection mirrors the rights in the Charter.

VEOHRC has also noted how in some criminal matters the Charter has helped the courts to consider the content of the common law citing cases like Antunovic v Dawson & Anor [2010] VSC 377 where the Supreme Court addressed the right to liberty and security of a person [section 21 of the Charter] subject to involuntary mental health treatment. Equally not everyone in the judicial system has been pleased to address human rights issues. As VEOHRC noted jurisdictions such as the County Court have said argued that interlocutory appeals on Charter grounds can fragment the Court’s processes (VEOHRC 2011: 52).

CONCLUSION

It may safely be concluded that the Charter has been as successful as those who drafted it, wanted and designed it to be.

Debeljak [2007] rightly argued that ultimately the success of the Charter would depend on parliamentarians and governments taking rights seriously as a constraint on their actions. If recent experiences have suggested anything, it is that governments are swayed as much by regard to ‘public opinion’ as they are by a desire to do the right thing, and that if public opinion is careless about rights so then will parliaments be careless of rights.

A good case can be made of course that across a large body of legislation Ministers and their departments have found it relatively simple to abide by both the spirit and the letter of the Charter. It is also true that SARC between 2007 and 2010 carried out an heroic program of legislative scrutiny. Yet it is possible to argue that on too many occasions the members of SARC agreed with departments when Ministers said that any incompatibilities between the legislation and the Charter were ‘reasonable’ or necessary to meet public expectations. In too many cases this appeal to reasonableness simply meant that prejudices spread widely through the community were deemed to be more important than those things which human rights protect like the dignity of persons and the expectation that their interest in living flourishing live are as worthy of promotion and protection as anyone else’s. On occasion as we saw, the passage of some legislation made possible the most awful possibility, namely that the Charter was used to render discrimination and prejudice based on people’s age, gender or sexuality a lawful matter.

The government had always stressed that its preference was to give priority to the dialogue model. In this respect the fact we might conclude that the dialogue has been perfunctory at best. The fact that we have had only two Ministerial declarations about the incompatibility of new legislation with the Charter between 2007 and 2010, suggests that government
departments formed the view early that they would be able to secure passage of their legislation even when they knew aspects of it to be incompatible with the Charter, by simply not pointing to that incompatibility. If SARC noticed any incompatibilities the chances were that SARC would accept the departmental explanation.

Likewise the fact that to date the Supreme Court has made just one declaration of inconsistency suggests that Victoria’s courts and tribunals do not feel strongly impelled or empowered to protect Charter rights. In this respect the design flaws of the Charter become all too plain. This is a Charter that gives citizens nowhere to go to seek remedies when they believe that their human rights have been breached. Likewise the courts have been given a severely reduced and constrained role by the Charter. The Charter treats courts and tribunals as ‘public authorities’ only when they are acting in an administrative capacity. When acting judicially, courts and tribunals are not required by the Charter (at S 38) to act compatibly with human rights and to give proper consideration to relevant human rights when making a decision.

In these ways the Charter has delivered pretty much what it was designed to achieve in terms of the modest powers conferred on various agencies like SARC and the Courts to uphold the Charter. When the Labor government went to some pains in its Statement of Intent (2005) to insist that its Charter was a low-key approach to introducing a bill of rights into Victoria they meant to be taken seriously,
CHAPTER FOUR: STALKING HORSE OR TOOTHLESS TIGER? OBSERVING VICTORIA'S CHARTER OF HUMAN RIGHTS IN THE WILD

Human rights is still an amorphous idea in the community and this diminishes its effectiveness.
Bruce -Focus Group Participant 2010.36

One of the problems involved in assessing the value of the Charter is the muddle-headed thinking which even advocates for human rights can generate from time to time. In 2007 VECHRCA claimed in its first annual report e.g. that one of the things those who drafted the Charter wanted to do was to build ‘a culture of human rights’. It is hard to believe that VECHRCA seriously wanted us to accept the non sequitur involved when it went on to say apropos phrases like ‘Building a human rights culture’ or ‘Creating a new culture of human rights dialogue’.

While they represent exciting changes and developments, they can be difficult concepts with which to engage. In large part, this is due to the fact that Australia’s systems of government and broader public administration already contain the foundations of a healthy human rights culture (VECHRCA 2008:89).

Why the second sentence supports the first sentence is not made clear. Nor is it at all a self evidently truth that we already have the foundations of ‘a healthy human rights culture’.

This muddle-headedness is evident in the way the Labor government generally represented the Charter. Attorney General Rob Hulls said e.g. that the Victorian Charter seeks to reflect ‘the aspirations, values and circumstances of the Victorian community’. While this is a worthy sentiment, if the Charter did indeed reflect ‘the aspirations, values and circumstances’ of Victorians, we might well ask why the Victorian Government would have thought it necessary to introduce the Charter. There is more than a hint of denial at work in Hulls’ claim. It may be believed, even sincerely perhaps, by some agencies and their workers that ‘we’ are already committed to an ethos of human rights and so to that extent the Charter is ‘a bit redundant’. That disingenuous response is harder to deal with than the more honest scepticism (even hostility) on the part of other public servants who may neither understand, nor accept the relevance or the practical value of the Charter.

In fact one reason why we need a Charter of Human Rights and Responsibilities is the abundant evidence that we do not have a healthy human rights culture. There is plenty of evidence that too many Australians both working in government or living in the broader community find it easy to give expression to persistent discriminatory beliefs and forms of behaviour and to do so persistently. In this chapter I want to suggest some ways of thinking.

36 In referring to the research carried out in 2010, all names of the participants in the study have been changed. Likewise the identity of the agency and most of the departments named in the research have been de-identified in accord with the conditions on which the research was conducted.
about culture as part of an exercise in thinking about how the Charter might begin to change the culture of practice before turning to a case study of how one organisation in Victoria has addressed the Charter in its own practice.

Let me start with the idea that we do not have ‘the foundations of a healthy human rights culture’ but do have problems with persistent discrimination. Just two instances to support this proposition will have to suffice.

WHY DISCRIMINATION IS A PROBLEM

In 2006 in response to the UN Secretary General’s Study on Violence Against Children, the UN General Assembly set October 2009 as the target date for achieving the universal abolition of corporal punishment of children. By 2010 when this deadline which had come and gone, Australians in general, and legal officials of the various Australian governments in particular were still debating whether it should be lawful or not to ‘[C]ause or threaten to cause harm to a child that lasts more than a short period’ or that ‘causing harm to a child by use of a stick, belt or other object’ should be lawful or whether only a smack with an open hand should be seen as legally acceptable?

To be clear, Australians have yet to agree that corporal punishment of children ought to be prohibited in our homes, schools, penal systems and alternative care settings. The normal legal prohibition of unlawful assault apparently does not apply to our children since it is deemed appropriate that people including parents and other guardians have a right to use ‘reasonable’ degree of punishment or chastisement. In spite of all that we know about the effects of violence on children it seems that many adult Australians still have no trouble accepting the proposition that hitting, smacking, shaking, punching, pulling hair, scratching, burning, scalding or washing kid’s mouths out with soap is acceptable and implies neither a will to humiliate or degrade the children or teenagers to whom this is done. The situation in Australia is very simply summed up in one table:

<table>
<thead>
<tr>
<th>Territory</th>
<th>Home</th>
<th>School</th>
<th>Penal system</th>
<th>Alternative care</th>
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Table 1: Summary of Legality of Corporal Punishment of Children By Jurisdiction in Australia

80
NB: The sheer variability of what is/isn't allowed by way of terms like 'reasonable chastisement' and the different options allowed eg., when distinguishing between child care centres, different kinds of schools, residential care, foster care arrangements (etc) makes summary difficult.

One survey of parents conducted in Queensland by the Parenting and Family Support Center at the University of Queensland reported in 2007 that 71 per cent of parents smacked their children occasionally: of these 43 per cent said they would use their hand, 10 per cent said they would use their hand or a hard object (Herald-Sun 15 May 2007). In another survey of 720 adults (ie., people aged 18 +) in 2006 (for the Australian Childhood Foundation and the National Center for Prevention of Child Abuse at Monash University) 45 per cent said it was reasonable to leave a mark on a child as a result of physical punishment -down from a 2002 survey which found 55% believed that this was acceptable. One in ten respondents thought smacking a teenager was also acceptable. One in ten of these people said it using something like a cane, belt or stick was acceptable while 14 per cent suggested a wooden spoon was a good implement (Tucci, Mitchell & Godard 2006).

The second instance is possibly more dramatic. Late in 2006 members of the Armed Offenders Squad, a Victorian police unit were found to have resorted repeatedly to torture to beat confessions out of suspects (OPI 2008). As the Office of Police Integrity (2008:7) commented later:

It is hard to imagine a situation in any civilised society in which there is a greater imbalance of power than when a person is taken into police custody. [The Ombuds] report [has already] documented how members of the now defunct Armed Offenders Squad ‘acted in an uncivilised manner and exploited that power imbalance for a so-called “noble cause”.

The OPI report included audio-visual recordings of three instances of serious and sustained torture including this one:

At about 6:05PM, a purported 'welfare check' occurs when an unidentified police officer introduces the Squad inspector to the suspect. The Inspector can be heard saying: "It's going to be a long hard day for you, pal. It's going to be a long day for you. Alright, I suggest you listen to some of the advice that the boys are going to give you. It might be a lot less painful. A lot easier for you, alright?"

At about 6:17PM, the suspect is dragged from his chair and assaulted by the two members of the Squad. During the assault Officer One told the suspect to "Show us some fucking respect here" and, between slapping or punching the suspect, he said the words "Fucking ... Armed ... Robbery ... Squad".

At 6:21PM, shortly after the assault recorded above, an unidentified police officer enters the interview room and throws a box of tissues on the table and says words to the effect of "Don't bleed everywhere".

81
At about 6:50PM, in the presence of Officer Two, Officer One again assaults the suspect by slapping him to the left side of his face numerous times with his right hand. As he was assaulting the suspect, Officer One says words to the effect of "That ear is coming off by the end of the day".

As the OPI (2008: 33) concluded: it seemed that too:

Too many of [the members of the Armed Offenders Squad believed that the end justified the means] and that bashing a 'crook' was a community service. The Squad, through a lack of appropriate monitoring and accountability within Victoria Police, was allowed to develop its own culture, out of step with the organisation's direction. Its members drew comfort from the strong support they received from the Police Association.

In this respect, 'public opinion', as evidenced in media commentary and letters to the editor suggested that the public agreed with the Armed Offenders Squad. The public seemed to accept that police sometimes had to resort to beatings 'to get results' and that this enabled the public to feel safe.

These two instances suggest that we should not take the idea that we already have the foundations of a healthy human rights culture too seriously. Rather we can and should agree with YEOHRC (2009: 63) when it said that:

The enactment of the Charter is a catalyst for change in the culture of government - in terms of how government approaches its role and functions, as well as how it builds its relationship with the community. By the idea of a culture of human rights the Commission [means] to emphasise four things it wishes to promote including participation, accountability, non-discrimination and attention to vulnerable groups, empowerment and linking planning, policies and practices to human rights principles and standards.

If nothing else the idea of linking planning, policies and practices to human rights principles and standards gives us a basis for asking whether this is actually happening inside the various agencies that make up the Victorian government because we now have a Charter. One of the fundamental reasons we need a Charter and have a Charter is to address persistent discrimination. The formal identification and protection of human rights is integrally connected to trying to prevent the various harms that occur when people discriminate against other people.

One way of thinking about discrimination is to follow the modern approach adopted by governments who define it as the idea that a particular person or even a whole group of people can be or ought to be treated less favorably than another person or group because those people possess certain distinguishing characteristics. Those characteristics may include everything from skin colour, and national or ethnic origin, through their marital status, age,
physical or mental disability, and on to their religion, sexual preference or trade union activity (HREOC 2011). These characteristics are typically understood in ways that implies people with these characteristics are less intelligent, less competent and so less worthy or even less ‘human’. Australian governments have moved since the 1970s to make these kinds of discrimination illegal.

Yet there is another more subtle, even insidious form of discrimination which the Victoria police use of torture points to. Gelber (2011) e.g. points to this kind of discrimination in her discussion of the right to free speech and freedom of expression. As she notes, ‘free speech is a vital democratic freedom’ and is something most Australian take for granted: ‘If you were to ask most of us whether free speech exists in this country most of us would say yes’. However, as she goes on:

When you scratch the surface, this consensus on freedom of speech fractures, demonstrating that Australians are not as comfortable with free speech as we profess. From the burning of the national flag to preventing political protests to censoring artworks we consistently show a willingness to trample on this vital human right (Gelber 2011: 1).

Here we see another version of discrimination which focuses on certain kinds of behaviour especially what is thought to be aberrant behaviour. In the case of the Armed offenders Squad, the police took the view that the use of violence, the carrying of armed weapons and ‘standover’ techniques by criminals warranted them using violence, armed weapons and ‘standover’ techniques to stamp out that behaviour. By the time the OPI investigated these cases this belief and the use of torture it sanctioned had sedimented into a culture of practice. If there is one thing we do know it is that it very hard to change cultures of practice. Let me turn to a discussion of what I mean by these ideas of ‘culture’ and ‘practice’.

CULTURE AND PRACTICE

We frequently encounter other people who do things collectively in a particular way and of course we also belong to groups or organizations. This might involve being part of a particular family, being a member of a football club, being employed in a community health center or working as teachers in a school. One of the first things we notice about these groups is that the characteristic beliefs and ways of doing stuff which defines these people and what they do, is that their beliefs and behaviour are deemed to be normal, natural and right. This is so irrespective of any particular beneficial or harmful effects occasioned by their beliefs and behaviours. This is so even when certain attitudes and feelings lead to attacks on people’s dignities, or breaches of their rights, which may extend to really serious things like the use of torture or even mass murder.

31 Claudia Koontz (2006) in her study of The Nazi Conscience e.g., shows how Nazi behaviour followed logically and easily from a set of assumptions and beliefs about ‘traditional’ institutions values of honor, dignity, Christianity, and the primacy of the and the threat to order posed by ‘non-Aryans’, homosexuals, coloured people, criminals and the like. Similar ideas continue to appeal to conservatives today in countries like the USA, the UK and Australia.
being normal and right.

The Victorian Equal Opportunity and Human Rights Commission (2008) captured the naturalness of discriminatory beliefs and activities when it drew on the Attorney-General's Justice Statement to point out that discrimination occurs:

... when processes and practices become entrenched in organizations and are viewed as neutral and acceptable, but in fact result in discrimination against various groups who are often disadvantaged in other areas of their lives.

Discriminatory treatment experienced by groups like women, indigenous people, people with disabilities or children and young people rest on a bedrock of prejudicial beliefs which too many people simply treat as commonsense. This is because too many of us start with the premise that 'they' (e.g. women, young people or people with disabilities) lack certain abilities 'we' have, and therefore need to be protected in ways which deny them basic respect and rights. The arguments made in 2000 in the parliamentary debates about why age-based discrimination involved in a youth wage appealed to 'common sense'. It was said e.g. that young people were 'inexperienced', 'ethically immature', and not as intelligent as adults. It is noteworthy that these same arguments had been trotted out in the 1960s to justify not paying women equal pay for equal work.

Finally another difficulty is that all too frequently, as in the case of the Armed Offenders Squad, is that the discriminatory attitudes and behaviours are often wrapped up in a thick veil of good intentions. A lot of ordinary, well-intentioned paternalism on the part of perfectly decent, even well-intentioned professionals like teachers and human service workers, persists because of the assumption that they both know better than their students or 'clients', and who get easily miffed when their practices are queried. This gives rise to the practice of 'social ventriloquism' as professionals use words to describe or explain their students or 'clients' which are deeply offensive to those people even as they also talk for them as if they were not able to speak for themselves.

To put all this simply we confront here the problem of long-held prejudicial beliefs and practices which have sedimented culturally into a practice. Pierre Bourdieu is one writer who has contributed a lot to our understanding of human conduct - and to the problem of how to try to change some of this.

ON PRACTICE

Pierre Bourdieu's theory of practice is the linchpin of all his work. In it we see his distinctive refusal to embrace any way of understanding which pits 'the individual' against 'the social'. Thinking about issues using an idea like 'the individual' versus 'the social' is to rely on an unhelpful binary: Bourdieu thinks this is a bad way to think about social life. In his work we see what it means to focus on relations as the central conceptual 'object' if you like of a property
conceived social science. It also produces some quite remarkable insights and arguments deploying his idea of habitus.

One basic point Bourdieu makes is the same simple one Mary Midgley (2001) makes. The mainstream social sciences to date, have broken up what is whole and created false choices or binaries like ‘individual’ versus ‘the social’ or ‘genetic’ versus ‘social’ factors when it comes to understanding things like human conduct, or what he calls ‘practice’. Bourdieu is critical of this long-standing tendency. These include the distinction between ‘objective’ and ‘subjective’ knowledge used eg., to sustain a bifurcation between ‘objective’ methodologies used in positivist science and hermeneutically inclined ‘subjectivist’ approaches, a binary that both rests on and informs the no-less basic binary created between ‘facts’ and ‘values’. A strong case can be made that these binaries are unhelpful because profoundly confused. (On theory/practice see eg., Dewey 1960; Bourdieu 1990; Schatzki 1996; on skills see Holmes 2000; on fact/values see Putnam 2002). (It does not help, as those critical of these dualisms -like Hegel (1977), Dewey (1970) and Hacking (1983), or more recently Rorty (2002).

Bourdieu says these conceptual binaries are not helpful because they fail to understand the character of human practice. They do so for example by separating out ‘thinking’ from ‘action’, ‘theory’ from ‘practice’ and by confusing use of values with competencies and skills and encouraging object-subject dualism. From Aristotle (1965) through Weber (1978) and Dewey (1977) to Taylor (1985), Bourdieu (1990) and Rorty (2002), it has been well understood that human action is thought-filled at once rational, ethical and purposeful in character.

Human action is sometimes informed by human intentionality. It can be purposeful because humans design or imagine what it is they way to say, build or do before the activity which gives effect to that thought. ‘Rationality’ can and does mean many things, but at least it always means that a social actor can give an account of what they did and why they did it after the event. They may do of course in terms of motivations to act arising out of intentions, the desire to give effect to ethical values or to pursue some rational calculation of self interest or they may appeal to ‘causes’ acting on them because they felt that they were impelled to act eg., by ‘forces’ external to them. (Whether we are obliged to accept any such account as true is an entirely different matter).

This is because as philosophers of language like Wittgenstein (1953) and Austin (1962) first pointed out, so much human action and interaction is a form of practice that is habitual and often not at all that reflective. Bourdieu argues that an awful of human activity is both unthinking and habitual. The ‘linguistic turn’ as it has been called reminded us that speech-making/listening or writing/reading, activities central to teaching, medicine, welfare work, administration, counseling and so forth are often habitual, even ritualised. That is we rely on clichés and stock phrases and even words whose meaning we don’t actually understand. As Thevenot’s (2001) work suggests there is a complex interplay within any site of practice (like the domestic activities that make up a household or the activities of teaching, timetabling, holding
meetings and appointing new staff that make up say a university) at work in any field of practice between the pragmatics of the habitual and the demands that some new situation sets loose. And then there are the ethical issues that demand attention.

Bourdieu helps to unpack a way of thinking about our social lives. As is now well understood Bourdieu (1977) set lose his ideas about habitus and field as his way of designating the whole network of relations and practices which make the social world what it is.

A habitus consists of a set of historical relations deposited within individual bodies in the form of mental and embodied schemas of perception, appreciation, judgment and action. Habitus is in effect the idea that what we do when we do it, is natural; it is that sense we have what we do and how we do it is the only way things can be done. Bourdieu insist that so much human practice has this quality. That is so much of what we do is a kind of second nature: we do things because literally we can think of no other way of doing things. The result is that so much of what we do has a kind of 'unconscious' or 'unknowable' quality. When we are acting we are in effect acting unconsciously we suspend reflexiveness and operate almost as if in a state of amnesia. The effect as Bourdieu suggests is that:

The agent engaged in practice knows the world too well ... takes it for granted, precisely because he is caught up in it, he inhabits it like a garment ... he feels at home in the world because the world is also in him, in the form of the habitus (2000: 142-3)

A field on the other hand refers to a set of objective historical relations between positions anchored in certain forms of power or capital. In this way he argues we can carry out the kind of 'double reading' that makes a real social science possible. What does he mean by a 'double reading'? In Bourdieu's view if we are to make a 'science of the social' possible than we need to:

Uncover the most profoundly buried structures of the various social worlds which constitute the social universe, as well as the mechanisms which tend to ensure their reproduction or their transformation (1989:7)

In constructing his social ontology he distinguishes between the first order world, the world as made by the distribution of the material resources and the means of the appropriation of socially scarce goods and values (i.e., all the forms of capital he acknowledges) and the second order world, the systems of classification and symbolic meaning that function as schemata for the characteristic activities of feeling, thinking and judgment engaged in by human actors.

To adequately map these two orders we need says Bourdieu a double reading or a 'double focus set of analytic lenses'. The first reading treats society in the manner of a social physics, constituting the social world as an objective structure best grasped from outside. This reading is 'objectivist' and 'structuralist' and is the kind of approach on offer in Durkheim of Suicide (1897), a reading that treats the world as a world of 'social facts'. This first reading accepts that
human actors are constrained by unwritten, invisible and objective determinants. As he puts it, there is:

... an unwritten musical score according to which the actions of agents each of whom believes he or she is improvising her own melody, are organized [1992:8]

But if this reading is left to its own devices, it produces a decidedly odd account of the world, treating individuals or groups as passive supports to more ‘real’ ‘structures’ or ‘forces’ that mechanically work out their independent logic. That is makes us into puppets of ‘structures’ which jerk our strings; suddenly we lose any sense that we are the people we are. To overcome this we also need a second reading that recognizes that the experience of meanings is part and parcel of the total experience.

This means however that we don’t overstate the importance of the way we make meaning or make sense as if we were entirely free to do so. As we saw earlier there has been on the other side of the binary a ‘symbolic interactionist’ tradition represented by Garfinkel (1967) or Cicourel (1967). These writers offer another one-sided account of the second order saying that social reality is whatever the actors who constitute it, want it to be. On this account social reality is the work of social actors who construct ‘their social world via the organized artful practices of everyday life’ (Garfinkel 1967:11). Yet as Bourdieu insists, this one-sided reading cannot account for the resilience of the resulting institutions, the power that they have and use, nor can it explain by what principles the work of social construction of reality proceeds, nor can it explain the genealogy of the categories used in the work of world building.

A ‘total science of society’ must reject both an objectivist stress on causality and mechanical ‘structuralisms’ as well as the ‘social constructivist and phenomenological individualism’ of the ‘symbolic interactionists’.22 As Wacquant (in Bourdieu and Wacquant 1992:10) put it:

Objectivism and subjectivism, mechanicalism and finalism, structural necessity and individual agency are false antinomies. Each term of these paired opposites reinforces the other; all collude in obfuscating the anthropological truth of human practice.

Thinking about practice requires that we stop using binaries and that we engage in a weaving together of ‘objectivist’ and ‘constructivist’ readings. We are both free and not-free to make sense: we are both free and not-free to choose how to behave. This is because we are social creatures who are born into a pre-existing world of beliefs, knowledges, and well-established way of doing things which we have to fit into: at the same time was we follow rules and act out of habit we also face new puzzles and problems which arise in the circumstances of our shared live with others. To do this we need to be able to think what we do. This is what Bourdieu’s other important contribution found in his theory of reflexivity emphasises.

To be reflexive is to think critically about one’s own beliefs and behaviours. It is a very important capacity but how are we to do it? Given his observations about habitus it seems that most of us will never engage in it. This indeed often seems to be Bourdieu’s conclusion.

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22 This relationalist rejection of the either/or binary of objectivism/subjectivism is remarkably similar to the work of Ian Hacking e.g., his *Historical Epistemology* (2002).
here are, says Bourdieu, three ways we may not ‘get it’. The social co-ordinates of class, gender and ethnicity may well help to blur our sense of self and help close down reflection on why we think what we think. The second problem lies in the inability to understand how the position we occupy within a given field (like a school or a government agency providing health care) may affect our thinking especially given the way the may also be being shaped by the larger dispositions of social power, like the way a given budget affects the number of teachers that can be employed in a school. Another problem, and this is one of Bourdieu’s strongest concerns is the is the intellectualist bias itself which seduces us into treating the world, as Manent suggests, as a spectacle where we are simply a spectator. This is what many intellectuals scientists and researchers do; they love reading and researching the world as if they are outside it looking in. This may for example encourage them to treat the world as ‘a space full of significations to be interpreted rather than as concrete problems to be solved practically’. This is a problem because it may lead us to entirely miss the defining features of a given field of practice. As Bourdieu (1992:38) puts it:

Whenever we fail to subject to systematic critique the presuppositions inscribed in the fact of thinking the world of retiring from the world, and from action in the world in order to think that action, we risk collapsing practical logic into theoretical logic.

The only antidote to this is to subject all of our work to persistent and relentless reflexive critique. We should do he says whether we are relying on policy documents, legislation, statistical data, or ethno-methodology. Reflexivity means and requires a ‘systematic critique’ of all and any of these techniques and assumptions. And as Bourdieu (1990:14) adds this requires:

... subjecting the position of the observer to the same critical analysis as that of the constructed object at hand [i.e., the topic of social scientific research].

This is not then something best done by thinking about ‘the ego at work’ -as Garfinkel and Giddens seems to imply making reflexivity an exercise in endless introspection. Rather it requires a rigorous even ‘scientific’ reflective practice that makes the fundamental shaping of thought itself as a social activity shaped by objective factors including both the conscious as well as the unconscious aspects into its central object of research and thought. This is required since it involves:

... thinking out the unconscious or un-thought categories of thought which delimit the thinkable and predetermine the thought (1990: 10).

This requires far more that an attention being paid to our inner life by means for example of some kind of ‘diary-keeping’. Reflexivity calls for rigorous attention being given to the places in which we work like universities and their disciplines, their journals and research grant practices, or to kindergartens and their staff and their pedagogies, addressing both the conscious and unconscious aspects of the practice in that place.
This involves paying attention to the way people in a given organisation or institution use language categories and metaphors as they talk about and make sense of what they do. In ways that takes account of the theories, the assumptions, the paradigms, problems and the judgments at work within a given field. That is the subject of reflexivity must be the entire field of practice which includes the language categories, the intellectual assumptions and beliefs as well as the way relationships are established or space used. One classic study that does this is the work of Connell et al (1982) as they studied the way students, parents and teachers set up a space called 'schools' and establishes various kinds of practises that become habitual and unconscious but reflect the play of different kinds of power.

We see here precisely why Bourdieu’s is right when he says that the chief obstacle to engaging in the kind of reflexivity he speaks of is not epistemological, so much as social and political. Promoting reflexivity cannot help but raise other people’s hackles beginning with intellectuals and academics who cling to their idea of academic status and authority. This is no less the case for teachers or public sector workers who will raise the hackles of their managers or policy makers if they start to press for reflexivity.

There is also a practical difficulty: how are we to enable reflexivity to happen. Given that the normal disposition of many of us is to defend the way we think feel or act as normal and right what steps can be taken to start the process of reflexivity as a prelude to changing the way things get done like taking human rights more seriously? This work helps to frame a difficult question: if our characteristic attitudes, likes and dislikes have hardened into habitus how can we promote any change?

Do we eg start an educational process and present people with facts that challenge their habitus? One usual and often enthusiastic response is to insist that education will fix this problem. As one government training manual observes:

... to make the Victorian dialogue model work, it is important that the courts, the parliament and public authorities understand the Charter. This is why education is important. It is envisaged that every employee of a public authority will ‘THINK CHARTER’ and consider human rights in all aspects of their work. (DSE 2007:10) (My stress).

This enjoining of public sector workers ‘to actively THINK CHARTER’ and to think of this as the major change ‘you need to make to the way you work’, clearly signals that the process of implementing the Charter has been defined as a cultural project grounded in an educational process.

Yet does this really address the problem of change and how to promote it?

As cognitive theorists like Lakoff (1999) have pointed out human tend to search for or interpret information in a way that confirms existing preconceptions. Cognitive psychologists call this 'motivated cognition' - a tendency to select or interpret facts to fit an existing mental map of the world we wish to believe is true. Research by Nyhan and Reifler (2006) found e.g. that
experiments which focused on assessing the effectiveness of corrections, show that presenting people with facts that contradict what they believe simply ends up strengthening their existing beliefs.

I want to explore the implications of this by turning to some research carried out in 2010. I conducted focus groups in one organisation which seems to be doing a really good job of embracing the Charter. I spoke with this organisation's frontline workers to discuss their first-hand experience working with the Charter. In this chapter, I present the findings of that research. In effect as I suggest here there is no problem when an organisation has within it a culture or practice that is already well-disposed to human rights.

RESEARCH

The nameless agency is a statutory public authority. It is independent from but funded by a major government department. Its officials work on behalf of 'clients' all of whom are weak and vulnerable in particular ways. The operations of this agency and its employees fall under the purview of the Victorian Charter. Their work also includes engaging other key public authorities, including some of the biggest government agencies in Victoria. This means that their workers have an interesting perspective from which to form a view of the way these other agencies have engaged with the Charter.

Focus group discussions were conducted with some two dozen of the agency's frontline workers to discuss their first-hand experience working in a context shaped by the Charter. The research was done in June 2010 following a process of recruitment of participants which was supported strongly by senior managers in the agency. We ran a series of focus groups with staff eager and willing to talk about their experience of the Charter since its Parliamentary passage in July 2006. Ethical consent was sought and appropriate protections and guarantees were given to participants, including non-specification of either the names of participants or the use of details of cases handled by the agency.

The research questions were designed firstly to elucidate the way staff in this agency experienced the training provided by the Victorian government. We also wanted to know what effects if any the Charter has had on their practice and, for want of a better term, what we can call their 'organisational ethos'. Finally, we wanted to establish how they experienced and judged the effect of the Charter in relation to work done by staff in other agencies with whom they interact, as well as what changes if any they see in the ethos of other organizations.

I do not claim that the propositions reported here are true. However, they certainly seem to reflect a set of strongly held and broadly shared views by a significant number of staff who work in the agency. I am inclined to treat the findings of this research as important and
subsequently I believe that if the observations do indeed have merit then some further action is warranted.

Preparing for the Charter

The agency was already up and running on rights for some time before the Charter.

Henry - Focus Group Participant.

A number of the participants and especially people already working in the agency in late 2006, and throughout 2007 and 2008 were fully aware of the Charter in the months running up to the introduction of the legislation in early 2006.

Those participants who were already working at the agency were variously 'optimistic', 'expectant', 'excited' or 'looking forward' to the day the Charter became operational. Most indicated strong, enthusiastic, optimistic support for the Charter. Expectations ran high, as did the hope that this would make their work 'easier' or else would help to refine their work and the work of the agency. Some who recalled having less enthusiasm about the Charter's introduction said they were sceptical that the lofty goals of the Charter would translate into meaningful outcomes. One participant had mixed feelings, concerned that as some of the agency's work involved 'removing people's rights', the Charter might be used as a device against the agency. Others admitted that since the Charter's introduction, they felt that their expectations had not been met, though they still preferred to have the Charter rather than have no Charter at all.

Several of the participants who were working in other parts of government or other agencies in the period between 2007 and the start of 2008 said they were favourably impressed upon starting work at the agency at how widespread the regard for the Charter was and how much it seemed to have changed the language and the way the agency employees approached their work and how senior staff and management at the agency took the Charter so seriously.

A number of these participants stressed how much this was in 'quite stark contrast' with the perfunctory or 'compliance-only' approach adopted for example at the biggest department they deal with, even in one of that department's branches, which as one participant said liked to talk up the way 'they' had adopted a 'cutting edge' human rights framework for the services they offered. One participant said there had been no training or workshops run in her department and she felt that the Department of Justice had grossly under-resourced the rollout of the education and personal development training process inside the public sector. There was agreement about this point from several of the participants and some criticism about the relative paucity of resources coming from Department of Justice to support workshops, training and preparation.
Participants were both aware and supportive of the ‘highly proactive’ steps taken inside the agency by senior staff to prepare for the introduction of the Charter. They pointed to many instances the agency had conducted training using in-house resources along with some training provided by the Victorian Human Rights and Equal Opportunities Commission (VHREOC) to help staff get in touch with the Charter. Participants pointed to the eagerness with which the agency managers and workers had set up working groups to analyse the Charter and to try to assess their work against its likely impact. They noted the energy and passion brought to bear in the early days of getting ready for the Charter.

There was further criticism by several participants of the paucity of resources coming from the Department of Justice to support workshops, training and preparation. Participants pointed to the ongoing commitment inside the agency to resource the continuing rollout of the Charter and specifically noted the careful and persistent effort put into reviewing and revising the agency’s practice manuals for giving effect to rights talk and rights-based criteria for staff to draw on in doing their work.

**Making use of the Charter**

I wouldn’t call the agency a human rights organisation, but we do use the Charter as a touchstone in what we do.

Abigail - Focus Group Participant.

When asked how the Charter had affected daily practice since its introduction, most of the focus group participants said the it had not done anything dramatic or innovative to their work or the functioning of the agency. Many highlighted the high level of passion for rights that had characterised the agency and that they had been committed to the acronym FRED (freedom, respect, equality and dignity) in their work anyway.

Most participants agreed that the Charter had worked best by encouraging a sharper and more refined approach to the already existing culture within the agency to make human rights a core part both of the agency’s work and in the decision-making process by workers in individual cases. The Charter did assist in increasing their leverage in places like the Victorian Civil and Administrative Tribunal (VCAT) and in some of their interactions with ‘big agencies’.

All pointed to the much more explicit and consistent use of human rights talk and ethical criteria both in individual case decisions and policy. One spoke in terms of the ‘extra flush’ the Charter had put on the act under which the agency operates. Interestingly, one participant who started working at the agency after the Charter’s introduction did not recall receiving much in the way of rights training. As a result, she said working with the Charter could be frustrating because many of its implications were vague, especially when it came to ‘balancing’ rights. Nonetheless, she found the Charter ‘reassuring in terms of decision-making’.  

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Several participants reported that the Charter had been helpful in dealing with VCAT, with decisions being taken that increasingly reflect a more explicit regard for human rights, which in turn had helped further the work of the agency. One participant said that as far as they were concerned the Charter was there to be used to hold major agencies much more accountable. They described the biggest department they dealt with, as simply having too many systemic and structural issues getting in the way of taking the Charter even a little bit seriously. This proposition received unanimous support.

Many participants also pointed to the general lack of awareness on the part of the general community or support for human rights 'out there'. They said this made their work much more difficult, especially with families and various professional groups, and thought that the government should be more proactive in promoting a culture of rights generally than they were currently.

The discussion segued at this point to a more general problem with human rights. Many participants pointed to a central and ongoing conflict in their own work between promoting and protecting their clients' rights to various freedoms versus their right to be protected from harm and abuse even if and when this involved serious loss of their freedoms. Some participants described this conflict as a perennial problem and said it was difficult to negotiate in each case, especially as the problem is not well understood in the community or by many of the people they dealt with in their work.

Many participants also spoke about their need to treat carefully and sensitively the tensions between competing rights, for example between the rights of their client and competing and legitimate rights of other family members or other people in the health care system. There was strong group agreement that trying to resolve these often intractable conflicts is the most challenging and stressful part of the job. As one participant put it, 'You don't resolve, you just agonise'.

Participants also pointed to the high level of collegial support they received to deal with these tensions, through team meetings, consultation with their team leaders and personal development workshops.

Problems with the Charter

The Charter hasn't changed the day-to-day trench fighting. It's still about dollars and resources.'

Jimmy - Focus Group Participant.

Many participants pointed out in fairly forceful fashion that the Charter had, in 2010, not yet produced the kind of far-reaching reviews of statutory frameworks that they had been hoping for given the Charter's scope. They felt this to be especially true in areas like child
protection, aged services or mental health which connected with the agency’s work, especially as parts of the relevant legislation were ‘clearly within the scope of the Charter’.

As an example, participants cited aspects of enabling legislation dealing with disability services which, in their view, was clearly in breach of the Charter. According to one participant, this was something the agency had drawn attention to ‘on more than one occasion’ by writing to the relevant department requesting appropriate legislative review and change and had been told politely but firmly to ‘go away’. This participant said there was ‘significant Ministerial blockage or resistance’ to taking human rights seriously. As another participant put it, the biggest department they dealt with sometimes seemed not familiar enough with its own legislation and indeed in some cases less familiar with it than the agency. Equally, as another participant put it, that big department seemed ‘overwhelmed by their own organisational maintenance issues and problems’. Another participant insisted that even though the rhetoric of rights was ostensibly strong in some areas like disability services there was no actual long or practical history of their taking human rights seriously.

Another instance was raised where again it seemed that there had been a serious breach of the Charter but the agency had been ‘pissed off’ by the relevant department. One participant reported how the agency had been told by another major department to not ‘overuse the Charter’, a stance which concerned people in the agency deeply. (A number of serious cases then under review or in process in 2010-11 were raised but cannot be described here).

One participant pointed to the difficulties faced by some potential clients with serious mental health or physical health issues in terms of being able to access the agency. He cited one instance where relevant professionals had actively blocked one very vulnerable person from accessing the agency and exercising their right to get support from it.

Another participant mentioned how she and the agency more generally had been criticised heavily for referencing the Charter in a case where a government department appeared to be in serious breach of it. There was repeated reference by many of the participants to their concern that the Labor Government’s ‘softly softly’ approach to rolling out the Charter had overemphasised the soft law elements of the Charter and not sufficiently provided for the use of a ‘hard law’ approach.

The Charter’s status as ‘soft law’ was the subject of the strongest and most consistent criticism from participants. This criticism pivoted on two issues - lack of resourcing and lack of effective legal remedies.

As participants pointed out if rights protected by the Charter were breached, there was currently no provision for remedial action. There was much discussion as to whether this made the Charter in effect ‘a toothless tiger’. One participant said she did not find it useful to argue
from a rights position when dealing with other agencies and organisations because 'they don't listen to human rights arguments'. Such arguments are regarded as 'soft' and 'do-goody' and ultimately 'it's more effective to look at where they're coming from' and build up a more 'concrete argument' based on that, she claimed.

Participants said lack of adequate resourcing meant the Charter had not brought about enough changes in practice in major areas where government intervened in people's lives. There was fervent discussion about how little had changed when it came to 'shoving people into nursing homes'. One participant said 'it's too easy in our work to justify limitations of people's rights'. The Charter has not produced better options, others said, and 'too often, decisions are about least worst alternatives'. For example, the choice frequently came down to taking away a client's independence by putting them in care, or maintaining their freedom and independence even though they might be a danger to themselves. Some participants lamented the lack of a viable care option. 'I wish we didn't need [our kind of intervention]', said another.

It seemed that people working at this agency turned its frustrations outwards. Expressing what they saw as the futility of the 'soft law' approach to human rights, they said one of the reasons it was so hard to get traction on rights was that 'people in the community' simply either don't talk in terms of rights, or use them semantically to suit their own agenda. The general public, as one participant put it, either regard rights as inconvenient or by and large just 'don't give a shit'. As a result, the group wondered if the Charter was actually intended to change things, and if so, where that change was supposed to come from.

Service agencies and the Charter

[The biggest department] is a classic case of an organisation talking the talk but not walking the walk.

Emily-Anne - Focus Group Participant.

Participants said too many of the agencies and organisations they worked with or interacted with on behalf of their clients seemed far more fussied about everything else than human rights. Participants uniformly reported that almost every agency and organisation they dealt with treated rights talk, when used by or advocated the agency as a 'luxury' or as an 'irrelevance'.

The biggest department was picked out as a case where the idea of personal freedom seemed often to be used as a basis for deflecting or rejecting the agency's advocacy for the right of their client to be protected. DHS was accused of 'hiding behind the rhetoric of autonomy'.

Participants drew frequent attention to the way the use of language employed by these organisations had not changed to reflect the idea or priority that now needed to be given to
human rights. This was something participants said they had often remarked on among themselves given the agency’s high priority towards rights generally.

Several participants observed that the Charter had not been taken seriously by one major central department which had the capacity to release extra resources so as to make aspects of some of the rights spelled out in the Charter more real and achievable. Rights talk has not yet made it into Treasury, said one participant. Another said it was even worse inside Victoria’s child protection system.

The failure to shift to rights talk was a theme to which participants often returned. They pointed to the way the ‘organisational discourse’ of places like aged care facilities was still preoccupied more with managing beds, managing waiting lists and addressing financial and budget issues rather than rights. Other participants drew attention to the way doctors and psychiatrists were more worried about their clinical judgments and managing waiting lists than the rights of severely disabled and vulnerable people. They noted too how some of these organisations and personnel ‘cleverly played on’ the theme of human rights to freedom, but only so as to avoid their obligations to respect the rights of some people to be protected from grossly abusive circumstances. In effect so these participants aid the rhetoric of freedom was used to defeat or offset the claims of rights to protection.

The biggest department that the agency dealt with came in for sustained criticism. It was noted by some participants that the biggest department lived up to its reputation as a big, chaotic, poorly managed, under-funded and under-resourced behemoth; what was especially noticeable was the way the language of human rights seemed hardly to ever be heard in the corridors at this department and how quickly even some key branches were able to push aside all talk about rights as a luxury or an irrelevance when the agency was representing a client. One participant said the gap between the rhetoric of rights in the biggest department and their actual practice was simply huge and mentioned one branch specifically as being constantly in breach of basic human rights. Another participant, who had worked at the biggest department prior to working at the agency argued that there had been almost no attempt to systematically introduce rights-based practice or train workers in her unit in readiness for the introduction of the Charter. Many of these participants said staff at the biggest department seemed preoccupied with maintenance of their own machinery and processes and that people working in the agency got a lot of ‘pushback’ from that department when they tried to raise rights issues on behalf of the people they were representing.

One participant eg., pointed to very serious breaches both of procedural justice and of the Charter as operational issues took over, leaving vulnerable clients technically facing the expiry of their rights to be looked after for months and months, a very serious breach of the rule of law which the biggest department simply ignored or denied.
The health care system and hospitals were also subjected to persistent criticism. As one participant put it, there are whole regions especially in rural Victoria where the hospital system was ‘stuffed’ and there were simply no beds that meet the needs of their clients. Arguing rights in a context where there were no resources was an exercise in frustration, said one participant.

The Workplace culture

[The agency] leads the pack in Victoria in terms of making human rights central to daily practice.

Heloise - Focus Group Participant.

There was strong consensus that the agency was a supportive and caring workplace with plenty of passionate people deeply committed to human rights. There was a high level of agreement that issues of rights were debated fiercely and frequently and a lot of time and effort was put into supporting staff with personal development skills training. Another participant agreed but said that he was critical only of one aspect of the agency. He said that he thought that many of the people in the agency were good at intellectualising about human rights but were less good at dealing with the emotional and embodied nature of human rights especially when issues like sexuality were involved. He said he thought there was too much recourse to technical talk or to equity talk when what was needed was more attention being paid to the emotional dimensions of human rights. (There were some nods of agreement from other people at this point but no one took up the issue any further).

Another participant noted that one ‘nice aspect of the agency ethos’ was the use of staff awards to recognise the work done by workers in the agency. Some participants noted wryly that occasionally there were ‘quite emotional blow-ups inside the office’ but that this mostly took place over minor issues.

Some participants wondered if as the agency got bigger, the capacity to support the psychological care of staff might diminish. It was pointed out that the work was often highly stressful as clients killed themselves, died or had to endure distressing housing or residential care that were ‘grossly inadequate’. In addition, agency workers frequently found themselves caught in highly stressful conflict situations with family members, with tribunal processes or in their interactions with agencies and organisations. Many participants felt there would be more cases of worker burnout.

There was also concern expressed by all present about the inadequate resourcing of the agency. Too few people were employed which meant a waiting list had been established for clients who had been granted access the service but for whom there weren’t any spare workers to take up their case. Participants said at the time of the focus group this queue contained around 80 clients. This means that the agency was technically in breach of its statutory obligations to represent clients who had been assigned to it.
**Next steps?**

Things won’t change until Treasury starts taking rights seriously.

Janice - Focus Group Participant.

Many of the participants reiterated their support for the government extending the Charter by adding social, economic and cultural rights to the existing array of civil and political rights. Some participants added that they were less than optimistic about the likelihood of this, given the Labor Government’s refusal to proceed to introduce a national Charter of Rights in late 2009. (This observation was made some months before the state election which voted the Labor government out and installed the Baillieu Coalition government).

That said, participants also recognised that ‘some of the most glaring instances of abuse of rights’, especially in ways that affected the most disadvantaged and marginalised people in the community, reflected lack of adequate resourcing by government, specifically Treasury. There was no disagreement on this point this by any participant.

Other participants wanted to see the Victorian Government and/or Department of Justice refine the Charter to make it more of a ‘hard law’ than a ‘soft law’. Some participants indicated that they wanted the Charter to have more teeth and to be used in a more mandatory fashion.

**TOWARDS A CULTURE OF HUMAN RIGHTS?**

What then can be said about the Charter and its effectiveness, especially with regard to the promotion of a culture of human rights?

Firstly it is plain the VEOHRC has tried to emphasise the positive features of the culture change process set loose by the Charter. Possibly VEOHRC needs to believe that this is occurring. It has relied on surveys to arrive at some relatively positive conclusions. VEOHRC [2009: 61] e.g. noted that the 2008 People Matter Survey provided ‘the first opportunity to test application of the values and principles relating to human rights within Victorian public sector workplaces’. It noted that Paul Eate (Executive Director - Standards and Equity at the State Services Authority); advised the Commission that the following conclusion could be discerned from survey responses:

Any pre-existing understanding of human rights in the public sector has been amplified and brought into focus with the introduction of the Charter in Victoria. The Charter has encouraged employees to see human rights as relevant to their work.33

How much or how widespread this sentiment was, was not clarified. VEOHRC has persistently claimed, possibly bravely and in the face of little good evidence, that public awareness of the Charter and of human rights generally is in good shape.

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33 Interview with Paul Eate, Executive Director – Standards and Equity, State Services Authority, 29 September 2008
By 2010 VEOHRC (2011:30) was claiming e.g. that a community survey carried out by Colmar Brunton showed three things. Firstly the Charter was believed to have:

...helped bring about a positive cultural shift in government especially at senior and strategic levels. There was a strong sense that ‘training, guidelines and the obligations of the Charter have changed the way that policy issues are analysed, created opportunities for advocacy and made government more transparent and accountable’

However this positive impact was not perceived to have ‘fully flowed through to front-line functions, with respondents noting disparities about the performance of different public authorities’. Reference was made e.g. to expressions of concern about disability services while those working in housing and homelessness services tended to be more positive about the impact of the Charter’. Finally among organisations in particular, the Charter was ‘credited with delivering better, fairer outcomes for Victorians, with approximately 60 per cent of respondents agreeing or strongly agreeing that this was the case.’(VEOHRC 2011: 30). Since this last conclusion summarised a whole lot of sentiment grounded neither in any evidence about ‘better, fairer outcomes’ let alone clarity about what weasel words like ‘better, fairer outcomes’ could possibly mean, this ‘finding’ does not deserve to be taken all that seriously.

In 2008, VEOHRC had also asked all departments how they were monitoring their performance against the Charter and whether it had been integrated into strategic and operational plans, and performance management systems? Among the departments which responded the Department of Education and Early Childhood Development replied that in 2008:

A dedicated project officer co-ordinates ongoing implementation and compliance strategies and progress is monitored by the Implementation Group.

The Charter is specifically referred to in some organisational plans (such as the Human Resources Business Plan) and its principles form the basis of a range of other planning documents that address social inclusion, cultural diversity and anti-discrimination.

Human rights principles are reflected in many of the department’s performance standards that are used to measure performance (VEOHRC 2009: 64).

A year later DEECD was reported as providing:

...induction training includes a session on Charter obligations, with new departmental and teaching staff, as well as staff in related entities being encouraged to complete an online training module within four weeks of joining the department. The online training module launched in August to promote Charter awareness has been completed by more than 4500 staff. Staff continue to attend Department of Justice tailored training courses (VEOHRC 2010: 23)

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34 Without doubting the integrity of the research process itself its is noteworthy that the community consultation carried out by Colmar Brunton relied on ‘in-depth interviews with representatives from relevant peak bodies, non-government organisations, academics, legal bodies and advocacy organisations identified by the Commission’ as well as an online survey to gauge community perceptions of how well the Charter is working in practice".
Anyone who has completed the increasingly widespread use of online training modules will have their own view about the value of such exercises. Having attended one major regional work-planning conference in DEECD in mid-2011, it can also be reported that a more complete absence of human rights or reference to the Charter could not be imagined. This matters since the bulk of those in attendance were not front line workers so much as middle managers. The key drivers in the two-day conference seemed to be damping down increasing demand for services in a region crunched between already lengthy waiting lists and major budget cuts introduced by the new Government, and anxiety about how to implement new national curriculum and literacy and numeracy standards. This is to say nothing of the apparent near-complete ignorance by many teachers about the existence of the Charter let alone the need for their paying some attention to it.

In 2009 VEOHRC (2010: 22) continued to be optimistic noting that signs like 'the growing use of human rights audits, human rights ambassadors and performance management systems incorporating Charter values' suggest that culture of human rights change is emerging. Yet VEOHRC (2010:22) also noted more soberly that:

... progress in achieving such a culture will continue to be gradual and nuanced. In particular, encouraging attitudinal change towards the relevance of human rights protection is an enormous task, the pace of which will vary across different sectors and portfolios.

It is just as likely that many government departments and service agencies have been slow to adopt a rights-based framework, and that too many professionals and employees are unable or unwilling to 'think Charter' or have simply resisted engaging with human rights altogether. A good deal more careful research may elucidate the extent to which the Charter is affecting the workplace culture of Victorian government.

Secondly if we turn to the experience of the agency one clear conclusion is that where there is a strong existing commitment to human rights the Charter will be successful in promoting the growth and deepening of a culture of human rights culture. This point was supported by the Ombudsman when its compliance officer noted that:

The codification of the Charter into workplace practices through training, website development and publications is the straightforward step. The more difficult step is changing people's attitudes. This will happen relatively easily in organizations where there is already a strong human rights based approach. It will happen through necessity in service areas that are subject to public scrutiny. Where it will take time is in those areas of the public sector that are neither traditionally rights driven, nor particularly controversial in their service provision.

It also matters that in that particular instance the agency is relatively small and homogenous organisation. This makes it possible to both frame a conclusion about the state of the workplace culture and to see it as possibly more amenable to systematic attempts to change the culture of the organisation. Neither of these things can be said of big complex organisations.
It is plainly difficult e.g. to assess the state of a large organization’s workplace culture in general or in terms of its ‘culture of human rights’. VEOHRC has said that in regard to a big department like the Department of Human Services/Department of Health that three years into the Charter the Department still faced the challenge ‘to help staff understand, through further education and training, how the Charter relates to their work and its impact on practice and procedure.’ It faces this challenge because as VHEORC (2009: 64) pointed out one human rights audit carried out in the Health Development Unit, revealed that while staff displayed a high level of interest in the Charter they did not feel ‘well informed about its application in decision making and planning. They also identified the need for strong human rights leadership and support from senior staff’.

The point of this observation is that there is enough evidence that the Victorian Government having passed the Charter legislation, was always going to face an uphill battle in embedding the ethos of human rights in the culture of the public sector workforce to say nothing of the broader culture of the Victorian community. One story will have to suffice here to catch the problem.

The story, Having completed one workshop on the Human Rights Charter for one departmental agency executive in early 2008, the most senior figure thanked me and my colleague for the workshop. He said he could reassure us that we had very little real work to do, as his agency was already committed to the ethos of human rights. There were just two women in the group of 20 or more executives and as this man spoke I saw them both look at my colleague and I with some intensity. As the meeting broke up, they approached us and said quietly so as not to be overheard, that they both worked in an intensely hierarchical and deeply ‘bikey’ culture where they daily experienced a profound lack of regard and respect as women and as colleagues and that nothing that their senior manager had said should be believed. They invited us to a quiet coffee away from their workplace and over the next hour or so told us many stories about their workplace and the diminished lives they led in it. This story is exemplary in this way.

The long term roll-out of the Charter faces two large challenges. One is the overt scepticism possibly even antagonism on the part of some public servants up and down the hierarchy about the relevance or value of the Charter. Far worse is the basic denial implicit in the statement that we are already ‘doing human rights’ and so the Charter is to that extent ‘more or less redundant’ because ‘we are already doing it’. The far deeper problem is the problem that large numbers of us who think and do what we have long grown accustomed to thinking and doing may no longer be able to ‘think what we do’, and therefore cannot ‘see’ any problems with the way we do things. This loss of perspicacity amounting to a loss of consciousness which Pierre Bourdieu says is typical of much human ‘practice’ is both deep and utterly conventional. It may well be the price we pay for living in social arrangements which confer a sense of order and propriety. If these propositions have any weight, then the roll out of the Charter as a process of cultural change faces very real challenges indeed.
CONCLUSION

History says: Don't hope
on this side of the grave.
But then once in a lifetime
The longed for tidal wave
Of justice can rise up
And hope and history rhyme.

As we look about us at the start of the twenty-first century there are many admirable things that Australians have by hard work, a bit of luck and some indifference won for themselves. If we are to continue to enjoy the benefits of what has been won, new and different kinds of effort will be needed or our losses will slide beyond repair or recovery. The accomplishments of one generation can all too quickly become matters needing drastic remedial action and transformation. Things won in one generation may sometimes constitute the basis of loss and destruction for the next. It is time now for the Australian community to knit some new threads for a common sensibility that links a renewed political vocabulary to membership of a community in which all of us can feel at home. Adopting a human rights framework such as the Victorian Charter of Human Rights and responsibilities provides one important impetus to do just that.

If I am right in my assessment of the capacity of rights talk and advocacy by itself to do this we cannot afford to be complacent. Avoiding complacency is both the opportunity and the obligation central to a humanist tradition that insists, says Veronica Brady (1994: 7) that 'we are obliged to contest what is inhumane in the name of that humanity which it constantly attempts to define, defend and enlarge'. Here in this conclusion I want to call attention to the need to develop a specific and clear ethical vocabulary which we might want to use as we rethink and refine our commitment to human rights. In effect I want to argue that building a culture of human rights will involve attending to both the 'personal' and 'social' dimensions of a culture of human rights and to do so in ways that will require all of us to start to think better. There are several basic considerations which suggest why it matters that people working in the public sector along with their colleagues in NGOs aim at achieving more clarity. One has to do with playing a stronger more forthright role in promoting public goods. The other has to do with simply doing better in terms of the kinds of policy work it does as well as improving the quality of its service provision and its management.

At the 'personal' level by which I mean certain cognitive and motivational factors, such a culture will be need to be backed by and/or informed by a widely shared capacity and disposition on the part of its members to deliberate about their actions and establish reflexively whether their actions are defensible against some idea of the good. Educational
projects plainly can play a major role in promoting the capacity of governments and the community to pursue both knowledge and practical reasonableness as a good.

To start with I want to refer to the work of George Lakoff, one of the world’s leading cognitive scientists. The point of engaging more effectively in modern policy and political debates and some sense of how this can happen, has been has been given fresh impetus by Lakoff. His work over the last two decades or so directly addresses the way we might begin to frame or reframe political debates debates oriented to a conception of human rights.

**ENGAGING WITH POLITICAL AND POLICY DEBATES**

if we are to generate a culture which takes human rights seriously, we need to understand better a few things like ‘how people think’ and ‘how people change their minds’. In the United States until the recent election of Obama the neo-conservatives/economic-liberals persistently won the policy debates forcing the democrats under Clinton into the politics of the Third Way. George Lakoff (1999; 2005) argues this coalition was successful not because they had got more and better facts with which to mount their case. Rather he insists their success is explicable in terms of them understanding better than their progressive opponents how people think and how they change their minds. (This it should be said is not to overlook the value of their access to powerful media organisations like the Murdoch media empire or their access to important economic resources).

Lakoff is a cognitive scientist who has spent several decades showing us in great detail how humans think and in particular how metaphors make language use and even our mathematical systems possible (eg., Lakoff & Johnson 1981; Lakoff & Nunez 2002). Drawing on this groundbreaking work, Lakoff turned to the way America’s political culture was working.

Lakoff concluded that the neo-conservatives began to win the political and policy debates in America in the early 1980s because they were better able to construct an authoritative emotional and ethical frame of metaphors and values. The economic-liberals and neo-conservatives won the policy debates in the USA because they have been able to construct a more authoritative and/or more appealing emotional and ethical framework of political and policy ideas. They have used important metaphors and values and feelings to make links with large numbers of ordinary people. They have not made the mistake too many progressives have made of dismissing the views and ideas and feelings of large numbers of people as irrational, stupid, irrelevant or unworthy. Rather as Lakoff argues they have ‘won’ because they have used metaphors and appealed to common values in ways that have that resonated with large numbers of ordinary people. And to speak plainly ‘we’ have ‘lost’ because we have not done these things - yet.

As he points out apropos American social policy most Americans now know that there are lots of ‘slutty single mothers’, ‘lazy, drug-using unemployed teenagers’ and sundry other ‘dole
bludgers' and 'welfare cheats' exploiting the welfare system at the expense of the rest of 'us' hard-working, tax-paying citizens. As Lakoff says they know this as certainly as they know 'we' are fighting 'a war against terror'.

Progressives, says Lakoff, have spent too much time critiquing the neo-conservatives and not enough time constructing an alternative and a no-less appealing set of ideas, values and metaphors so as to frame the kinds of policies we stand for or otherwise need to develop. As Lakoff insists, an old habit that dies hard among 'the left' or progressive groups has not helped: I refer to the way that progressives love to critique their opponents - to say nothing of each other.

There is one big problem with critique and it is this.

Every time someone tries to criticise their opponent they've lost the debate before they have even started to talk. As Lakoff (2006:14) puts it, 'When we negate a frame, we evoke the frame'. When President Richard Nixon e.g. argued for his innocence during the Watergate affair in 1974 and claimed on a national television address that I am not a crook', he was dead in the Watergate: everybody immediately thought about him as a crook. So when the welfare sector criticises the neo-conservative Peter Saunders at the CIS they are playing directly in to the neo-conservative frame which insists that income support gives 'money for nothing' to 'welfare bludgers'.

In effect there has been both a vacuum of alternative ideas and a viable and attractive way of framing the policies and ideas which start with a regard for human rights both in the United States and in Australia. Neo-conservatives have taken full advantage of the failure of progressives to spell out their own compelling ethical vision and simply filled the resulting vacuum. As Lakoff insists those who work for government or the community sector or who think of themselves as 'progressive' needs to remember better the role ethical ideas and feelings play in people's lives and set out to do few things. These things include avoiding critique of your opponents and avoiding relying on evidence-based arguments and instead paying attention to spelling out a positive, ethically specific set of propositions while also paying attention to the kinds of metaphors used to win both minds and hearts.

To do this says Lakoff, progressives who work in the public and community sectors need to get over a certain disdain for ordinary people and their long-established preference for experts and their specialist kinds of knowledge. Progressives need to get over their simple faith that gathering all of the evidence together or engaging in critique by itself will win hearts and minds of those its needs to persuade. In saying this I am not saying we should give up ideas about rationality, the value of looking for and using evidence or the value even of critique. I am only saying that by themselves these things will never be enough.
if we take Lakoff as seriously as I think he needs to be taken, those promoting human rights need to set out to persuade people by the value and clarity and goodness of fit between the things we stand for and the lives of ordinary people. This process should begin by specifying the kind of ethical ideas that will secure a new and widespread consensus about human right.

People who want to promote human rights in Australia need to set out to persuade people by the value and clarity and goodness of fit between ethical goods they stand for and the lives of ordinary people. So how should we think better? How do we do this?

If we are to think better, I suggest, firstly that we need to identify and use an ethical vocabulary and do so with increasing clarity and skill. The point of doing this is to be much clearer about what we stand for and why. The second thing we then need to do if we are to do better is to engage with much greater clarity and courage in the task of promoting a vigorous political debate designed to extend and promote the public sphere. There is much more to human existence than economic growth or managerial efficiency and it is up to those who care about human rights to lead the recovery of clarity and purpose we have so conspicuously failed to keep in mind.

**ON GOODS THAT MATTER: TOWARDS A VOCABULARY OF ETHICAL IDEAS**

Let me propose a starting point. It is offered by two people who witnessed the awful decline of an entire society into muddle, fantasy and criminality. The place was Germany, a deeply humane, even civilized or enlightened society that descended in January 1933 into an entirely modern form of civilized barbarism at the hands of the Nazi movement. Both witnesses were German Jews who fled Germany in time to see both the collapse of institutions like universities, the churches, or unions that we might have expected would defend Germany against what was to happen. Mindful of this decline, which he saw with his own eyes, Theodor Adorno suggested that 'intelligence is ultimately an ethical capacity'. And in her meditation on why ordinary people become complicitous in the great crimes against humanity, which deformed the twentieth century, Hannah Arendt (1958:5) pointed to our widespread reliance on clichés:

... the heedless recklessness or hopeless confusion or complacent repetition of 'truths'

which have become trivial and empty-seems to me among the outstanding characteristics of our time.

To this she proposed an austere, even troubling antidote:

What I propose, therefore, is very simple: it is nothing more than to think what we are doing.

Among the many ways we might think about Arendt’s proposition, we might treat it as advice about getting clarity about how we live. Achieving some degree of ethical clarity is a good thing because it helps us to address the most deeply practical questions. All practical
reasoning and involves as Bernard Williams insisted, asking and answering that small and most practical of questions, namely "what should I [or we] do?"

To get maximum clarity and against the widespread tendency we see at work today when we are invited to talk about our 'values', I suggest we use the simple vocabulary which Leo Strauss, another witness to the decline of Germany after the Nazi seized power, suggested when he used just two simple words, 'goods' and 'bads' to think with.

By 'goods' I mean those qualities, attitudes and accomplishments that make our life both personally and collectively worth living and which most of us will agree, after some reflection do so, and would seek to promote. By 'bads' I mean those qualities, attitudes and accomplishments which detract from our capacity to live a good life, and which if we had any capacity would seek to abolish or overcome. If we like to think in terms of negatives we can quickly work out that for each good there is relevant negative or opposite human bad.

To be very clear: using these two simple words is just a start. It may help us to do better if we also understand that all questions of practice are ultimately ethical questions.

As Aristotle put it so nicely, all of our actions as humans are oriented to some idea of the good. This is one assumption I rely on here. Another is that we face a non-resolvable diversity of ideas about what is good and what is bad.

The problem we face by virtue of living together is that our ideas of the good rarely coincide with each other's and yet the need to live together does not go away. (Sociologists like Durkheim who fantasised about 'society' as a singular moral entity grounded in consensus did a grave disservice to thinking well). The basic problem is that we face an irreducible plurality of ideas about the goods that matter. We cannot make that diversity of ideas about the good go away -ever.

It is doubtful that the long dreamt of philosophical goal of hoping that if philosophers work at it hard enough they will find one compelling rational argument able to persuade 'you' to agree with 'them' about some good will ever going to be achieved. Two thousand four hundred years ago Socrates had already worked out knew that his attempt to persuade his fellow citizens that it was better to allow a wrong to be done than commit one was never going to be successful simply by making a rational argument or even by his own use of relentless skeptical interrogation. So Socrates famously made his point the only way he knew how he allowed himself to be convicted of a capital offence. He accepted his own death to make his point the only way he knew how by living out his ethical ideas. Practice, not theory is the way practical questions are best answered.

This does not mean of course that we do not need to think better. To think better we will need to identify a vocabulary of ethical ideas and start to practise engaging in "practical
reasoning’. All practical reasoning involves asking and answering one question, ‘what should I [or we] do?’

It is a question we face daily and on too many occasions we don’t do it justice. This is because as Hannah Arendt suggested time and time again, we don’t think what we do.

The result is a gently graded curve of what Mary Midgley (2001) called simply human ‘wickedness’. There are many kinds of wickedness from minor transgressions like the little white lie or personal betrayal, through to what Kant called ‘radical evil’ like war, terror and genocide.

Let me quickly say why we should stop talking about values while observing a difference that matters.

**ON INSTRUMENTAL VALUES AND HUMAN GOODS**

Too often there is not enough attention paid to a basic distinction that matters between two quite different kinds or types of ‘values’.

One group of values ought to be called instrumental values. These are distinct from what can be called fundamental human goods - though as becomes clear when we think about it they are also connected.

This distinction can be grasped if we recollect that this is really what people are getting at when they make a commonsense distinction between means and ends.

In the case of instrumental values (or means) we can say that ‘X’ is an instrumental value because it enables the achievement of fundamental goods or alternatively because it prevents fundamental human bads. One strong implication is that these instrumental values have no value per se se. That is they are neither valuable nor valueless in themselves until we have established which good/s or bad/s they respectively make possible or prevent.

Think about the value attributed to ‘efficiency’. Economists have long identified ‘efficiency’ or doing or making something with the least expenditure of time, energy or cost; or ‘equity’ (i.e., treating everyone the same); as a good thing or a good idea i.e., as a valuable. This is fine in the abstract. However it is only when we pay attention to the question of what goods these instrumental values make possible that we can agree that they are in fact valuable or alternately destructive. ‘Efficiency’ for example plainly is valuable when it is connected to achieving some good. Think however about the alleged value of efficiency when bureaucrats set about making the trains run efficiently as they carry millions of people to their deaths in killing camps in Poland after 1942. This efficiency is not a good idea.
Even 'equity' or the principle of fairness is really only an instrumental idea. 'Equity' is the idea or injunction that we ought to treat everyone equally by applying a set of rules, principles or regard as if everyone is the same and so is to be treated in similar fashion. The idea of 'equity' suggests that to treat one person differently to another in the matter of accessing a valuable service (like a hospital or education) is to discriminate against one person by favouring another. Treating people differentially is thus treated as a bad idea because unfair. Yet a little thought about its suggests that treating everyone as if they are the same is a slightly mad idea because it fails to take account of something quite basic. Think about the bad that is set loose if we apply the principle of equity to treat all people in the same way in such fashion as to ignore the fact that people do not have the same abilities, backgrounds or resources. Treating a person eg., with cerebral palsy and who is strapped into a wheelchair as if they have same abilities as a champion athlete, involves a failure to notice something quite important and should suggest that applying a rule of treating everyone equally is to miss something important. Again we need to ask what particular goods will a decision taken to treat a random group of people fairly (i.e., as if they are the same in all respects that matter to the intended treatment or policy) actually achieve or alternatively what bads might occur in consequence of making such a decision.

This idea of instrumental value applies no less to the promotion of human rights. Human rights property understood only have value as means to basic human goods. There is no intrinsic value in claiming a right to privacy or freedom of expression until we can establish which particular good or bad the securing of that right will secure or promote. For example, if we use the right to privacy to plot and carry out the murder of another person this not a good which that right secures.

This very brief discussion is not meant to disparage instrumental principles. Instrumental values (including attempts by governments to specify and promote a range of human rights) are important. We need them. There is no point identifying a range of basic goods if we either do not know how to achieve them, or cannot achieve them because we lack the means to do so. Equally those instrumental values are really not valuable until we have attached them to more basic goods or bads. Instrumental values are important to the extent that they help to define or think about the ways we strive to achieve the goods that matter.

Again it matters that we work getting clear things we often muddle or confuse these two kinds of values: this requires lots of practice as we try to improve our capacity to think well or to know well as a prelude to doing well.

WHAT ARE THE HUMAN GOODS?

I have referred to basic human goods. What might this mean? What are the goods that define or enable a human life to be understood and lived as a good life? I think the discussion by
John Finnis (1980) provides an uncommonly robust answer to this question. Certainly I know of none better.

In a book which seems to have too quickly and unjustifiably disappeared from too many people’s list of indispensable books, John Finnis (1980: 18) offers a gritty and compelling account of the nature of the fundamental human goods and the role played by human rights. As Finnis announces from the start, he wants to identify both the human goods and the requirements of practical reasonableness that help to constitute a sense of what we might mean by a good human life. It is an unfashionable book since Finnis is neither a relativist, nor a liberal individualist. He plainly belongs to a tradition of natural law, which has sought to ground its claims about the good life either in a naturalistic anthropology and/or in a religious account of an order of things established by a God.

His is an inquiry into both the kinds of goods which support human flourishing and of what practical reasonableness looks like. As he says for this to be possible the theorist has to find a point of ‘reflective equilibrium’ between description and evaluation. His account is located methodologically in the capacity of a theorist like himself to develop a non-value neutral descriptive account of the goods, which accepts that such a theorist necessarily participates in the work of evaluation. Finnis proposes a kind of analytic dialectic which moves backwards and forwards between assessments of human good and its practical requirements and explanatory descriptions using historical, experimental, and sociological materials and methods. This says Finnis requires both a descriptive-evaluative anthropology of the goods which support a flourishing life, or inform the good life, conjoined with a capacity to understand what is really good for human persons and what is really required by practical reasonableness.

It is an ambitious exercise since Finnis claims that there are universal goods, albeit goods which can only be specified at a certain level of generality. Further he claims that his account is not so much a wish list as something descriptively grounded in the actual circumstances of human existence. His inquiry relies on the descriptive social sciences that seek to tell us how people in different societies engage their pursuit of the good life. Yet it is not put off by the inevitable discovery that people in different times and places are not all equally devoted to or united in their conception of what justice or the goods may look like. As he notes Leo Strauss (1953: 10) treated the fact that there is an indefinitely large variety of notions of right and wrong, is not so much ‘incompatible with the idea of natural right, than it is the essential condition for the emergence of that idea’. Equally it needs to be informed by sound judgment about all aspects of genuine human flourishing and by insight into what authentic practical reasonableness’ looks like. Assessing this depends on Finnis’ ability to persuade his readers that he has made a good case. We may test the adequacy of his work by considering his claim that knowledge of truth is a basic human good.
It says something about Finnis' courage, if nothing else, that he is writing at a time when all manner of relativisms have flourished which deny that truth matters or that reality is real. Finnis defends the proposition that the first great human good is knowledge where knowledge is conceived of as knowledge of truth. This is an important argument worth dwelling on.

This good he (1980: 60) says, is grounded in a very common human activity, namely the ‘activity of trying to find out, to understand and to judge matters correctly’. As he (1980: 61) puts it:

Commonly one’s interest in knowledge, in getting to the truth of the matter, is not bounded by the particular questions that first aroused one’s desire to find out ... In explaining, to oneself and others, what one is up to, one finds oneself able and ready to refer to finding out, knowledge, truth as sufficient explanations of the point of one’s activity, project or commitment. One finds oneself reflecting that ignorance and muddle are to be avoided ... 'It’s good to find out...’ now seems to be applicable not merely in relation to oneself ... but at large ... and for anyone.

This idea of knowledge -of truth- as an intrinsic good is not limited. Saying that knowledge is a valuable activity is simply to say that the pursuit of knowledge makes intelligible any particular instance of the human activity and commitment involved in such a pursuit’. He (1980: 65) proposes that knowledge is a human good and there are no sufficient reasons for doubting that this is the case. He allows that the truth of this claim ‘cannot be demonstrated, but then it needs no demonstration’. It is simply self-evident. This is not to say that each one of us will recognise the value of knowledge. Such recognition is not innate and will not, for example, be experienced as such by a newborn child:

Rather the value of truth only becomes obvious only to one who has experienced the urge to question, who has grasped the connection between questions and answers, who understands that knowledge is constituted by correct answers to particular questions and of other questioners who like himself could enjoy the benefit of attaining correct answers.

As Finnis (1980: 74-5) then proceeds to suggest, any scepticism about the basic value of knowledge is self-defeating or self-nullifying. (He accepts that this cannot be used to show that the basic value of knowledge is self-evident). As he shows some propositions are logically self-contradicting like claims that ‘I know that I know nothing’, or ‘I can be proved that nothing can be proved’. Others are operationally self-refuting as with the case of someone singing, ‘I am not singing’. It is another instance of an operationally self-refuting claim if someone were to assert in writing that, ‘No one can put words (or other symbols) together to form a sentence’. Finnis says that for someone to say that knowledge is not a basic good is operationally self-refuting. The reason for this is simple:
For one who make such an assertion intending it as a serious contribution to rational discussion, is implicitly committed to the proposition that he believes his assertion is worth making, and worth making qua true; he thus is committed to the proposition that he believes that truth is a good worth pursuing or knowing. But the sense of his original assertion was precisely that truth is not a good worth pursuing or knowing. Thus he is implicitly committed to formally contradictory beliefs.

As he concludes, knowledge of truth is a basic good. This seems to be objectively true because there are warrants for asserting it, and because it seems to be correct and there are certainly no ways of denying it. Thought it be non-demonstrable, it is objectively the case that knowledge is a good to be pursued. For those not inclined to agree the anus is on them to say or show why they think this.

Are there other basic values or goods that may be indemonstrable but which seem to be self-evident? Is it not the case, as so many social scientists and philosophers have observed, that human cultures manifest such a wide degree of variability, even chaos in their preferences, motivations and evaluations that no values or principles can be said to be either universal or self-evident? He addresses this protean problem in two ways. Firstly he asserts, though of course does not try to validate this claim, that a survey of human cultures does suggest that all societies manifest a common set of goods. Secondly we could also pursue this task by asking ourselves via some process of intense meditation what are the basic aspects of my well being that I regard as basic goods? He says we will again come up with a similar set of basic goods.

To pre-empt an obvious response from sceptics, Finnis (1980: 85) insists that the identification of these basic goods is not intended to deny the limitless diversity in the ways people and cultures experience these goods. There is limitless diversity with respect to the depth, duration of commitment, intensity in the extent to which the pursuit of any given good is given priority in the shaping of a life in common or in more personal ways. As he says, this is only to recognise that truth is not the only basic value and:

... that people and their cultures differ in their determination, enthusiasm, sobriety, far sightedness, sensitivity, steadfastness and all the other modalities of response to any value.

As to those goods Finnis identifies seven basic goods. They are life, knowledge, play, aesthetic experience, sociability or friendship, practical reasonableness and religion.

Life itself is the most basic good. It encompasses all aspects of life as vitality from self-preservation in the face of imminent threat of death or injury, to the many ways we seek self-determination by way of bodily and emotional health including freedom from pain. All societies show a concern for the value of life, as well as a regard for bringing new life into
being. Self-preservation is accepted as a motivation for action, while killing another human is everywhere prohibited unless there is some strong justification for it.

Knowledge as the pursuit of truth is the second great and basic human good. All societies, for example, provide for the education of their young in both the instrumental or technical aspects of living from how to avoid danger to how to obtain food through to aesthetic, ethical and religious practices.

Then there is the value attributed to being practically reasonable. All societies show a regard for the capacity of its members to be practicably reasonable i.e., to possess and display the capacity to reflect on and make choices about what we will do, or how we will live, and what values ought properly obtain in any given situation requiring us to act. It relates both to the choice of ends and the means we might adopt to achieve those ends. It has internal dimensions frequently understood as the display of personal qualities or virtues like courage, gentleness, moderation and so on which define a person’s character just as it has external dimensions about the shape and quality of our relations with each other. Being practically reasonable forces reflection on the interplay between being free to choose and the resources of intelligence and character available to make good choices. It follows as Finnis (1980: 119) will argue later, that one central requirement of practical reasonableness is that we will, as an instance of practical reasonableness, always seek to act so as to promote on or more of the basic goods. (Or to put this negatively practical reasonableness entails ‘not choosing directly against a basic good’). Acting deliberately in the light of the requirement to act in practically reasonable ways needs, he says to acknowledge that the basic goods are the only guides we have. (That is true he insists for anyone who acts deliberately for they must be seeking some form of good even if only the good of authentically powerful self expression and self-integration which he seeks through sadistic assault or through malicious treachery or deception ‘with no ulterior motives’).

Play is another basic good. All societies demonstrate a regard for various kinds of play serious and formalized or informal and relaxed. Humans value play for its own sake; they play physically, intellectually and socially where the point is simply the enjoyment of play. And play involves some kind of activity that is its own end.

Aesthetic experience involves the pursuit of beauty and is likewise everywhere valued. It is often found in forms of play but is distinguished from play because of the value given to some idea of the beautiful and because, and unlike play, the pursuit of beauty does not need to involve activity; it can be done contemplatively, even meditatively.

Sociability and friendship are inescapable aspects of our common flourishing. All of us live in or on the margins of a community of some size. In all societies there is both friendship and closer familial relations involving sexuality. In all there are rules for sexual life like some prohibitions against incest and rape and some favouring of permanence and stability in
sexual activity. All societies also display a concern for cooperation and reciprocity while recognizing the difference between meum and tuum and possessing some reference to ideas of justice.

All societies display a regard for some order of things in which ideas of the sacred or the transcendent play a central role. All societies have ritualised ways for example of demonstrating regard for the bodies of dead members of the group in some traditional or elaborate way. All have ways of referring to something beyond the ordinary or mundane aspects of communal existence and the human scale of things, typically involving some idea of super-nature or the transcendent. All societies have arrived at a question, which Finnis (1980: 89) says defines what he means by the value attributed to religion:

For as there is the order of means to ends, and the pursuit of life, truth, play and aesthetic experience in some individually selected order or priorities and pattern of specialisation, and the order that can be brought into human relations through collaboration, community and friendship, and the order that can be brought into one’s character and activity through inner integrity and outer authenticity, so finally there arise such questions as ... how are all these orders, which have their immediate origins in human initiative, and pass away in death related to the lasting order of the cosmos and to the origin if any of that order?

As for those who deny the existence of the transcendent, thinking of existentialists like Sartre who deny the value of ideas of ‘god’ or the transcendent, Finnis responds noting that even Sartre:

... nonetheless appreciates that he is ‘responsible’ i.e., obliged to act with freedom and authenticity and to will the liberty of other persons equally with his own, in choosing what he is to be, and all this because prior to any choice of his ‘man’ is, and is-to-be free. And is this not a recognition [however residual] of, and concern about, an order of things beyond each and every man?

Of this list of the goods Finnis makes a number of important observations. While he allows that there will doubtless be argument about the exhaustiveness or inclusiveness of these goods, Finnis says that while there is nothing magic about the number seven, when other goods are proposed it will shown on analysis that they are simply sub-sets of these goods, or else ways or combinations of ways of giving effect to one or more of these seven goods. (This goes to claims for example about virtues like courage, humility or prudence: those virtues are better understood as some of the instrumental ways we identify to live towards the goods that matter).

Secondly each of these goods is basic and each is self-evidently a good. None for example can be reduced analytically to any other by virtue of being simply instrumental to the others, and accordingly there is no way of constructing a hierarchy of goods. Each if reflected on, can be treated as the most fundamental. Each can reasonably be focussed on, and each,
when focussed on claims a priority of value. Further each one of us can reasonably choose to
treat one or more of these as more fundamental. That is, there is necessarily a sense in which
each of can as a subject make a choice between these various goods and order them in
ways that reflect our choices. Finnis (1980: 93) instances the scholar who privileges the pursuit
of knowledge over friendship, religious worship, play and the pursuit of the beautiful. These
choices properly reflect the interplay of the personal and the social circumstances that
shape one's temperament, upbringing, training, capacities and opportunities and thereby
influence our choices and rankings of the goods that matter. This does not affect the
'objectivity' of these human goods.

I do not propose to add any additional justifications for what is surely an uncommonly bold
set of propositions. I am persuaded by Finnis. Like Finnis, I think that the core human goods he
specifies do grasp, albeit at a certain level of abstractness, a sense of the goods that provide
'am outline of everything one could reasonably want to do, to have, or to be' (Finnis 1980:
97).

Almost as importantly they provide a basis for thinking about how and by what means a
community such as ours might set about promoting and protecting these goods and the role
to be played by organizations that make up the community sector that will actively seek to
promote them.

At the least though they do not provide any ready-made or simple basis for adjudicating
between people who wish to promote different kinds of goods, they may help to clarify
further what is at stake when various claims are made.

Even more to the point they provide a basis for reinvesting the kinds of community dialogue
we need to have with something of the content that such dialogues might deliberate about
because it forces us to be clear about what it is that we truly value and wish to promote. I
say this because as I want to indicate shortly, this list provides really just a starting point. As I
will argue shortly there is still a long way to go in getting clear what these goods actually look
like and why getting consensus about them at a level of detail that matters is going to be
difficult.

Hopefully enough has been said to suggest to any reader some thing of the case for thinking
about a number of basic human goods. It would good if now that reader treats this
presentation as an invitation to 'stop and think' and then to actively begin opening up
spaces and opportunities for conversation in their workplace.

This also opens up the possibility pf cultivating the capacity for good judgment.

CULTIVATING GOOD JUDGMENT
The idea of working to promote human excellence, to assist people to flourish has a great deal to commend it. It requires that we understand better the conditions and circumstances in which humans might flourish or not live at all well. Finally, it suggests that answering ethical questions has less to do with philosophical analysis and much more to do with being a good person who can in each circumstance try to exercise good judgment.

We plainly need people of good character (the Greeks called this person a phronemos) who will work with other people to cultivate their good character and who will do in a shared sense of what the goods of a flourishing life look like. This puts an onus on all of us to have and to practice good judgment (or what the Greeks called phronesis).

Aristotle gives us the best overview of what good judgment is about (in his Nichomachean Ethics (Reeve 1995)). Modern writers like Bent Flyvberg have applied this account to urban planners (2001, 2002, pp 353-366) and Mark Smith (1994) to education. The obvious starting point is what does good practice looks like when thinking about working with people whose human rights have not been taken seriously?

Those who work in this tradition stress the need to be good at practical deliberation addressing the question ‘what ought I do in this case?’ This question necessarily arises in the contexts of our daily lives with other people.

What this means in particular for anyone who works with young people was spelled out two thousand years ago by the great Greek poet Pindar. Pindar wrote movingly about what a young grape vine and a young person needs if they are to grow well. Pindar (cited in Nussbaum 2003: 1) says:

... Human excellence grows like a vine tree, fed by the green dew, raised up among wise men and just, to the liquid sky.

Among the basic requirements needed to achieve this idea of human flourishing: the Greeks called this arete while the Romans called it ‘virtue’, Pindar identified a good heritage, fostering natural and social circumstances, the avoidance of catastrophe and/or good luck, and the ability to develop ‘confirming associations’ with other human beings. As Pindar insists, ‘We have all kinds of needs for those we love: most of all in hardships, but joy too, strains to track down eyes that it can trust’ (Cited Nussbaum 2003: 1). The idea of good judgment (phronesis) draws on the classic Greek concept which Aristotle referred to as a particular kind of practical intellectual virtue: that is, knowing how to act in specific situations.

Translated into contemporary language, good judgment refers to a practical wisdom that is more than simply knowing about principles of action. Good judgment refers to a practitioner having the wisdom that come though experience to make good judgment and to know how and when to act in ways that will promote the basic goods. Good judgment refers to an ability on the part of the practitioner to know when and in what ways to act courageously, honestly,
or generously. It refers to the ability to know how and why what might be an act of courage in one context is high risk or reckless in another. This means being both context sensitive and able to judge what the right measure of an action is. (Aristotle spoke often about a golden mean” think of a virtue like "courage". Too little is the vice of "cowardice" too much is the vice of foolhardiness.

People who work in the public sector and/or who in the community sector need to acquire the virtues and to practice good judgement aimed at securing a flourishing life. That flourishing life or good life (eudaimonia) involves recognising it as ‘something that all by itself makes a life choice-worthy and lacking in nothing’. The good practitioner is good at finding ways to achieve his ends and begins with things that are in his power to do; his ends are also good because he has thought about the good life. As Aristotle explains:

We deliberate not about ends but about what promotes ends. For a doctor does not deliberate about whether he will cure or an orator about whether he will persuade ...
Rather we first lay down the end and then examine how and by what means to achieve it (Reeve 83).

This implies for example that no doctor would ever do anything not aimed at healing the patient. (At a minimum it involves ensuring that no one is harmed: by implication the idea of experimenting on prisoners would simply not occur to any good doctor. As to the ends we can and should deliberate on them, but as we do says Aristotle, we will discover that promoting a good life requires us to cultivate both the knowledge that points us to the goods as well as to the virtues that by definition describe the good life. That is, to lead a good life requires us to attend to our own virtues and to encourage others to do so as well.

The person who has or is a good character and is both trained in the virtues and is habituated to the virtues. This involves a commitment to deliberation and decision and calls on virtues of character like courage, prudence and dignity, or self-respect as well as wisdom.

The good character understands that they confront particular practical problems but each instance is always framed as the problem of how to secure the good or flourishing life. Good judgement involves a combination of practical knowledge and practical action. It is always focused on particular people and particular cases. Yet it is not a simple matter. It involves the most complex array of elements like theoretical and craft knowledge. It requires reasoned deliberation on universal truths but always in such a way as to bring them to bear on the particular case. Aristotle writes for example how:

All law is universal, but in some areas no universal rule can be correct; and so where a universal rule has to be made, but cannot be correct, the law chooses the universal rule that holds for the most part well aware of the error being made... the source of the error is not in the law or the legislator but in the nature of the object itself (Cited Reeve: 77).
That is the practitioner committed to good judgment acknowledges that many, perhaps all practical problems are messy.

It also certainly draws on our emotional responses to things since emotion can give us valuable clues about the goods that matter (Judith Butler has recently made the point that grief or what she calls ‘grievable loss’ tells us by the depth of our emotion on losing someone we cared for, that that person was valuable).

Applied to all sorts of professional practices involving other people, it requires of the ‘practitioner’ (either as professional or as volunteer) a capacity to take account of competing interests and demands in different situations. In one context a major act of honesty may require the professional to be very frank, yet in another the right action may be otherwise.

Consider the following case. You are a teacher, counselor or youth worker who has been asked for a reference from an employer who is interested in employing a young person as an apprentice. The professional has been working with the young person for a number of years and knows he has the right skills, training and aptitude for the job but also knows the young person has a criminal record. What does good judgment require in this instance? Does it require honesty, and if so how much?

This involves knowing how and when to be truthful in ways that are measured and which consider the competing goods at stake.

In this situation it entails taking into account and weighing up: the prospect of the young person re-offending; the young person’s right to right to privacy; the positive outcomes likely to result if they are given secure employment; the likelihood that the employer will discriminate against the young person because they have a criminal record; the harm that may result if the young person does not get the job because the employer objects to their having a criminal record; the employer’s right to know about that aspect of their prospective employees past; the youth worker’s reputation and credibility.

In working out what good judgment requires it is useful to ask: what is the professional’s intention? Is it to help ensure the young person thrives in all the ways they can which includes securing employment, getting an income, a trade and hopefully moving away from a history of criminal activity? Who wins and who loses in respect to each of the above options?

Answering these questions against a background of experience that has provided opportunity to develop intuition, insight perception and foresight is how the practitioner can make ‘good judgment’. Good judgment relies on practice, and as Damasio observes, it ‘...depends on how well we have reasoned in the past; on how well we have classified the events of our past experiences in relation to the emotions that preceded and followed them; and also on how well we have reflected on the successes and failure of our past intuitions.’ (2006, xix)
RESOURCING FOR SUCCESS

The practical implications of this discussion can be summarised simply.

The public sector (as well as the community sector) needs to be able to actively promote the kinds of capacities which have been outlined above if a culture of human rights is to emerge. This will involve asking what practical steps like training and professional development do we need to put in place? What kinds of things can managers and senior staff do to demonstrate the kind of virtues and ethical capacities to establish an ethos such that these capacities for ethical clarity and promotion of human rights become second nature. How can we support people inside organizations to exercise their practical reasonableness?

In saying this we can guess that engaging with people's values and those emotions we might properly call 'moral emotions' (especially those traced out in the tradition of virtue ethics like prudence, tolerance, courage) will need to be valued more as the psychic core upon which a habitus of ethical reasonableness and an ethos of respect can arise but will do so only if we also ensure that we build a scaffolding of institutional supports. The problem alluded to here is deserving of more than a throwaway treatment but its essence is caught for example, in public remarks made by Sir Ronald Wilson after his retirement from various public judicial posts to the effect that:

... he felt constrained by the judicial office ... there were times on the High Court when his heart wished to go in one direction but his mind and oath of office took him in another. He found this disappointing and it took a lot out of him. (Buti 2007: 349).

By this I also mean to refer to certain ideas and practices (like strong support for "whistle-blowing" or freedom of information mechanisms) which are embraced and championed by organisational leaders and codified into codes of practice designed to complement individual practices respectful of rights and focussed precisely on overcoming bad habits like obedience to authority (Milgram 1974). That is we need to attend to both formal and informal mechanisms which ensure for example that large number of ordinary people both want to speak truth to power or actively thwart or prevent the daily display of lack of respect or regard for others and are protected and encouraged organisationally to do so.

At the least to start to think about what the idea of a culture of ethical practice in which for example a deep culture of respect, explicit promotion of human rights, and a capacity to ask what goods are being promoted comes into being. One long term consequence of this may well be the cultivation of relationships and activity in families and workplaces, and in public places both real like streets and sporting arenas as well as virtual spaces like on-line 'chat-rooms'.

CONCLUSION
Without overstating the problem or including every person or organization who works to promote the public good, there is a strong case to be made that too many organizations in have lost their way. By this I mean firstly they cannot give a set of plain, simple account either of why they exist or what particular goods they seek to promote.

In particular it is clear is that too many organizations seem to have been captured by a mixture of managerialism and a perceived need to use the vocabulary of economic liberalism, which has provided the dominant policy frame in public policy and politics over the last few decades. Along with this goes a tendency for people to take their cue from whatever the latest bright idea it is that has swept through various central agencies in either the state or federal government. Recall the litany of ‘bright ideas’ that have captured public policy beginning perhaps with ‘the active society’, ‘compulsory competitive tendering’, ‘investing in social capital’, ‘building strong communities’, ‘mutual obligation’ or the most recent example ‘social inclusion’. That they are not alone in losing their way is suggested when academics, who really ought to know better, will say cheerfully enough, even though they know that a metaphor like ‘social inclusion’ really doesn’t mean anything in particular, will take it seriously because there are research dollars to be got if one ‘plays the game’.

One of the results is a reduced capacity to say clearly what the role of the public and community sectors is and why it does what it does.

This can lead some agencies into a loss of focus or even into doing things that are harmful. (Child protection provides an awful example of this). It has also seen a diminution in advocacy and a diminished willingness to be courageous for example by challenging government policy or the dominant policy paradigms. In particular way too much ground has been conceded to the hybrid mix of economic-liberalism and neo-conservatism which now shapes the discursive field of public policy and too little attention or energy devoted to spelling out the ethical ideas that matter.

This suggests the value and the need to be much clearer firstly about the ethical vocabulary that might be used. This will include being able to draw a distinction between certain instrumental values (or means) and certain human goods (or ends). Being able to make the distinction between instrumental values (like efficiency or equity) and human goods (like knowledge, sociability or play) is likely to mean that we will be attentive to what we are trying to achieve like promoting those basic goods that enable us to lead flourishing lives and then how we might do this better.
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