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Scrutiny of Acts and Regulations Committee  
- 7 JUN 2011

Mr Edward O'Donohue MLC  
Chairperson  
Scrutiny of Acts and Regulations Committee  
Parliament of Victoria  
Melbourne, 3000.

Dear Sir,

Inquiry and review of the  
Charter of Human Rights and Responsibilities Act 2006

I present my submission to the above inquiry as follows. I would be pleased to attend any public hearing of the inquiry and expand on, or answer questions about, my submission.

1. Whether the Charter should include additional human rights under the Charter, including but not limited to, rights under the –

   (a) International Covenant on Economic, Social and Cultural Rights;

   (b) Convention on the Rights of the Child; and

   (c) Convention on the Elimination of All Forms of Discrimination against Women?

I do not support any amendment to Part 2 of the Charter by the addition or removal of rights.

One of the criticisms of the Charter is that Part 2 contains a selective catalogue of rights, which do not reflect any broad community consensus. Those rights are, however, derived substantially from the International Covenant on Civil and Political Rights 1966 (ICCPR). The ICCPR itself reflects a long-standing and widespread international consensus on human rights which was expressed in the United Nations Declaration of Human Rights 1948.

The antecedents of the UN Declaration of Rights are the two great political instruments of the Enlightenment: the United States Bill of Rights 1789 and French Declaration of the Rights of Man 1789. These instruments of course drew on earlier documents like the English Bill of Rights 1688 and Magna Carta 1215.

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The concerns of these historical instruments still resonate around the world today: the Charter 08 movement in China calls for a catalogue of human rights based on those in the UN Declaration; the influence of these rights can also be seen today in the democratic movements in the Arab world.

To criticise the Charter for a biased selection of rights, as many do, is thus both ahistoric and misconception. Rather than being somehow inconsistent with our political history and traditions, the Charter is in fact a logical extension of them.

While there is undoubtedly a broad consensus in support of the rights contained in Part 2 of the Charter, I do not think the consensus extends to the rights in the International Covenant on Economic, Social and Cultural Rights. Whether, or the extent to which, society is expected to provide for such rights is a highly contested political issue in Australia. Since these matters sit outside the broad social consensus on human rights, I do not think they should be included in Part 2 of the Charter.

I am not persuaded that the rights contained in the Convention on the Rights of the Child and in the Convention on the Elimination of all Forms of Discrimination against Women require expression in the Charter beyond its current provisions. Those two conventions essentially contain restatements and specific, detailed elaboration of certain human rights as they apply to children and women. The Charter is concerned with a more general expression of rights as they affect everyone. I think it is preferable to leave the Charter to operate at this level of generality and to include specific elaboration of rights as they affect certain groups in other legislation.

2. **Whether the right to self-determination should be included in the Charter?**

I am likewise not persuaded that issues of self-determination for indigenous Australians sit within the broad social consensus on human rights and therefore that they should be included in the Charter. Furthermore such matters should be resolved at the national rather than State level.

3. **Whether there should be mandatory regular auditing of public authorities to assess compliance with human rights?**

This would be a good idea, subject only to the availability of resources.

4. **Whether the Charter should include further provisions with respect to legal proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful by the Charter?**

One of the most contentious aspects of human rights protection under the law is the extent to which rights should be actionable. The Charter has adopted the model which excludes actionable rights, following the United Kingdom Human Rights Act 1998 and the Human Rights Act 2004 of the Australian Capital Territory, in contrast to the United States Bill of Rights and the New Zealand Bill of Rights Act 1990. This is said to be more compatible with the Australian constitutional tradition of Parliamentary sovereignty.
It is doubtful whether the tradition of Parliamentary sovereignty is a satisfactory justification for denying actionable human rights in Australia. The doctrine of Parliamentary sovereignty derives from the Westminster Parliament, which was for some time truly sovereign, in the sense that it could exercise the absolute powers which had, before the English Civil War and the Glorious Revolution of the 17th Century, been exercised by the sovereign. However, since the United Kingdom joined the European Union, the Westminster Parliament ceased to be sovereign as its law-making capacity then became subject to European law. This was indeed the impetus for the UK Human Rights Act, to make the protection of human rights in the UK a matter of UK, rather than European, law as far as possible.

The full sovereign powers once exercised by the Westminster Parliament have never been reposed in any Australian Parliament. The colonial legislatures were subject to many restrictions on their law-making capacities. Since Federation both the Federal and State Parliaments have been subject to the Federal Constitution, and this has imposed many restrictions on their law-making capacities, including certain human rights, such as freedom of communication on political matters, the right to vote, the right to engage in interstate trade and commerce, the right to a trial by jury.

These rights have not been actionable in Australia in the American sense of founding a claim for damages for breach. However, they have entitled persons who are affected by legislation which contravenes these rights to bring legal proceedings for declarations that the law is invalid. Our law has always included this possibility. Thus it is erroneous to say, as many do, that creating actionable human rights would represent some kind of revolution in the law in Australia. It would only build on the protections already contained in the law and which have operated for many years without any apparent difficulty.

Section 39 of the Charter provides, in effect, that if a person has grounds outside the Charter to seek legal redress against a public authority, the person may also seek redress for contravention of the Charter. The Charter thus does not create an actionable right to sue a public authority.

In my view the Charter should be amended to create actionable rights against public authorities. I explain above why I do not think the creation of such rights would be any significant departure in our law. Below I explain the importance of the Charter to the delivery of Government services. I see no good reason why this should not be augmented by permitting legal redress for breaches of human rights by public authorities.

Those who caution against the excesses of big Government should welcome such rights. They will help to ensure that Government agencies are accountable under the law, do not exceed their powers and do not use those powers as instruments of oppression or discrimination.
5. What have been the effects of the Charter Act on -

(a) the development and drafting of statutory provisions;
(b) the consideration of statutory provisions by Parliament;
(c) the provision of services, and the performance of other functions, by public authorities;
(d) litigation and the roles and functioning of courts and tribunals; and
(e) the availability to Victorians of accessible, just and timely remedies for infringements of rights?

I will deal with topics (a) and (b) together, then (c) and finally (d) and (e) together.

Questions (a) and (b)
These questions are best answered by the members of Parliament themselves. I can only offer an outsider's perspective that the Charter appears to have had a positive impact on the legislative process. It is true that statements of compatibility under s 28 have become formulaic but this is not the fault of the Charter. It can and should be fixed by the Government of the day insisting on properly considered statements of compatibility. But even formulaic statements are better than none. Section 28 does ensure that human rights receive some basic consideration in the legislative process.

As we saw in relation to the Summary Offences and Control of Weapons Amendment Act 2009, Parliament has power to enact legislation inconsistent with human rights. This has only happened once in over 4 years of operation of the Charter. This suggests that the Charter is achieving its objective of restraining human rights contraventions by Act of Parliament, while reserving to Parliament the ultimate say about whether human rights should be adhered to in a particular case. In such a case Parliament is only expected to say why it is acting inconsistently with human rights: s 31. This is a reasonable requirement to impose on the Parliament.

Question (c)
In my view and experience, the most important section of the Charter is s 38, which imposes an obligation on public authorities to act consistently with human rights. There is a considerable body of anecdotal evidence that this provision has had a big impact on the way in which State Government services are delivered, especially to those most in need of them.

A number of stories are collected by the Human Rights Law Centre on its website at: http://www.hrbc.org.au/content/topics/national-human-rights-consultation/case-studies/.

These stories show that the Victorian public service, to its great credit, has reacted positively to the obligations cast on it by s 38 and sought to introduce a strong human rights culture.
I would like to recount a story in which I was personally involved and which demonstrates the impact of s 38. The case concerned a single mother who was a public housing tenant in western Melbourne. She has two young sons, who were both enrolled and doing well in the local schools and sporting clubs. Her boyfriend grew some marijuana plants in her backyard. This was observed by her neighbour who informed the police. The police raided the premises and charged the tenant with cultivation and possession of marijuana. When the Ministry of Housing learnt of this they issued an eviction notice based on the tenant’s illegal conduct on the premises. Eviction would most likely have resulted in homelessness for the tenant and her two children. Requests to the Ministry to reconsider were dismissed and the tenant applied to the Victorian Civil and Administrative Tribunal (VCAT) to set aside the eviction notice. The Ministry was again asked to reconsider. An official said the Ministry could not reconsider as the matter was now in the hands of VCAT. VCAT rejected the application and the tenant appealed to the Supreme Court.

I was briefed for the Supreme Court appeal. My view was that the appeal had only moderate prospects of success but that the Ministry should be asked to reconsider the matter again and its obligations under s 38 of the Charter specifically drawn to its attention. This happened; the Ministry was told it could not abdicate its responsibilities to VCAT or the Court; that it was under a duty to provide public housing to those in need; that, in discharging its duty it was obliged to consider the tenant’s human rights, which included her property rights under the lease and her right to a family life and to privacy. This request succeeded and the Ministry withdrew the eviction notice.

This case study neatly illustrates the impact of the Charter in Victoria. Its impact in litigation is limited because it creates no actionable rights; however, because it imposes a duty on public servants to respect human rights in discharging their functions it is having a big impact in the delivery of Government services. This is significant because it is the most vulnerable and underprivileged in our community who are most reliant on Government services and who suffer the most regular breaches of their human rights.

Questions (d) and (e)

Contrary to many predictions, the Charter has had only a modest impact on the conduct of litigation in Victoria. The number of cases in which it has been cited have been small. The number in which it was significant are smaller still. Since it does not confer actionable rights, but merely directs courts to interpret legislation and apply the common law so far as possible consistently with human rights, it effects only a minor reallocation of the law rather than any kind of revolution. The recalibration is nevertheless worthwhile but its impact should not be overstated. In particular the old saw about handing power to unelected judges has been discredited by the Victorian experience.

In over three years of operation, s 36 has only been applied once: R v Momcilovic (2010) 25 VR 436, currently on appeal to the High Court. Subject to what the High Court may decide, Momcilovic has amply demonstrated that scaremongering about the impact of the Charter was unwarranted. Momcilovic has confined the interpretation power in s 32 and
demonstrated that the power still resides in Parliament whether or not to apply legislation which is incompatible with human rights. 

Because the Charter does not confer actionable rights, it has not had any impact on improving the availability to Victorians of accessible, just and timely remedies for infringements of rights. To have such an impact the Charter would have to be amended to confer actionable rights. Even then, the impact is likely to be limited unless Government provides adequate legal aid funding.

6. What have been the overall benefits and costs of the Charter?

I would summarise the benefits of the Charter as follows:

(a) It has made the Parliament more mindful of human rights in the legislative process by requiring it to take human rights explicitly into account in that process, even if it decides to legislate inconsistently with human rights.

(b) It has created a human rights culture within the Victorian public service which has greatly improved the delivery of Government services to those most dependent on them.

(c) It has recalibrated the law so that human rights are more likely to be upheld in the interpretation of legislation and the application of the common law.

I am not in a position to judge the financial costs of the Charter. I expect they would be modest in the context of total Government expenditures. I cannot think of any other costs.

7. What options are there for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria?

Apart from the recommendation I make above about conferring actionable rights for breach of human rights by public authorities, I would only suggest one further amendment, namely the repeal of s 48. That provision excludes the operation of the Charter to any law applicable to abortion.

Without going into the controversy about the provenance of this provision, I would only observe that there is no sound reason in principle or practicality for it. The Charter should apply to the interpretation of the Abortion Law Reform Act 2008 like any other Act.

The repeal of s 48 would then permit an examination of whether s 8 of the Abortion Law Reform Act is an impermissible infringement on freedom of conscience, as some contend. That would also dispose of the disingenuous complaint that the Charter is no good because it does not protect doctors' consciences from s 8 of the Abortion Law Reform Act.
Otherwise, as I note above, unless legal aid funding is greatly increased, Victorians will continue to be denied the ability to protect and uphold their legal rights.

Yours faithfully,

Michael Pearce