SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

REVIEW OF THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT
2006

SUBMISSION

JUSTICE KEVIN BELL

31 MAY 2010

Review of the Charter

1 Section 44(1) of the Charter of Human Rights and Responsibilities Act 2006 requires the Attorney-General to cause a review to be made of the first four years operation of the Charter and tabled in each House of Parliament. The review must be into the operation of the Charter, not into the broader questions which may be raised by human rights legislation of this kind.

2 By s 44(2), the review must include a consideration of whether certain additional international human rights should be protected, whether the right of self-determination should be included, whether there should be mandatory reporting of compliance by public authorities with human rights and whether there should be further provisions with respect to the enforcement of the Charter and remedies for its breach.

3 The Attorney-General has appointed the Scrutiny of Acts and Regulations Committee of the Victorian Parliament to conduct the review. These are the Terms of Reference, as published in the Victorian Government Gazette on 19 April 2011:

   To inquire into and report by 1 October 2011 on the first four years of operation of the Charter of Human Rights and Responsibilities Act 2006 (the Charter Act), including:

   1. the matters referred to in section 44(2) of the Charter Act

   2. 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

      (e) the availability to Victorians of accessible, just and timely remedies for infringements of rights

   3. the overall benefits and costs of the Charter Act; and

   4. options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria.

This submission

4 I write this submission as a judge of the Supreme Court of Victoria (since 2005) and as a former president of the Victorian Civil and Administrative Tribunal (2008-2010). I was the chairperson of the committee of the Judicial College of Victoria which advised the college on educating judicial officers of the courts and the tribunal about the Charter. When president of the tribunal, I was a member of the board of the college. The views expressed in this submission are entirely my own and do not represent the views of the court, the tribunal or the college.
In my capacity as a judge of the court and the president of the tribunal, I have made a number of judgments and decisions which (subject to appeal) applied or considered the Charter. I will not be commenting on those decisions here. Nor will I be commenting on certain legal questions about the interpretation and application of the Charter which are before the courts or the tribunal. I will be making a submission on only some of the subjects in the terms of reference.

Summary position

In my submission, the Charter has made an important contribution to the operation of the legal system and government administration in Victoria. Despite its limitations and deficiencies, it has significantly improved the protection of the human rights of the community, especially the weak and the vulnerable, performed an important educative function about the importance of respecting human rights and given added capacity to courts and tribunals to take human rights into account. It has enhanced respect for the rule of law.

A limitation of the Charter is that it does not provide effective remedies for people whose human rights have not been respected by public authorities. It is true that, under the Charter, human rights can be relied on indirectly, and in a limited way, in separate proceedings in courts and tribunals. By comparison with the prior position, this has provided a welcome increase in the degree of enforceable human rights protection which individuals can obtain. But a person cannot bring proceedings to enforce their human rights under the Charter fully and directly. This is unsatisfactory and should be changed. It is of the first importance that human rights be effective. From limited and indirect reliance, the system should move to full and direct enforcement.

With respect to preparing and reviewing legislation, including the role of this committee, the operation of the Charter has been of fundamental importance. The community has a strong expectation that proposed legislation will respect human rights, unless there is demonstrable necessary justification for not doing so. A scrutiny mechanism is needed to give effect to that expectation. The current legislative review arrangements, together with the statement of compatibility requirements, constitute that scrutiny mechanism. In my submission, they should be retained, if not strengthened.

Protecting the human rights of the community

The extent of the pre-Charter protection of human rights should be acknowledged. For some time, there has been specific human rights legislation, for example the Equal Opportunity Act 1995. Under the Victorian Civil and Administrative Tribunal Act 1998, the tribunal has a Human Rights Division with that and some other specific jurisdictions. In the courts, the principle of legality stated by the High Court of Australia requires legislation to be interpreted consistently with fundamental common law rights and freedoms, where it is open to do so. There is a similar principle permitting legislation to be interpreted consistently with international conventions, where it is open to do so. In all cases, the legislation must prevail. The evolution of the Victorian legal system and our governmental arrangements has been in the direction of greater human rights protection for many years.
10 However, the weakness of the pre-Charter position was that human rights were not protected systematically and comprehensively. Whether a person would have their human rights respected depended on whether they came within a specifically protected category or were dealt with by a rights-respecting official. There was not a general legal (statutory) requirement to act compatibly with human rights applying across the whole of government, on pain of the action being unlawful.

11 Section 38(1) of the Charter was a reform of fundamental importance because it addressed this problem. By making it unlawful to do otherwise (absent contrary legislation: s 38(2)), it imposed a positive obligation on public authorities to act compatibly with human rights and take them properly into account when making decisions. The Charter thereby required the human rights of all persons to be respected, not just those in a specific category or those dealing with a sympathetic official.

12 In my submission, the provisions requiring public authorities to act compatibly with human rights have been of great benefit to the Victorian community. The implementation of these provisions has involved some extra cost to government, added a layer of principle to administrative decision-making and action and required changes to the operation of some government departments. Whole of government education and training has been required, including by the judiciary of the courts and the tribunal. These modest burdens have been more than compensated by the greater protection of the human rights of the community which the Charter has ensured.

13 The Charter was of positive assistance to me as the president of the tribunal. In that capacity, I was legislatively responsible for the general management and administration of the tribunal and heard and determined many proceedings in a wide variety of jurisdictions. Moreover, at the request of the government, I carried out a review of the tribunal, and published a report. My successor, the Hon Justice Iain Ross AO, is taking that process further. In my conduct of the administration of the tribunal, in hearing and determining proceedings and in carrying out the review, I found the human rights framework in the Charter to be of great value.

14 The tribunal provides services to the Victorian community and in that respect at least is a public authority under the Charter. The way the tribunal deals with parties, witnesses, government departments, the professions and the community generally is an important facet of its operation as a component of Victoria's system of civil justice. Human rights issues are routinely raised in the course of this interaction. By incorporating human rights in the management and administration of the tribunal, the quality and efficiency of its service was improved and a number of important issues were addressed. The tribunal embraced this approach, which did not significantly add to cost. The educative steps which were taken among the staff were an unequivocal positive in management terms. The Charter was particularly important in conveying to the administration of the tribunal that they played a vital role in ensuring the community obtained access to justice, which was a fundamental human right.

15 The decisions and judgments in which I have invoked human rights speak for themselves, as does the review report.
Empowering the weak and vulnerable.
16 There are people in the Victorian community who are weak and vulnerable and who rely on government for assistance and protection. The poor, the homeless, many people in CALD communities, the disabled (including people with a mental illness) and residents of institutions are all examples.

17 In their relations with public authorities, including ‘functional’ public authorities to whom governmental functions have been transferred, such persons are at severe risk of having their human rights infringed. This is not due to poor intent but to the relation of power between public authorities on the one hand and weak and vulnerable people on the other. Relatively, this is the relation of the powerful to the powerless. It is at the interface between public authorities and weak and vulnerable people that a legally binding framework of human rights is most needed. At that interface, people need not just human rights protection but human rights empowerment so that they can advocate on their own behalf as much as possible.

18 In my submission, the Charter has operated to enhance respect for the human rights of the weak and vulnerable. It has given them an increased measure of protection and power in their relations with public authorities. On the service delivery side, the implementation of the Charter has stimulated much-needed reform in a number of agencies. On the empowerment side, a number of government and not-for-profit agencies, as well as community legal centres, have used the Charter successfully to advocate on behalf of people with human rights problems, and to assist people to advocate on their own behalf. I have seen this in evidence both in the court and the tribunal.

Educative function
19 The function of all legislation is not just to prescribe the law but also to educate the community about their legal rights and responsibilities. For example, the Equal Opportunity Act was enacted both to afford legal protection from and against discrimination and to educate the community about the importance of respecting the equal position of all people.

20 Respect for human rights is an indispensable feature of contemporary society and the rule of law. Human rights are not absolute and yield to the general welfare of society where this is demonstrably justified according to a strict and legislatively specified standard. Democratic and social reciprocity – rights, respect and responsibility - is a central principle of the Charter. Expecting your human rights to be respected means respecting the human rights of others. This is a responsibility of membership of a liberal, democratic and tolerant society. In my submission, the enactment of the Charter has helped greatly in educating the community about the fundamental democratic importance of rights, respect and responsibility.

21 The educative value of the Charter consists in it being a statement by the Parliament, representing the people, about the importance of human rights in contemporary Victorian society. At one level, the Charter specifies the norms of behaviour which are now expected of public authorities. At another level, the Charter is as a statement by our Parliament of what we should expect of ourselves in that regard. In both its existence and
its operation, the Charter has thereby made a substantial contribution to increasing public awareness of the importance of respecting human rights.

23 Contemporary society is complex. The reach of government is long and growing, especially in areas which impact on the physical and social wellbeing of the community and on our fundamental rights and freedoms as individuals. As in other advanced democracies with which we compare ourselves, the Charter in Victoria has provided a framework for public discussion about legislation and government action impacting on individuals in the community. The Charter has operated to specify the standards against which these impacts can be considered. As public awareness of those standards has increased, the capacity of the community for effective democratic participation has been enhanced. I strongly endorse the educative contribution which the Charter has made in this regard, and the associated work of the Victorian Human Rights and Equal Opportunity Commission.

Making human rights effective

25 The present means of enforcing human rights under the Charter are welcome improvements on the prior position but limited. In my submission, this is a deficiency in the scheme of the Charter which should be rectified. Human rights should be no different to other legal rights. Human rights should be capable of effective enforcement by an appropriate remedy for infringement.

26 Human rights are for the protection of individuals. To legislate for a human ‘right’ is to legislate for a legal standard applying to the conduct of government administration towards individuals. An appropriate and effective remedy should go with the right so as to bring that standard into effective operation. To enact the right but not the means of effectively enforcing risks undermining the practical importance of the right. All the comparable jurisdictions have both the right and the remedy.

27 Human rights are legal rights of a particular kind which the nature of the remedy should reflect. In comparable jurisdictions, judicial officers in courts and tribunals have developed principles for the proper enforcement of human rights, having regard to their nature. The declaration of breach has been an important remedy - to vindicate the claim of the individual, to express society’s disapproval of the breach and to stimulate institutional reform, where necessary. Sometimes a modest award of damages has been made. Where appropriate in the ordinary jurisdiction of the court or tribunal concerned, the human rights standard has been used in interpreting the applicable legislation or in granting a conventional remedy. The international experience suggests there is nothing to fear from giving courts and tribunals a jurisdiction to award an appropriate remedy for infringing human rights.

28 I want to put forward one option for consideration. The Victorian Civil and Administrative Tribunal has original jurisdiction to make compensatory orders, and grant other relief, in relation to proven discrimination against the Equal Opportunity Act. Under the Victorian Civil and Administrative Tribunal Act, and as I have mentioned, the tribunal exercises that jurisdiction in the human rights division. This division was established by the Rules Committee under the first president of the tribunal, the Hon (and then Justice) Murray Kellam AO. Building on that approach, legislation could be enacted
giving further jurisdiction to the tribunal in that division to grant like relief for breaching human rights. Only public authorities could be liable. Only public authorities are bound to act compatibly with human rights. If this approach was successful, the courts could be given the jurisdiction also. To investigate this option, the Victorian Law Reform Commission could be given a reference.

**Conclusion**

29 When the *Charter of Human Rights and Responsibilities Act* was passed in 2006, there were fears in some quarters that an avalanche of litigation would be the result and that human rights compliance would be an intolerable burden on the conduct of government administration. From my experience as a judge of the Supreme Court of Victoria and the former president of the Victorian Civil and Administrative Appeals Tribunal, that has not been so.

30 By contrast with the previous legislative arrangements and the common law (important as these were and are), the Charter is a systematic and comprehensive framework for protecting and promoting human rights. Enacting the Charter brought human rights directly into our law and performed a powerful educative function about the fundamental importance of human rights to Victoria as a liberal, democratic and tolerant society. It has and will further increase public understanding of and respect for the rule of law and public confidence in the legal system.

31 One deficiency in the operation of the Charter is that the present means of enforcing human rights are limited. The Charter should be amended to provide an appropriate remedy for infringement.

32 Thank you for giving me the opportunity to make a submission. If I can be of further assistance, please contact my chambers.

*Justice Kevin Bell*

*Supreme Court of Victoria*

7 June 2011