

**“The significance of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* for reconciliation with the Aboriginal community and a federal charter of rights”**

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**National Indigenous Legal Conference**

**Melbourne  
12 September 2008**

With the passing by the Victorian Parliament of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, Victoria became the first State to enact a charter of rights.<sup>1</sup> It was a milestone in Victoria’s legal history, in the development of Victorian democracy and in the reconciliation of Victorians with the Aboriginal community.

There should, in my view, be a federal charter of rights. The Victorian provides a model which, with appropriate improvements and adaptations, the federal government should follow.

The Victorian Charter gave express recognition to the Aboriginal community in two respects. First, one of the founding principles of the Charter is that “human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia’s first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.”<sup>2</sup> Second, one of the human rights recognised by the Charter is the cultural right, which includes the “distinct cultural rights” of Aboriginal people.<sup>3</sup>

It is true that Victorian Aboriginal people have had protection under equal opportunity and anti-discrimination legislation in the past, as they do now. It is also true that the special places of Aboriginal people have been and remain covered by heritage protection

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<sup>1</sup> The first Territory to pass such legislation was the Australian Capital Territory, when it enacted the *Human Rights Act 2004 (ACT)*.

<sup>2</sup> The Preamble to the Charter.

<sup>3</sup> Section 19(2).

legislation. There is other legislation of this kind. So the Charter is not the first occasion on which, in legislation, the interests of Aboriginal people in Victoria have been recognised. But the recognition in the Charter of Victoria's Aboriginals as "descendants of Australia's first people" and of their "distinct cultural rights" is of a profoundly higher order.

This recognition is in the Charter, which enacts rules of near-universal application for the exercise of governmental power. Those rules are for the protection of human rights as between the community and government agencies generally. The Charter contains general rules for enacting, implementing and interpreting legislation consistently with human rights. It must therefore be seen to be a fundamental part of our legal framework. The recognition must be seen in the same light. More than that, the Charter specifies the human rights regarded as "essential in a democratic... society".<sup>4</sup> It is here making the fundamental link between human rights protection and the proper functioning of democracy, which is the foundation of our system of government.

Such is the setting, one of singular importance, in which the Parliament, on behalf of the people of Victoria, has chosen to give recognition of our Aboriginal community. This is a transcendent recognition, higher than any other. This is democracy in Victoria lifting heavy weights, and being strengthened by the exercise.

The Charter operates powerfully at the symbolic level to make a statement about the identity and history of the Victorian community. It declares as founding principles "a democratic and inclusive society"<sup>5</sup> and "diversity... enhances our community".<sup>6</sup> After stating those principles, the Charter goes on to speak of the Aboriginal people of Victoria as descendants of "Australia's first people" and of their diverse relationship with their lands and waters. This is a transcendent statement about the identity and history of Victorians, made on the highest plane of principle: it specifies the fundamental values with which the Victorian community identifies and then, consistently with those values,

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<sup>4</sup> The Preamble to the Charter.

<sup>5</sup> The Preamble to the Charter.

<sup>6</sup> The Preamble to the Charter.

recognises Aboriginal Victorians, being members of that community, as descendants of the first Australians, of those who were here before.

Once this is appreciated, the significance of the Charter to Victoria's Aboriginal community, and logically of a federal charter of rights to Australia's Aboriginal community, and more generally to the cause of reconciliation with the Aboriginal community generally, can be fully appreciated. Comprehensive human rights legislation may not directly address the appalling extent of Aboriginal disadvantage, for which a range of particular measures are needed. However, it is an essential component of the solution to the broader problem of which that disadvantage is the most obvious symptom - the historical disempowerment and dispossession of the Aboriginal community.

Human rights are founded on human dignity as a fundamental birthright. Human rights are about equality, respect and the rule of law (among other things). To fail to recognise Aboriginal people as the descendants of the first Australians, the special relationship they have with their traditional lands and waters and their distinct cultural rights, would be to treat them with disrespect, to treat them unequally and to subvert the legitimacy of the rule of law. It is therefore difficult to contemplate the enactment of a charter of human rights which did not recognise Aboriginal people, relationships and culture in that way.

In a charter, we declare the human rights values with which we as a community identify. By doing so, we try, through our elected representatives, to bring all members of the community into a fixed centre of common sympathy. This creates in the charter an unstoppable moral momentum towards the recognition of the Aboriginal community, of their history as the descendants of the first Australians, of the relationship they have with their traditional lands and waters and of their distinct cultural rights. That is one important reason why I support the enactment of a federal charter of rights. In my view, it would necessarily contain such a recognition, consistently with a later (or accompanying recognition) in the Australian Constitution.

Australia is not the only Western country with a colonial history of Aboriginal disempowerment and dispossession. The international experience shows that human rights charters are part of the solution to the problems of nationhood created by such a history. Witness Canada, South Africa and New Zealand.

Let me now turn to the human dimension of human rights.

One of the great strengths of the human rights principles embodied in the Charter is that they focus on the human dimension. A human rights problem most often presents itself as a government decision that will impact on an individual adversely in human rights terms. I will address four of the innumerable examples which could be chosen. The elderly person must be evicted from their home, so the transport authorities say, because the home must be demolished to make way for a new railway track. The mentally-ill patient must be heavily and involuntarily sedated, so the medical experts say, to prevent him or her from self-harming. The civil liberties of the community must be restricted, so the police authorities say, in the interests of fighting terrorism. The school with programs for Aboriginal students must be closed, so the education authorities say, because enrolments are too low and costs are too high.

Of course these are just a few of the examples of problems that routinely confront the community and government in modern society. Yet the common law, for all its genius, is simply ill-equipped to deal with them. It is only through the case-sensitive application of human rights legislation that they can be properly addressed. That is another reason why I support the enactment of a federal charter of human rights.

Human rights legislation such as the Charter is inherently case-sensitive. The mechanism that brings this about is the proportionality test. This test operates to determine whether the impairment of a human right by a government decision or under a particular legislative provision can be demonstrably justified in a free and democratic society. The first step is to determine whether a human right recognised in the Charter is engaged. If so, the second step is to determine whether the impairment, in its kind and degree, is a

justifiable response – in the sense of being within the range of proportionate responses – to the problem being addressed.

The Charter specifies the human rights that are protected, drawing on the International Covenant on Civil and Political Rights. I can use my case examples to illustrate those rights and the concept of engagement.

There is a right in the Charter not to have your privacy, family or home unlawfully or arbitrarily interfered with.<sup>7</sup> That right would probably be engaged by the proposal to evict the elderly person from their home to make way for the railway track. There is a right not to be subjected to involuntary medical treatment.<sup>8</sup> That right would be engaged by the proposal to force medication on the patient. The Charter contains a number of civil liberties protections, such as the right not to be subjected to arbitrary arrest or detention and to be brought before a court without delay.<sup>9</sup> Those rights could be engaged by various kinds of anti-terrorism laws, such as laws allowing non-suspects to be arrested and detained for questioning for long periods of time. There are “distinct cultural rights”<sup>10</sup> held by Aboriginals which I have already mentioned. There is a right to equality before the law and to the enjoyment of rights without discrimination, which is subject to a special measures exception.<sup>11</sup> The closing of the school with the programs for the Aboriginal students may engage those rights.

Given that a proposed government action or statutory provision engages the human rights of the individuals affected, it would then be necessary to decide whether the limitation or impairment of the human rights was justified in the sense I have explained. It is here that the Charter provides us with a new and important tool for decision-making: the proportionality test. The test is derived from comparable legislation overseas. But the Charter specifies the test in terms that are unique and very helpful. This is section 7(2):

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<sup>7</sup> Section 13(a).

<sup>8</sup> Section 10(c).

<sup>9</sup> Section 21.

<sup>10</sup> Section 19(2).

<sup>11</sup> Section 8(3).

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Applying this provision to each of my case examples requires a careful analysis of the critical facts to determine whether the limitation in the action or statutory provision is justified in this sense. For example, is eviction of the elderly person really necessary for the construction of the new railway track? Is there a reasonably available alternative route? Have adequate arrangements for the relocation of the elderly person been made? In the next example, on a careful assessment of the medical evidence, is the strong medicine really necessary? What is the actual risk of self-harm? Is a medicine available that will adequately control the risk without the same side effects? As to the anti-terrorism legislation, is the threat of terrorism established by the police authorities, and what is the nature and degree of the threat? Are the proposed restrictions on civil liberties justified by reference to what has been established and do the proposals go outside the range of proportionate responses? Finally, as regards the closure of the school with the programs for Aboriginal students, how does the government propose to educate them in a way that respects their distinct cultural rights, if it is not to be done through that school?

Under the Charter, that kind of analysis is legally expected of Victorian government officials who engage in decisions that affect human rights. This is because the Charter makes it “unlawful” for a “public authority” to act in a way that is incompatible with human rights or to fail to give proper consideration to a relevant human right,<sup>12</sup> unless by statute the Parliament has required otherwise.<sup>13</sup> “Public authority” is defined broadly to include virtually all persons and entities who exercise statutory powers and functions of a

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<sup>12</sup> Section 38(1).

<sup>13</sup> Section 38(2) provides sub-s (1) does not apply if a statutory provision requires the decision-maker to act in the particular way. Section 32(1) requires legislation, so far as it is possible to do so consistently with their purpose, to be read in a way that is compatible with human rights.

public nature, including the police and local councils.<sup>14</sup> The Charter thus requires virtually all government decision-making to be human rights compliant. At least the administrative actions of courts and tribunals must also be so compliant.<sup>15</sup>

The Charter is built on the “dialogue model” of human rights legislation, which means it has the following attributes. It is an ordinary legislative enactment and not a constitutional enactment (however much it is a part of our fundamental legal framework). The proponents of legislation must lay a statement before the Parliament setting out how the legislation is compatible with human rights.<sup>16</sup> The Charter allows the Parliament to make an override declaration so that particular legislation has effect despite it being incompatible with human rights.<sup>17</sup> The Charter does not allow the courts and tribunals to declare invalid legislation that is incompatible with human rights, although it gives the Supreme Court an important power to declare that legislation, properly interpreted, is inconsistent with human rights.<sup>18</sup> The relevant minister must respond to a declaration by laying a written response before the Parliament within six months.<sup>19</sup> Regrettably, there is no separate cause of action for breach of human rights, but that ground of unlawfulness can be relied upon when administrative law relief could otherwise be claimed, as in many cases it could.<sup>20</sup>

The “dialogue” inherent in these arrangements is that which occurs between the courts and the Parliament, and within the community, as regards the nature and extent of human rights incompatible legislation and government actions. The model adopted in Victoria, while significantly enhancing respect for human rights in the governmental and legislative framework, carefully specifies the role of the courts and tribunals so as to protect the legislative supremacy of the Parliament as the ultimate expression of the democratic will.

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<sup>14</sup> Section 4(1).

<sup>15</sup> Section 4(1)(j); cf s 6(2)(b).

<sup>16</sup> Section 28.

<sup>17</sup> Section 31.

<sup>18</sup> Section 36.

<sup>19</sup> Section 37.

<sup>20</sup> Section 38(1).

The Victorian Charter should not be regarded as the perfect model. There is room for debate about whether the Charter has struck the right balance between protecting human rights and protecting the role of Parliament and the executive. There is room for debate about the practical non-enforceability (or limited enforceability) of human rights by individuals and hence the adequacy of the protection afforded.

However, in my view, there is no room to doubt that the Charter has significantly enhanced the role of human rights in governmental decision-making. There is no room to doubt that, by recognising the Aboriginal community as the descendants of Australia's first people, the diverse relationship they have with their traditional lands and waters and their distinct cultural rights, the Charter has made a substantial contribution towards Aboriginal reconciliation and towards addressing the fundamental problem of Aboriginal dispossession and disempowerment. There is no room to doubt that, by passing the Charter, the Parliament has given the courts and tribunals necessary powers, to be exercised within carefully specified limits, for the resolution of human rights problems with which the common law is ill-equipped to deal. Finally, there is no room to doubt that Victorian democracy has been strengthened by the enactment of the Charter.

Each of those points applies with equal if not stronger force in the federal sphere of government. It is for those reasons that I support the enactment of a federal charter of rights.