

CRITIQUE AND COMMENT

THE VICTORIAN *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES*: ORIGINS AND SCOPE

GEORGE WILLIAMS*

[The Victorian Charter of Rights is the first bill of rights to be enacted by an Australian state. It is a limited change to the law that does not disturb accepted principles of parliamentary sovereignty and does not confer powers associated with the United States Bill of Rights, such as that of courts to strike down legislation. Instead, the focus of the Victorian Charter of Rights is on improving the work of government and Parliament and thereby preventing human rights problems from arising in the first place. This article explores the origins of the Victorian Charter of Rights and its intended operation.]

CONTENTS

I	Introduction	880
II	Why Is There No Australian Bill of Rights?	883
III	The Road to the <i>Victorian Charter of Rights</i>	885
	A Origins	885
	B The Community Consultation	887
	C What the Community Said	891
	D The Outcome	893
IV	The <i>Victorian Charter of Rights</i>	893
	A The Model	893
	B Which Rights?	895
	C The Changing Charter	897
	D Limiting and Overriding Human Rights	898
	E Obligations on Public Authorities	900
	F A ‘Dialogue’ about Rights	901
V	Conclusion	903

I INTRODUCTION

The *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (‘*Victorian Charter of Rights*’) is a landmark in Australia’s constitutional and political history. While it is not the nation’s first bill of rights, that being the *Human*

* BEc, LLB (Hons) (Macq), LLM (UNSW), PhD (ANU); Anthony Mason Professor, Faculty of Law, The University of New South Wales; Director, Gilbert + Tobin Centre of Public Law; Barrister of the Supreme Court of New South Wales; Chair, Victorian Human Rights Consultation Committee. This article is developed from a Senate Occasional Lecture on ‘Victoria’s *Charter of Human Rights and Responsibilities*: Lessons for the National Debate’, delivered at Parliament House, Canberra, 7 July 2006. I thank Edwina MacDonald for her comments and assistance.

Rights Act 2004 (ACT) (*‘ACT Human Rights Act’*),¹ it is the first such instrument in an Australian state. Like the Australian Capital Territory law, it is an innovative, if modest, change to the Australian system of government in the form of an unentrenched Act of Parliament that protects a range of civil and political rights.

The *Victorian Charter of Rights* marks a decisive departure, at least in Victoria, from the long-held notion that the best protection for human rights is the good sense of our parliamentary representatives as constrained by the doctrine of responsible government and the common law as applied by the judiciary. This view was fostered at the conventions held in the 1890s that drafted the *Australian Constitution*² and in writings such as those of 19th century English constitutional theorist, A V Dicey.³ The view has included adherents such as former Prime Minister Sir Robert Menzies, who regarded the doctrine of responsible government as being the ‘ultimate guarantee of justice and individual rights’ in Australia.⁴ He argued that the doctrine meant that Australia had no need of the ‘formality and definition’ of rights in an instrument like a bill of rights.⁵ In recent years this view has come under challenge as people have questioned whether the conventions attaching to responsible government, such as ministerial accountability, retain the same force.⁶

Reliance upon the common law system has also been questioned, including by some of Australia’s most senior judges. For example, former Chief Justice of the High Court Sir Anthony Mason has remarked:

the common law system, supplemented as it presently is by statutes designed to protect particular rights, does not protect fundamental rights as comprehensively as do constitutional guarantees and conventions on human rights. ... The common law is not as invincible a safeguard against violations of fundamental rights as it was once thought to be.⁷

This perspective now commands acceptance in the United Kingdom, which enacted its own bill of rights in the form of the *Human Rights Act 1998* (UK) c 42 (*‘UK Human Rights Act’*). The *Victorian Charter of Rights* is primarily based upon this law, as well as the *ACT Human Rights Act* and the *New Zealand*

¹ See generally Hilary Charlesworth and Gabrielle McKinnon, ‘Australia’s First Bill of Rights: The Australian Capital Territory’s *Human Rights Act*’ (Law and Policy Paper No 28, Centre for International and Public Law, The Australian National University, 2006); Julie Debeljak, ‘The *Human Rights Act 2004* (ACT): A Significant, Yet Incomplete, Step toward the Domestic Protection and Promotion of Human Rights’ (2004) 15 *Public Law Review* 169; Carolyn Evans, ‘Responsibility for Rights: The *ACT Human Rights Act*’ (2004) 32 *Federal Law Review* 291.

² George Williams, *Human Rights under the Australian Constitution* (1999) ch 2.

³ A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959). See also Eric Barendt, ‘Dicey and Civil Liberties’ [1985] *Public Law* 596.

⁴ Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (1967) 54.

⁵ *Ibid.*

⁶ See, eg, the report of the inquiry into allegations by members of the executive that asylum seekers coming to Australia by boat had thrown their children overboard: Senate Select Committee on a Certain Maritime Incident, Parliament of Australia, *Inquiry into a Certain Maritime Incident* (2002).

⁷ Sir Anthony Mason, ‘The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience’ (1986) 16 *Federal Law Review* 1, 12.

Bill of Rights Act 1990 (NZ), rather than upon constitutional instruments like the *United States Bill of Rights* or *South African Bill of Rights*.

The enactment of the *ACT Human Rights Act* and *Victorian Charter of Rights* also challenges the view that Australia has a strong record of protecting human rights which does not need improvement through better legal protection for such rights. In 1967, Sir Robert Menzies, just retired as Prime Minister, remarked that ‘the rights of individuals in Australia are as adequately protected as they are in any other country in the world.’⁸ Similarly, current Prime Minister John Howard said in 2000 that ‘Australia’s human rights reputation compared with the rest of the world is quite magnificent.’⁹

While Australia undoubtedly has a better human rights record than many other nations, the view that our record could not be significantly improved is no longer as readily accepted. Both the historic and contemporary weaknesses of the Australian record have been exposed, including by the federal government’s own Human Rights and Equal Opportunity Commission in regard to the forced removal of Aboriginal children from their families (the ‘stolen generations’),¹⁰ and the detention of children seeking asylum and refuge and their consequential development of a range of mental health problems.¹¹ Developments after September 11, 2001 have also led people to question how well human rights are protected in Australia, particularly since the enactment of new laws on sedition; the detention of non-suspects by the Australian Security Intelligence Organisation; control orders that enable house arrest; and preventative detention whereby someone can be held without charge or trial.¹² As Brian Burdekin, a former Australian Human Rights Commissioner, commented in 1994: ‘It is beyond question that our current legal system is seriously inadequate in protecting many of the rights of the most vulnerable and disadvantaged groups in our community.’¹³

The *Victorian Charter of Rights* is important not only because it is a significant change to the text of law. It is also significant because it requires a re-evaluation of these and other traditional views about Australian politics and law as they relate to the protection of human rights. The *Victorian Charter of Rights* demonstrates that it is possible to look again at some of the most basic assumptions and beliefs that underlie our system of government, and as a result, to bring about legal reform. This contradicts the view that bills of rights are not politically achievable in Australia. While this drew strong support from the litany

⁸ Menzies, above n 4, 54.

⁹ ABC Radio, ‘Prime Minister Continues Push for Regional Services’, *AM*, 18 February 2000 <<http://www.abc.net.au/am/stories/s101290.htm>>.

¹⁰ Human Rights and Equal Opportunity Commission, Australia, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

¹¹ Human Rights and Equal Opportunity Commission, Australia, *A Last Resort?: National Inquiry into Children in Immigration Detention* (2004).

¹² *Criminal Code Act 1995* (Cth) sch ch 5; *Australian Security Intelligence Organisation Act 1979* (Cth) pt III div 3. See generally Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia’s Anti-Terror Laws* (2006).

¹³ Brian Burdekin, ‘Foreword’ in Philip Alston (ed), *Towards an Australian Bill of Rights* (1994) v, v.

of failures to achieve change around Australia,¹⁴ it has now been swept away by the successes in the ACT and Victoria, as well as by new national initiatives like that by New Matilda for a national bill of rights.¹⁵

In this article, Part II explores the historical background to the *Victorian Charter of Rights*, followed in Part III by the process that led to its enactment. I then examine in Part IV how the *Victorian Charter of Rights* has changed the law. Parts of this article are more personal and reflective than might normally be the case in an academic treatment of the *Victorian Charter of Rights*. This is because I chaired the Human Rights Consultation Committee ('Consultation Committee') which recommended to the Victorian Government that the *Victorian Charter of Rights* be enacted. Rather than seeking to artificially put myself at arms-length from a development in which I was a participant, I take the opportunity where appropriate to speak from my personal experience and perspective.

II WHY IS THERE NO AUSTRALIAN BILL OF RIGHTS?

Australia is now the only democratic nation in the world without a national bill of rights.¹⁶ Some comprehensive form of legal protection for basic rights is otherwise seen as an essential check and balance in democratic governance around the world. Indeed, I can find no example of a democratic nation that has gained a new Constitution or legal system in recent decades that has not included some form of a bill of rights, nor am I aware of any such nation that has done away with a bill of rights once it has been put in place.

Why then is Australia the exception? The answer lies in our history. Although many think of Australia as a young country, constitutionally speaking, it is one of the oldest in the world. The *Australian Constitution* remains almost completely as it was when enacted in 1901, while the Constitutions of the Australian states can go back as far as the 1850s. The legal systems and Constitutions of the nation and the Australian colonies (and then states) were conceived at a time when human rights, with the prominent exception of the 1791 *United States Bill of Rights*, tended not to be protected through a single legal instrument. Certainly, there was then no such law in the United Kingdom, upon whose legal system ours is substantially based. This has changed, especially after World War II and the passage of the *Universal Declaration of Human Rights*,¹⁷ but by then Australia's system of government had been operating for decades.

Not only is the Australian constitutional system old by world terms, but it has resisted change. As far back as 1967 Australia was described by Geoffrey Sawer as '[c]onstitutionally speaking ... the frozen continent.'¹⁸ This is even more applicable today, with the last successful vote to change the *Australian Constitu-*

¹⁴ See George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (2004) ch 5.

¹⁵ See generally New Matilda.com, *A Human Rights Act for Australia* <<http://www.humanrightsact.com.au>>. New Matilda is an online magazine and policy portal providing a forum for commentary on significant Australian and international issues.

¹⁶ See Gareth Griffith, 'The Protection of Human Rights: A Review of Selected Jurisdictions' (Briefing Paper No 3, Parliament of New South Wales, 2000).

¹⁷ GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/Res/217A (III) (1948).

¹⁸ Geoffrey Sawer, *Australian Federalism in the Courts* (1967) 208.

tion in 1977 when it was amended, among other things, to set a retirement age of 70 years for High Court judges. A further eight unsuccessful proposals have been put to the people since that time. The period since 1977 is now the longest without any change to the *Australian Constitution* (the next longest period was between 1946 and 1967). The political party most often associated with constitutional reform, the Australian Labor Party, has itself not succeeded in having the people support a referendum since 1946, with Labor governments putting 13 failed proposals in ballots held in 1948, 1973, 1974, 1984 and 1988. By contrast, over 56 per cent of the member states of the United Nations made major changes to their Constitutions just between 1989 and 1999. Of the states making such changes, over 70 per cent adopted a completely new Constitution.¹⁹

The *Australian Constitution* was drafted and consideration given to inserting guarantees of human rights at constitutional conventions held in the 1890s. At that time, it made sense to trust that the then British traditions of the common law and responsible government would protect human rights. There was an additional reason why comprehensive rights guarantees were not included in the new *Australian Constitution* — the framers sought to give the new federal and state Parliaments the power to pass racially discriminatory laws.²⁰ This is clearly demonstrated by the drafting of certain provisions. For example, the *Australian Constitution*, as enacted in 1901, said little about indigenous peoples, but what it did say was entirely negative. Section 51(xxvi), the races power, enabled the federal Parliament to make laws with respect to ‘[t]he people of any race, other than the aboriginal race in any state, for whom it is deemed necessary to make special laws’, while under s 127, ‘[i]n reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.’

Section 51(xxvi) was inserted into the *Australian Constitution* to allow the Commonwealth to take away the liberty and rights of sections of the community on account of their race. By today’s standards, the reasoning behind the provision was racist. Edmund Barton, Australia’s first Prime Minister and later a High Court judge, stated at the 1898 Convention in Melbourne that the power was necessary to enable the Commonwealth to ‘regulate the affairs of the people of coloured or inferior races who are in the Commonwealth.’²¹

One framer, Andrew Inglis Clark, the Tasmanian Attorney-General, supported a provision taken from the *United States Constitution* requiring the ‘equal protection of the laws.’²² This clause might have prevented the federal and state Parliaments from discriminating on the basis of race, and the other framers were concerned that Clark’s clause would override Western Australian laws under which ‘no Asiatic or African alien can get a miner’s right or go mining on a

¹⁹ See Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction* (2000) 12.

²⁰ Williams, *Human Rights under the Australian Constitution*, above n 2, 33–45.

²¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 228–9 (Edmund Barton).

²² See *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 9 April 1891, 962 (Draft of a Bill to Constitute the Commonwealth of Australia s 18).

gold-field.²³ Clark's provision was rejected by the framers who instead inserted s 117 of the *Australian Constitution*, which merely prevents discrimination on the basis of state residence. In formulating s 117, Henry Higgins, one of the early members of the High Court, argued that it was acceptable because it would allow laws 'with regard to Asiatics not being able to obtain miners' rights in Western Australia. There is no discrimination there based on residence or citizenship; it is simply based upon colour and race.'²⁴ While in a 1967 referendum Australians chose to strike out the words 'other than the aboriginal race in any State' in s 51(xxvi) and to delete s 127 entirely, the racist underpinnings of our *Australian Constitution* remain.

The *Australian Constitution* as drafted and as modified on occasion, such as in 1967, continues to shape Australian law and government as well as attitudes towards the legal protection of human rights. An example is the split decision in the 1998 High Court case *Kartinyeri v Commonwealth*,²⁵ which did not resolve whether s 51(xxvi) could still be used to enact laws that discriminate against people on account of their race.²⁶ This and other decisions demonstrate how Australia has yet to fully move on from a system of government founded upon law and values that led, in the first year of the new national Parliament, to the enactment of the White Australia Policy.²⁷

One way to break with this past is to recognise that the accepted wisdom of the 1890s, at least as to issues of race and human rights, no longer holds true. This can be achieved by enacting new laws that protect freedoms from the misuse of public power and provide a way for Parliaments to pass laws and governments to apply them consistently with modern human rights principles like freedom from racial discrimination. While it is only a law of one state and cannot override national laws,²⁸ the *Victorian Charter of Rights* is one such a law.

III THE ROAD TO THE *VICTORIAN CHARTER OF RIGHTS*

A *Origins*

The origins of the *Victorian Charter of Rights* lie in the initiative issued by Victorian Attorney-General Rob Hulls in May 2004 titled *New Directions for the*

²³ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 665 (Sir John Forrest).

²⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1801 (Henry Higgins).

²⁵ (1998) 195 CLR 337.

²⁶ See Justin Malbon, 'Avoiding the Hindmarsh Island Bridge Disaster: Interpreting the Race Power' (2002) 6 *Flinders Journal of Law Reform* 41; Alexander Reilly, 'Reading the Race Power: A Hermeneutic Analysis' (1999) 23 *Melbourne University Law Review* 476; George Williams, 'Race and the *Australian Constitution*: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 643.

²⁷ 'Prohibited immigrants' under *Immigration Restriction Act 1901* (Cth) s 3(a) included '[a]ny person who fails to pass the dictation test: that is to say, who, when an officer dictates to him not less than fifty words in any prescribed language, fails to write them out in that language'. See, eg, the application of this Act in *Potter v Minahan* (1908) 7 CLR 277; *R v Wilson*; *Ex parte Kisch* (1934) 52 CLR 234.

²⁸ Of course, only the converse is possible: see *Australian Constitution* s 109.

Victorian Justice System 2004–2014: Attorney-General’s Justice Statement.²⁹ This statement proposed new directions for the Victorian justice system over the following decade and dealt with a wide range of matters, including the idea of a charter of human rights and responsibilities.³⁰ The *Justice Statement* recognised the view that the common law and government by elected representatives adequately protects basic freedoms. However, it also argued for re-examining such beliefs to determine whether Victorian law should be changed to better protect human rights through a charter. The *Justice Statement* did not say that a charter was needed or commit to such change. It instead proposed a public discussion to address the issue.

In April 2005, the Attorney-General announced the appointment of a four-person Consultation Committee.³¹ It comprised Rhonda Galbally AO, renowned for her community leadership in addressing disadvantage and her advocacy for people with disabilities, Andrew Gaze, basketballer and captain of the Sydney 2000 Olympic team, the Hon Professor Haddon Storey QC, a former Victorian Liberal Attorney-General, and myself as the chair.³² In dealing with legal issues, the Consultation Committee received considerable assistance from the Victorian Solicitor-General, Pamela Tate SC.

The time frame was tight, with only six months given to consult with Victorians and to report back to the Attorney-General by 30 November 2005. Some people were critical of the short time given for the consultation, with some expecting that a consultation of 12 months might have been allowed. However, the decision to provide only six months was both pragmatic and sensible. It was pragmatic because with a Victorian election due in November 2006, a 12-month consultation would not have allowed time for the implementation of any recommendations prior to the election. It was also sensible because six months was sufficient time for an intense and busy process to determine if people were in favour of change and, if so, generate momentum towards that end. There was a real possibility that a longer consultation may have allowed any momentum generated by the process to dissipate.

The Consultation Committee was appointed to operate independently of the Attorney-General and of government. However, in May 2005, the Victorian Government released *Human Rights in Victoria: Statement of Intent*³³ upon our appointment that set out the Government’s preferred position on any human

²⁹ Attorney-General, Department of Justice, Victoria, *New Directions for the Victorian Justice System 2004–2014: Attorney-General’s Justice Statement* (2004) (*Justice Statement*).

³⁰ *Ibid* 52.

³¹ Office of the Attorney-General, ‘Hulls Appoints Panel To Lead Discussion on Human Rights’ (Press Release, 17 April 2005).

³² I did not expect that I would be a participant in this process as I expected that all Consultation Committee members would be Victorians. Moreover, before the process I had never met Attorney-General Rob Hulls nor had I performed any work for the Victorian Government. My selection reflected the desire on the part of the Victorian Government to have someone chair the process with a strong academic and legal understanding of the issues. Except for a period spent in the United Kingdom, I spent almost all of the six months of the consultation based in Victoria. This proved essential given the extensive community discussions initiated by the Consultation Committee.

³³ Department of Justice, Victoria, *Human Rights in Victoria: Statement of Intent* (2005) (*Statement of Intent*).

rights model for the state. The Government indicated its preference for a limited set of human rights taken from the *International Covenant on Civil and Political Rights*,³⁴ and not for the protection of other rights taken from other conventions, such as women's rights, indigenous rights, or economic, social and cultural rights more generally (such as the rights to education, housing and health).³⁵ The Government also indicated that it preferred to preserve the sovereignty of Parliament with the courts being given only a limited role, and that it was interested in a model like that in the United Kingdom and New Zealand, as adapted recently in the ACT, and did not favour anything like the constitutional bill of rights found in the United States.

Like the short time frame given to the Consultation Committee for the consultation process, the publication of the *Statement of Intent* attracted criticism. Some people, especially those in the community sector, argued that the *Statement of Intent* was too prescriptive and could be seen as prejudging the process. There was particular concern about the *Statement of Intent* excluding protection of economic, social and cultural rights from the Government's preferred position. These criticisms had merit. Nonetheless, the *Statement of Intent* did play an important, perhaps even necessary, role in leading to the enactment of the *Victorian Charter of Rights*. By releasing the *Statement of Intent*, the Government went beyond establishing the process merely to gauge community opinion to indicating a preference for a model should the community be in favour of a bill of rights. This made the *Statement of Intent* influential within government when the Consultation Committee reported in a form that fell within the preferences expressed in it. The *Statement of Intent* was also useful during the consultations in giving community members a sense of the Government's position. While the Consultation Committee asked members of the community open-ended questions that sought responses far broader than the preferences in the *Statement of Intent*, it was useful when people asked where the Government stood to be able to provide a specific response.

B *The Community Consultation*

When the Consultation Committee first met after its appointment in April 2005, we quickly realised the enormous challenges involved in consulting with Victorians about their views on human rights and whether state law needed to be changed to bring about a bill of rights. These included the alienation of many people from their system of law and government, the difficulties in having young people participate, and the need to work with government to ensure that recommendations made in light of community views were consistent with what could actually be implemented.

A further major challenge was the ignorance of many Australians about the most basic issues at the centre of the consultation. This contributed to the alienation and anxiety felt by many people in regard to their system of govern-

³⁴ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

³⁵ See, eg. *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

ment. A 1987 survey, for example, conducted for the Constitutional Commission found that 46.1 per cent of Australians were unaware that Australia has a written Constitution.³⁶ Similarly, in 1994 the Civics Expert Group reported that only 18 per cent of Australians had some understanding of what their Constitution contained.³⁷ Significantly, only one in three people felt reasonably well informed about their rights and responsibilities as Australian citizens.³⁸

These findings have been replicated by a 2006 survey. Amnesty International Australia commissioned a nationwide poll of 1001 voters by Roy Morgan Research, the organisation that conducts the Morgan Gallop Poll, on a range of issues relating to anti-terrorism legislation and awareness of human rights.³⁹ Asked 'how much do you know about your own human rights?', only five per cent of people said 'a great deal', while 58 per cent said 'a moderate amount', 29 per cent 'a little' and five per cent 'nothing'.⁴⁰ However, this must be seen in light of the answer given to the question of whether human rights are protected by a bill of rights. Remarkably, 61 per cent said they thought Australia does have such an instrument, with 13 per cent indicating 'no' and 26 per cent saying they could not say.⁴¹ This revealed even higher levels of factual error than earlier surveys. It reflects the significant public attention given to such matters after September 11, 2001 and the false assumptions about the legal system formed as a result, as well as assumptions based upon references to bills of rights in popular culture like US television programs. After informing Australians about the absence of a bill of rights, the survey asked whether they would support a bill of rights. Sixty-nine per cent answered they were 'very likely' or 'likely' to do so, with 11 per cent saying they were 'neither likely nor unlikely' and only 14 per cent indicating they were 'unlikely' or 'very unlikely' to do so.⁴² This is consistent with an opinion survey of 1505 citizens published in 1997 by political scientists Brian Galligan and Ian McAllister which found that 72 per cent of respondents supported some form of a bill of rights for Australia, with seven per cent opposed and 21 per cent having no opinion.⁴³

To meet these challenges the Consultation Committee developed a process to give as many Victorians as possible a genuine say about the issue at a grassroots level.⁴⁴ It did so after examining the successful community-based process that

³⁶ Constitutional Commission, 'Many Australians Ignorant of Our Constitution' [1987] 5 *Bulletin* 6.

³⁷ Civics Expert Group, *Whereas the People ...: Civics and Citizenship Education* (1994) 19.

³⁸ *Ibid.*

³⁹ Roy Morgan Research, *Anti-Terrorism Legislation Community Survey* (2006) <<http://acthra.anu.edu.au/articles/Anti-terror%20community%20survey%20report.pdf>>.

⁴⁰ *Ibid.* 12.

⁴¹ *Ibid.*

⁴² *Ibid.* 17.

⁴³ Brian Galligan and Ian McAllister, 'Citizen and Elite Attitudes towards an Australian Bill of Rights' in Brian Galligan and Charles Sampford (eds), *Rethinking Human Rights* (1997) 144, 149.

⁴⁴ See generally Consultation Committee, Department of Justice, Victoria, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 139–49 ('*Consultation Committee Report*').

led to the *ACT Human Rights Act*.⁴⁵ The Victorian process was very different from how other inquiries, such as parliamentary committees, normally operate. We believed that the way to get people involved was not through the media, but to meet with people in their communities in small groups and to work through their local and peak community organisations. In fact, we believed that the media would only be likely to polarise the issue and further alienate people by focusing the debate not on education and governance, but on controversial issues like abortion. Our process sometimes involved what we called ‘devolved consultation’ whereby we worked with other bodies, such as the Youth Affairs Council of Victoria, to assist us to reach people with special needs, such as homeless people.⁴⁶ The process also involved extensive travel throughout Victoria. We talked to people ranging from community groups in Mildura, to indigenous people in Warrnambool, to the victims of crime and businesspeople in Melbourne, to the Country Women’s Association in Gippsland.⁴⁷ We paid particular attention to meeting with people who knew little or nothing about human rights and who might be the most alienated from the political and legal system. Rather than focusing upon the ‘converted’, we directed most of our time and energy to those people who are often the least likely to be interested in these issues or to take part in such a process.

On the road, as well as in Melbourne, we held up to four meetings per day, with each typically lasting two hours. These were not open town hall meetings, but meetings with a Consultation Committee member, arranged through community organisations or in some cases through information provided via the local media. The meetings were structured so that a large part of the time was spent listening to people and what they thought about the issues, followed by us providing the basic information they needed to have a say. We then directed the conversation to 10 key questions we needed their help to answer. At the end of the meeting, we encouraged people to reflect on the discussion, to talk to other people in their families and workplaces and to make a submission to the Consultation Committee in writing. We also made a commitment to read every submission we received.

The 10 key questions, as well as important background information, were set out in a 52-page booklet prepared by the Consultation Committee within a few weeks of its formation. The booklet, entitled *Have Your Say about Human Rights in Victoria*,⁴⁸ was launched on 1 June 2005.⁴⁹ It provided information about issues of governance and law explained, so far as possible, in a way that was accessible to a broad section of the community. Similar information was also set out on a website and shorter booklets and pamphlets prepared for indigenous

⁴⁵ See ACT Bill of Rights Consultative Committee, Department of Justice and Community Safety, Australian Capital Territory, *Towards an ACT Human Rights Act* (2003); Williams, *The Case for an Australian Bill of Rights*, above n 14, 66–7.

⁴⁶ See Consultation Committee, *Consultation Committee Report*, above n 44, 165–7.

⁴⁷ See *ibid* 146–7.

⁴⁸ Consultation Committee, *Have Your Say about Human Rights in Victoria: Human Rights Consultation Community Discussion Paper* (2005) (‘Community Discussion Paper’).

⁴⁹ Office of the Attorney-General, Victoria, ‘Hulls: Have Your Say about Human Rights in Victoria’ (Press Release, 1 June 2005).

people and people speaking other languages. The 10 key questions that formed the focus of the consultation and these publications were:

- 1 Is change needed in Victoria to better protect human rights?
- 2 If change is needed, how should the law be changed to achieve this?
- 3 If Victoria had a Charter of Human Rights, what rights should it protect?
- 4 What should be the role of our institutions of government in protecting human rights?
- 5 What should happen if a person's rights are breached?
- 6 What wider changes would be needed if Victoria brought about a Charter of Human Rights?
- 7 What role could the wider community play in protecting and promoting human rights?
- 8 What other strategies are needed to better protect human rights?
- 9 If Victoria introduced a Charter of Human Rights, what should happen next?
- 10 Is there anything else you would like to tell us about how human rights should be protected in Victoria?⁵⁰

Special materials were also prepared for young people to be used, for example, in schools. The Consultation Committee encouraged submissions from young people by email and through an interactive online submission form on our website. We found that many people who would not have been prepared to come to a community meeting, or to write a letter to the Consultation Committee, or to any government process were willing to provide their views on these questions, sometimes at great length, via these electronic means.

The Consultation Committee also ran a parallel process of consultation with the Victorian government. We met with the judiciary, members of Parliament, independent government agencies and senior executives of government departments, sometimes on a number of occasions, in order to inform them of the process and to make sure their views were taken into account.⁵¹ I was also fortunate to address meetings of the Secretaries of all departments and to talk to a number of Cabinet Ministers. In addition, the Department of Justice set up an inter-departmental committee with representatives from across all of Victorian government to shadow our community process so that as ideas emerged, but before our report was written, departments had a chance to comment to ensure that our views were informed by current practice. This made a real and important difference. In many areas the experience and advice of government helped to shape outcomes to produce something that not only had broad community support but which could be implemented effectively and at the lowest cost.

The involvement of government in the development of the *Victorian Charter of Rights* also gave the public servants involved a sense of ownership of reform. This may assist over the longer term in fostering a human rights culture within

⁵⁰ Consultation Committee, *Community Discussion Paper*, above n 48, 6.

⁵¹ For the list of meetings, see Consultation Committee, *Consultation Committee Report*, above n 44, 189–90.

the bureaucracy. This has proved difficult in the United Kingdom, where a 2003 report by the Audit Commission found that ‘a human rights culture takes time to develop. Our current findings show that progress is slow and in danger of stalling.’⁵²

C *What the Community Said*

The consultation process proved extremely successful in engaging with the community. We held 55 community meetings in Victoria as well as 75 more focused meetings with government, peak organisations and the like.⁵³ In addition, a round table of academic and other experts from Australia and New Zealand was held to provide specific advice on legal questions.⁵⁴ I also met with many people in the United Kingdom about the *UK Human Rights Act* when, during the consultation, I spent time in that country as part of a university-funded trip.⁵⁵

All up, the Consultation Committee received 2524 written submissions from across the community⁵⁶ — most, in my assessment, from people who had never before made a written submission to any public process. These submissions, whether received via the internet, written on the back of a postcard or set out in a letter, amount to the highest number of submissions ever received for a process in Australia that has looked at this issue.⁵⁷ By comparison, the New South Wales Parliamentary Standing Committee on Law and Justice that considered a bill of rights for New South Wales over 2000–01 received 141 submissions.⁵⁸

Of the submissions we received:

- 2341 were from individuals.
- 161 were from organisations.^[59] Many of these organisations represented significant memberships. For example:
 - The [Alternative Life Style Organisation] Foundation (5000 members);
 - Law Institute of Victoria (12 200 members); and
 - The Victorian Bar (over 2200 members).
- 22 were reports from workshops conducted as part of the devolved consultations.⁶⁰

⁵² Audit Commission, United Kingdom, *Human Rights: Improving Public Service Delivery* (2003) 16.

⁵³ Consultation Committee, *Consultation Committee Report*, above n 44, 147.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* 145.

⁵⁷ *Ibid.* v.

⁵⁸ Standing Committee on Law and Justice, Parliament of New South Wales, *A NSW Bill of Rights* (2001) 141–5.

⁵⁹ For the views of these organisations, see Consultation Committee, *Consultation Committee Report*, above n 44, 4.

⁶⁰ *Ibid.* 145.

After six months of listening to Victorians of all ages and backgrounds across the state, it was clear that a substantial majority wanted their human rights to be better protected by the law. While Victorians did not want radical change, they did support reform to strengthen their democracy and system of government. Overall, 84 per cent of the people we talked to or received submissions from (or 94 per cent if petitions and the like are included)⁶¹ said that they wanted to see the law changed to better protect their human rights.⁶²

Many people wanted to see their human rights better protected to shield themselves and their families from the potential misuse of government power. For even more people, however, the desire for change reflected their aspiration to live in a society that strives for the values that they hold dear, such as equality, justice and a 'fair go' for all. The idea of a community based upon a culture of values and human rights is one that we heard again and again during our consultations. Victorians sought not just a new law, but something that could help build a society in which government, Parliament, the courts and the people themselves have an understanding of, and respect for, basic rights and responsibilities.⁶³

One of the many ways that community views had a direct impact upon the *Victorian Charter of Rights* was the inclusion of the term 'responsibilities' in its title. For many people, responsibilities were a more powerful way of addressing community problems than what they perceived to be more individualistic conceptions of human rights. For example, some argued in favour of both a right to vote and a responsibility to cast a vote as recognised in Australia's system of compulsory voting. People across the community spoke positively about the idea of a document that recognised, even in symbolic terms, the interrelated nature of their human rights and responsibilities. The *Victorian Charter of Rights*, so far as I am aware, is the first such instrument in the world that includes a direct reference to responsibilities in its title.⁶⁴

The consultation process led to a 232-page report that made 35 recommendations. The report, delivered on time on 30 November 2005, was entitled *Rights, Responsibilities and Respect: Report of the Human Rights Consultation Committee*. The report included the Draft Charter of Human Rights and Responsibilities prepared for the Consultation Committee by the Victorian Chief Parliamentary Counsel and his staff.⁶⁵ With only minor modifications, this was the *Victorian Charter of Rights* enacted by the Victorian Parliament.

⁶¹ Ibid 146.

⁶² Ibid 145.

⁶³ Ibid ii.

⁶⁴ The Charter of Responsibilities Bill 2004 (ACT) was introduced into the ACT Legislative Assembly in response to the enactment of the *ACT Human Rights Act*. It was not passed by the Assembly: see Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 18 August 2004, 3873–86; Lara Kostakidis-Lianos and George Williams, 'Bills of Responsibilities: Is One Needed To Counter the "Excesses" of the ACT Human Rights Act 2004?' (2005) 30 *Alternative Law Journal* 58.

⁶⁵ Consultation Committee, *Consultation Committee Report*, above n 44, 191.

D *The Outcome*

The *Consultation Committee Report* was released to the public on 20 December 2005. On the same day, the Bracks Government indicated its acceptance of the central recommendation that the Victorian Parliament enact a charter of human rights and responsibilities.⁶⁶ It also said, however, that it needed time to work through the recommendations.⁶⁷

After five months of working the detail and implications of the *Consultation Committee Report* through government, the Charter of Human Rights and Responsibilities Bill 2006 (Vic) was introduced into the lower house of the Victorian Parliament on 2 May 2006. It was passed by the Legislative Assembly on 15 June and then by the Legislative Council on 20 July, before being given assent by the Victorian Governor on 25 July 2006.

The *Victorian Charter of Rights* comes into force on 1 January 2007, except for Divisions 3 and 4 of Part 3, dealing with the interpretation of laws and new obligations on public authorities, which is delayed to 1 January 2008.⁶⁸ This is to give departments and other agencies assuming new obligations under the *Victorian Charter of Rights* the time to train their staff and scrutinise their existing practices, policies and laws for consistency with the instrument. The postponed operation of the *Victorian Charter of Rights* is similar to that which occurred in the United Kingdom, where a two-year period followed the enactment of the *UK Human Rights Act* before it came into force.

IV THE VICTORIAN CHARTER OF RIGHTS

A *The Model*

The *Victorian Charter of Rights* is not modelled on the *United States Bill of Rights*. It does not give the final say to the courts, nor does it set down unchangeable rights in the *Constitution Act 1975* (Vic). Instead, it is an ordinary Act of Parliament like the human rights laws operating in the ACT, New Zealand and the United Kingdom. This ensures the continuing sovereignty of the Victorian Parliament. The *Victorian Charter of Rights*, like those instruments, is a 'parliamentary rights model', to use a term coined by Janet L Hiebert,⁶⁹ rather than a law that focuses on enforcement by courts.

As such, the *Victorian Charter of Rights* is designed to prevent human rights problems arising in the first place by improving the work of government and Parliament in the making and application of laws and policies. It does so by ensuring that human rights principles are a mandatory part of governmental decision-making. In this, the *Victorian Charter of Rights* is backed by a signifi-

⁶⁶ Office of the Attorney-General, Victoria, 'Victoria Leads the Way on Human Rights' (Press Release, 20 December 2005): 'Victoria is set to become the first state in Australia to introduce a Charter of Human Rights and Responsibilities, the Attorney-General, Rob Hulls, announced today.'

⁶⁷ *Ibid.*

⁶⁸ *Victorian Charter of Rights* s 2.

⁶⁹ Janet L Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 *Modern Law Review* 7.

cant investment of money, with the 2006–07 Victorian budget allocating \$6.5 million over four years for initiatives including a community education program and human rights training for agencies like Victoria Police.⁷⁰

The United Kingdom has a system of law and government similar to Victoria and the *UK Human Rights Act* has been a success without giving rise to the litigation and other problems sometimes associated with the *United States Bill of Rights*.⁷¹ Where it has been applied in the courts, the United Kingdom law has proved useful in balancing issues such as the need to fight terrorism with the democratic and other principles required for a free society.⁷² In Scotland, which has a similar population size to Victoria, an article surveying the impact of the *UK Human Rights Act* in the Scottish courts between May 1999 and August 2003 found that human rights arguments were raised in ‘a little over a quarter of 1 per cent of the total criminal courts caseload over the period of the study.’⁷³ Overall, the authors concluded that ‘it seems clear that human rights legislation has had little effect on the volume of business in the courts.’⁷⁴ While it is expected that the *Victorian Charter of Rights* will have a major impact on how courts and other bodies perform their existing work, it is designed so as not to lead to a significant increase in litigation.

The *Victorian Charter of Rights* is written, as far as possible, in clear language.⁷⁵ It begins with a preamble that sets out the community values that underpin it:

On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.

This Charter is founded on the following principles —

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- 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.

⁷⁰ Department of Justice, Victoria, *2006–07 Victorian Budget Fact Sheet: Victoria Leads the Way on Human Rights* (2006).

⁷¹ See Department for Constitutional Affairs, United Kingdom, *Human Rights Act 1998: A Statistical Update* (November 2001) <<http://www.dca.gov.uk/humanrights/hrimpact.htm>>.

⁷² See, eg, *A v Secretary of State for the Home Department [No 2]* [2006] 2 AC 221 on the use of evidence obtained through torture.

⁷³ Tom Mullen et al, ‘Human Rights in the Scottish Courts’ (2005) 32 *Journal of Law and Society* 148, 152 (citations omitted).

⁷⁴ *Ibid* 160.

⁷⁵ An exception is s 39 which deals with legal proceedings. This reflects the need for the *Victorian Charter of Rights* to give rise to remedies as well as the preference expressed by the Government in its *Statement of Intent* that: ‘the Government does not wish to create new individual causes of action based on human rights breaches’: Department of Justice, *Statement of Intent*, above n 33.

The Consultation Committee hoped that at least this aspect of the *Victorian Charter of Rights* can be used in schools and for broader community education.⁷⁶

B *Which Rights?*

The *Victorian Charter of Rights* protects the rights that are the most important to an open and free Victorian democracy. The included rights extend to:

- recognition and equality before the law;
- right to life;
- protection from torture and cruel, inhuman or degrading treatment;
- freedom from forced work;
- freedom of movement;
- privacy and reputation;
- freedom of thought, conscience, religion and belief;
- freedom of expression;
- peaceful assembly and freedom of association;
- protection of families and children;
- taking part in public life;
- cultural rights;
- property rights;
- right to liberty and security of person;
- humane treatment when deprived of liberty;
- children in the criminal process;
- fair hearing;
- rights in criminal proceedings;
- right not to be tried or punished more than once; and
- retrospective criminal laws.

These rights are contained in the *ICCPR*,⁷⁷ to which Australia has been a party since 1980. Some of the rights in the *ICCPR* were modified or even not included so that the *Victorian Charter of Rights* would match the contemporary aspirations of the Victorian people and so that it would contain only those rights that have broad community acceptance.

The two most contentious departures from the *ICCPR* are the rights to life and to self-determination. In regard to the former, the Consultation Committee received many submissions from people arguing with great passion both for and against abortion and for their position to be reflected in drafting any right-to-life provision. Unlike the general community support for other rights, there was no consensus when it came to the right to life as it applies to abortion. Given this,

⁷⁶ Consultation Committee, *Consultation Committee Report*, above n 44, ii.

⁷⁷ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

and the desire of the committee to recommend a bill of rights that was capable of unifying rather than dividing Victorians around a set of human rights, it was recommended that the right to life be modified by a subsection indicating that it ‘applies to a person from the time of his or her birth.’⁷⁸ This was modelled on s 9(2) of the *ACT Human Rights Act*. An even better solution was reached prior to the enactment of the *Victorian Charter of Rights*: s 48 now operates as a saving provision in stating that ‘nothing in this Charter affects any law applicable to abortion or child destruction’. This avoids a direct restriction on a fundamental right as that to life. It also ensures that when other rights in the *Victorian Charter of Rights*, such as that of privacy, might impact upon the abortion debate, they are incapable of doing so.⁷⁹ The provision meant that the *Victorian Charter of Rights* could be enacted in a way that maintains the status quo in the law as it relates to abortion. Whether the law of abortion should be altered is left as a matter of ongoing political and legal debate in Victoria without the possibility of it being resolved by judicial determination under the *Victorian Charter of Rights*.

The second contentious area is the right to self-determination, a right included in international conventions such as the *ICCPR*.⁸⁰ Like the issue of abortion, this attracted strong views both for and against. Many indigenous people spoke powerfully in favour of the need to recognise self-determination because they felt it might assist with longstanding and unresolved governance issues. Others in the community opposed such a provision, perhaps exactly for this reason. The Consultation Committee took the view that a self-determination right should not be included because, not only did it lack clear community support, its application was also uncertain. This also reflected a view that while issues of indigenous self-governance were pressing and important, these cannot be adequately resolved through a human rights instrument like the *Victorian Charter of Rights*,⁸¹ but required a broader constitutional settlement through a treaty or other instrument.⁸² Although the *Victorian Charter of Rights* does not include a self-determination right, it does in s 19 contain cultural rights, including in sub-s (2) specific recognition of the ‘distinct cultural rights’ of Aboriginal persons.

Many Victorians said that the *Victorian Charter of Rights* should contain rights relating to matters such as food, education, housing and health, as found in the *ICESCR*,⁸³ as well as more specific rights for indigenous people, women and children. Overall, 41 per cent of submissions argued for the inclusion of

⁷⁸ *Draft Charter of Human Rights and Responsibilities* s 8(2).

⁷⁹ See, eg, the use of privacy rights in this context in *Roe v Wade*, 410 US 113 (1973).

⁸⁰ Opened for signature 16 December 1966, 999 UNTS 171, art 1 (entered into force 23 March 1976).

⁸¹ Cf Melissa Castan and David Yarrow, ‘A Charter of (Some) Rights ... for Some?’ (2006) 31 *Alternative Law Journal* 132.

⁸² Consultation Committee, *Consultation Committee Report*, above n 44, 39. See also Sean Brennan et al, *Treaty* (2005).

⁸³ Opened for signature 16 December 1966, 993 UNTS 3, arts 11–13 (entered into force 3 January 1976).

some or all of such rights,⁸⁴ compared to 95 per cent which favoured the inclusion of civil and political rights.⁸⁵ While the Consultation Committee agreed that these rights were important, and also that the distinction between these and civil and political freedoms could be arbitrary or even non-existent, it did not recommend that they be included in the *Victorian Charter of Rights* at this stage. Instead it was decided that the focus should be on those democratic rights with broad support that applied equally to everyone. This means that the *Victorian Charter of Rights* only includes human rights that had very strong, certainly at least majority, community support.

C *The Changing Charter*

The rights included in (and excluded from) the *Victorian Charter of Rights* must be seen in light of the law encompassing a mechanism for review and change in four and then eight years (with further reviews then also possible).⁸⁶ This will enable a broader range of human rights as well as other issues to be considered again with the benefit of having seen the *Victorian Charter of Rights* in operation. A first review is mandatory by 1 October 2011, with s 44 stating that the Attorney-General ‘must cause’ a review to examine matters such as whether additional human rights, including a right to self-determination and rights contained in the *ICESCR*, should be included in the *Victorian Charter of Rights*. This gives the proponents of such rights a four-year period in which to educate the community and to make the case for their inclusion. Without this, it seems unlikely that they will be added given that they do not form a significant part of most other similar instruments, such as the *New Zealand Bill of Rights Act 1990* (NZ) and the *Canadian Charter of Rights and Freedoms*. The *South African Bill of Rights* is the most notable exception, but with the very different history and cultural and political traditions of that nation,⁸⁷ it is not a model that has proved sufficiently influential in Australia.

These mandatory reviews demonstrate how the *Victorian Charter of Rights* is not a one-off piece of legislation designed to set down unchangeable human rights in Victorian law. The Consultation Committee viewed the *Victorian Charter of Rights* as only the first step in the better protection of human rights in the state. This was one reason why, based on strong community views, it rejected the entrenchment of human rights in a constitutional form like the *United States Bill of Rights*. Rather than permanently including (or excluding) rights that might be viewed differently with the benefit of hindsight (such as the ‘right of the people to keep and bear arms’ in the Second Amendment to the *United States Constitution*), the expectation was that the *Victorian Charter of Rights* be updated and improved with the benefit of experience and in line with

⁸⁴ Consultation Committee, *Consultation Committee Report*, above n 44, 27.

⁸⁵ *Ibid* 26.

⁸⁶ *Victorian Charter of Rights* pt 5.

⁸⁷ See Devika Hovell and George Williams, ‘A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa’ (2005) 29 *Melbourne University Law Review* 95.

community thinking. The *Victorian Charter of Rights* is designed to be the start of long-term incremental change, not the end of it.

D Limiting and Overriding Human Rights

As with other bills of rights, the human rights set out in the Victorian law are not absolute. They can be limited where the circumstances justify it. This provides a framework within which the Victorian Parliament can continue to make decisions on behalf of the community about matters such as how best to balance rights against each other, protect Victorians from crime, and distribute limited funds amongst competing demands. Under the *Victorian Charter of Rights* Parliament can make such decisions informed by, but without having to defer unduly to, judicial pronouncements on such subjects.

In some cases the contestable nature of human rights must be implied from an instrument, such as in the case of the *United States Bill of Rights*. On the other hand, s 7(2) of the *Victorian Charter of Rights* provides:

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.

In setting out the factors in sub-ss (a) to (e), it is more explicit than most other like instruments, such as the *Canadian Charter of Rights and Freedoms* which only states in s 1 that rights are ‘subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’ In spelling matters out to a higher degree, the *Victorian Charter of Rights* draws upon the drafting of the limitation of rights clause in s 36 of the *South African Bill of Rights*.

The use of more explicit terms in the *Victorian Charter of Rights* reflects broader goals about its role in Victorian government. A clause like that in the *Canadian Charter of Rights and Freedoms* leaves much unsaid including, crucially, the key factors and analytical approach to be applied in determining whether a limitation can be justified. This is not a major impediment for courts and lawyers capable of quickly recognising that the spare words of the section require a form of proportionality analysis like that applied by Dickson CJC for the Supreme Court of Canada in *R v Oakes*.⁸⁸ On the other hand, such a clause is not readily accessible for people without legal training who must apply the *Victorian Charter of Rights* in policy and other contexts, such as departmental officers and members of the Victorian Parliament. The direct invocation of the relevant

⁸⁸ [1986] 1 SCR 103, 142–3.

factors in the *Victorian Charter of Rights* makes its operation more transparent and accessible and lessens the need for non-lawyers and political actors to place heavy reliance upon legal advice. This is appropriate for a law that is less focused on litigation in courts than upon the choices and cultures that pervade government and Parliament. It also makes the *Victorian Charter of Rights* less opaque for members of the public who want to understand the circumstances in which their rights can be limited.

The *Victorian Charter of Rights* further recognises the power of the Victorian Parliament not just to balance human rights and other interests but to override the rights listed therein. This is similar to s 33 of the *Canadian Charter of Rights and Freedoms*, which allows for a renewable five-year means by which Parliament can indicate that a law ‘shall operate notwithstanding’ a provision in specified sections of that instrument. Section 31(1) of the *Victorian Charter of Rights* states that Parliament may expressly declare that an Act or provision ‘has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.’ The declaration lasts for five years, and can be renewed. Its effect is recognised in s 31(6) as being that ‘to the extent of the declaration this Charter has no application to that provision’ (for example, a court might be excluded from making a declaration of inconsistent interpretation with regard to the provision).

As a matter of law, the override clause in the *Victorian Charter of Rights* is unnecessary. The Victorian law, unlike the *Canadian Charter of Rights and Freedoms*, is an ordinary Act of Parliament that, by the application of the traditional principles of parliamentary sovereignty, can be amended or repealed by a future Act. It is thus possible to override any of the rights in the *Victorian Charter of Rights* without recourse to a special mechanism. However, it is this very possibility that justifies its inclusion. Section 31 provides a means within the *Victorian Charter of Rights* whereby political imperatives can be met without the need to amend the *Victorian Charter of Rights* itself. In addition, the mechanism has a limited lifespan (though, significantly, it does extend beyond the life of a Parliament), meaning that the decision must be reassessed again in five years.⁸⁹ Although it is still possible to override human rights by amending the *Victorian Charter of Rights* itself, this is less likely to occur given that there is the option of using s 31. Overall, use of s 31 is preferable to a permanent amendment of the *Victorian Charter of Rights* enacted at a time of crisis that might damage the legitimacy of the instrument.

It can be argued that the inclusion of the override mechanism is dangerous because it allows *Victorian Charter of Rights* to be overridden where a law could not be justified under the s 7 limitation clause.⁹⁰ This is a real risk, but it is a low one because of the high political cost involved in using s 31. Section 31(4) states that ‘[i]t is the intention of Parliament that an override declaration will only be made in exceptional circumstances’, while s 31(3) provides that the member of Parliament introducing a Bill containing an override declaration must make a statement to Parliament ‘explaining the exceptional circumstances that justify the

⁸⁹ *Victorian Charter of Rights* s 31(7).

⁹⁰ Though, it might also be said that s 31 merely expressly states what is possible in any event.

inclusion of the override declaration.’ This non-justiciable requirement requires a level of transparency and compelling political justification that sets a major hurdle to using the override. In Canada, where there is not the same express need to justify the use of the override, the mechanism has been very rarely used. In fact, apart from Quebec, which already had its own bill of rights and saw no need for the new *Canadian Charter of Rights and Freedoms*, Canadian Parliaments have been extremely reluctant to use the override provision. The political price has been too high. A government desiring, for example, to override a ‘right not to be subjected to any cruel and unusual treatment or punishment’ must be prepared to meet strong and organised resistance from many sections of the community.

E *Obligations on Public Authorities*

Section 38 of the *Victorian Charter of Rights* states that ‘it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.’ Section 4 contains an elaborate definition of what is a ‘public authority’. The essence is that it is ‘an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)’.⁹¹ Hence, the definition can capture private bodies where they are exercising public power on behalf of the state. While a note to s 4 states that this does not include a non-government school in educating students (because it is not doing so on behalf of the state), the definition would include a privately-run prison conferred with the coercive powers of the state to deprive people of their liberty due to a criminal conviction.

Under the *Victorian Charter of Rights* a breach of this obligation can give rise to remedies. However, the *Victorian Charter of Rights* does not itself create new causes of action. It merely recognises that existing causes of action, especially administrative review and injunctive relief, are possible. The section further excludes the creation of new causes of action for damages for breaches of the *Victorian Charter of Rights*, thereby foreclosing a new public law right to damages like that developed in New Zealand under the *New Zealand Bill of Rights Act 1990* (NZ).⁹² This is captured in *Victorian Charter of Rights* s 39, a provision that can require multiple readings to yield a coherent meaning.⁹³

- (1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

⁹¹ *Victorian Charter of Rights* s 4(1)(c).

⁹² *Simpson v A-G (NZ)* [1994] 3 NZLR 667 (*‘Baigent’s Case’*).

⁹³ As to the reason for this awkward wording, see above n 75. No blame can be attributed to the drafters. The provision went through many versions, but this was the best that the collective wisdom of a number of people, including myself, could produce.

- (2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right —
 - (a) to seek judicial review under the *Administrative Law Act 1978* or under Order 56 of Chapter I of the *Rules of the Supreme Court*; and
 - (b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.
- (3) A person is not entitled to be awarded any damages because of a breach of this Charter.
- (4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.

The *Victorian Charter of Rights* goes significantly further than the *ACT Human Rights Act*, which neither imposes obligations nor recognises remedies in regard to the contravention of human rights by public authorities. This is a major weakness of that Act, in that it is simply silent on key issues of compliance and enforcement.⁹⁴ On the other hand, although the Victorian provisions are drawn from the *UK Human Rights Act*, they are not as broad or as straightforward. Section 8(1) of the *UK Human Rights Act* simply states:

In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.⁹⁵

F A 'Dialogue' about Rights

An important aim of the *Victorian Charter of Rights* is to foster a dialogue both within and between the arms of government as to the consistency of laws and governmental action on the enacted civil and political rights. In this, it replicates one of the central objects of the *ACT Human Rights Act*.⁹⁶ Whether or not 'dialogue'⁹⁷ is the correct word for what the *Victorian Charter of Rights* will

⁹⁴ But see ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review — Report* (2006) 33:

The Government should examine options for amending the *HRA* to include a direct duty on public authorities to comply with human rights and a direct right of action. Any proposal will need to address the scope of the duty and the sanctions, if any, for breach. These should be subject to a bar on any new right to compensation arising from breach, following the model recently adopted in Victoria.

⁹⁵ The section does, however, go on to regulate when damages may be awarded by stating, among other things, that '[n]o award of damages is to be made unless ... the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made': *UK Human Rights Act* s 8(4).

⁹⁶ ACT Bill of Rights Consultative Committee, above n 45, ch 4; see especially at 66–8.

⁹⁷ For the first use of this now widely used term, see Peter W Hogg and Allison A Bushell, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75. This use of the 'dialogue' metaphor has provoked intense debate in Canada: see Christopher P Manfredi and James B Kelly, 'Six Degrees of Dialogue: A Response to Hogg and Bushell' (1999) 37 *Osgoode Hall Law Journal* 513, and the further response by Peter W Hogg and Allison A Thornton, 'Reply to "Six Degrees of Dialogue"' (1999) 37 *Osgoode Hall Law Journal* 529. Amongst the now large volume of literature, see also Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001), and for an Australian treatment, see Leighton McDonald, 'Rights, "Dialogue" and Democratic Objections to Judicial Review' (2004) 32 *Federal Law Review* 1.

achieve, it is clear that it does create new and innovative forms of deliberation and interaction for law, policy and politics as they relate to human rights. This can be seen in the following areas where the *Victorian Charter of Rights* will be applied.

First, within the executive, public servants must take the human rights in the *Victorian Charter of Rights* into account in applying existing and developing new policies and laws. Government departments and other public authorities may also undertake audits of their programmes and policies to ascertain whether they comply with the *Victorian Charter of Rights*. Where decisions need to be made about new laws or major policies, submissions to Cabinet will be accompanied by a human rights impact statement.⁹⁸

Second, when a Bill is introduced into the Victorian Parliament, it must be accompanied by a Statement of Compatibility made by the person introducing the Bill which sets out, with reasons, whether the Bill complies with the *Victorian Charter of Rights*.⁹⁹ Parliament may pass the Bill whether or not it is thought to comply with the *Victorian Charter of Rights*. In addition, Parliament's Scrutiny of Acts and Regulations Committee must advise Parliament on whether each Bill is consistent with human rights.¹⁰⁰

Third, Victorian courts and tribunals must interpret, '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions ... in a way that is compatible with human rights.'¹⁰¹ Like the *ACT Human Rights Act*,¹⁰² this provision makes express reference to the purpose of legislation as a factor in the interpretative process in order to ensure that this is not overcome by the words 'so far as it is possible to do so', as is found without qualification in the *UK Human Rights Act*.¹⁰³ The Attorney-General¹⁰⁴ and Victorian Equal Opportunity and Human Rights Commission¹⁰⁵ may intervene in a court or tribunal that is applying the *Victorian Charter of Rights* to put submissions on behalf of the government and the public interest.¹⁰⁶ According to the normal rules of court and common law principles applying to interveners and *amicus curiae*, community and other groups may also be given leave to intervene.

Where legislation cannot be interpreted in a way that is consistent with a human right, the Supreme Court of Victoria may make a 'declaration of inconsistent interpretation'.¹⁰⁷ The use of this title for the declaration rather than 'decla-

⁹⁸ See generally Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes' (2005) 29 *Melbourne University Law Review* 665.

⁹⁹ *Victorian Charter of Rights* s 28.

¹⁰⁰ *Victorian Charter of Rights* s 30.

¹⁰¹ *Victorian Charter of Rights* s 32(1).

¹⁰² *ACT Human Rights Act* s 30.

¹⁰³ Section 3(1) of the *UK Human Rights Act* states: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' See *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 for the application of this section.

¹⁰⁴ *Victorian Charter of Rights* s 34.

¹⁰⁵ *Victorian Charter of Rights* s 40.

¹⁰⁶ See Consultation Committee, *Consultation Committee Report*, above n 44, iv.

¹⁰⁷ *Victorian Charter of Rights* s 36. As to the constitutionality of such a mechanism, see Wendy Lacey and David Wright, 'Highlighting Inconsistency: The Declaration as a Remedy in Administrative Law and International Human Rights Standards' in Chris Finn (ed), *Shaping Adminis-*

ration of incompatibility', as used in the *ACT Human Rights Act* and *UK Human Rights Act*,¹⁰⁸ indicates that the Court is not so much holding that Parliament has enacted legislation that is incompatible with human rights as that the Court has taken a contrary view to Parliament on interpretative issues, such as the content of the relevant right or the application of the limitations clause in s 7. This may make it less difficult for Parliament, after reviewing the declaration, to maintain its own contrary interpretation. A declaration of inconsistent interpretation does not strike down the law nor alter its application.¹⁰⁹ Instead, the Court must cause a copy of the declaration to be provided to the Attorney-General.¹¹⁰ The responsible Minister then has six months to prepare a written response to be laid before Parliament,¹¹¹ which may decide to amend the law or to leave it in place without change.

V CONCLUSION

The *Victorian Charter of Rights* marks an important shift not only in Australian law but in approaches to politics and the development of policy as they relate to human rights. To focus narrowly on the *Victorian Charter of Rights* as it applies to courts is to misunderstand its operation and to take far too limited a perspective of its significance. Although the judiciary does have an important role, such as in providing remedies for breaches, interpreting laws and making declarations of inconsistent interpretation, it is not the main body for the protection of human rights under the *Victorian Charter of Rights*.

The real focus of the *Victorian Charter of Rights* is upon ensuring that fundamental principles of human rights are taken into account at the earliest stages of the development of law and policy. The *Victorian Charter of Rights* recognises that the decisive point in achieving protection for human rights is not in court after a breach has occurred, but in government and Parliament in the development of policy and the drafting of law before either come into effect. This preventative aspect of the *Victorian Charter of Rights* means that human rights principles will be taken into account not just in courts but throughout government. Indeed, the role of protecting human rights under the Charter will be exercised far more frequently by government than the courts. Victoria Police, for example, will have day-to-day responsibility for applying human rights in protecting the community from crime and safeguarding the rights of accused. They, like courts, will apply human rights in interpreting the laws that define

trative Law for the Next Generation: Fresh Perspectives: Papers Presented at the 2004 National Administrative Law Forum (2005) 32, 51–4; Geoffrey Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?' (2006) 17 *Public Law Review* 188, 204–7; James Stellios, 'Federal Dimensions to the ACT Human Rights Act' (2005) 47 *ALAL Forum* 33.

¹⁰⁸ *ACT Human Rights Act* s 32; *UK Human Rights Act* s 4. See also the implication of a power to make such a declaration into the *New Zealand Bill of Rights Act 1990* (NZ) in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9. In 2001, a declaration of incompatibility mechanism was inserted as s 92J into the *Human Rights Act 1993* (NZ), a statute directed at remedying discrimination rather than being a bill of rights.

¹⁰⁹ *Victorian Charter of Rights* s 36(5).

¹¹⁰ *Victorian Charter of Rights* s 36(6).

¹¹¹ *Victorian Charter of Rights* s 37.

their role and powers. In this and other areas, such as mental health and child protection, the *Victorian Charter of Rights* will require that the work of government be undertaken fairly with due regard to our common freedoms.

Of course, government, Parliament and the courts in Victoria already had regard to human rights prior to the *Victorian Charter of Rights*, often to those rights set out in international law. The Charter was not inserted into a system in which human rights were ignored. However, the use of human rights principles often occurred in an ad hoc way because there was no obligation in Victorian law for human rights to be considered, nor were the rights set out in a clear instrument enacted by Parliament. The *Victorian Charter of Rights* will mean that fundamental rights are given a higher status and legitimacy within government and the community. Their protection will be approached more seriously and systematically.

The *Victorian Charter of Rights* will not only promote better regard for human rights principles, it will improve the quality of work by Victoria's public institutions — it is based on the idea that government should be transparent in its treatment of principles like human rights and also accountable to the people by operating fairly and without adverse discrimination. For example, the requirement for Statements of Compatibility in Parliament whereby key information is brought to public attention about the impact of a Bill will improve deliberation about changes to the law. This may also improve media coverage and community understanding of the work of government.

In many ways the *Victorian Charter of Rights* is modest. It does not disturb accepted principles of parliamentary sovereignty and does not confer the powers associated with many bills of rights, like the power of courts to have the final say by striking down inconsistent laws. The *Victorian Charter of Rights* also excludes the possibility of a new right of damages and is not comprehensive in protecting the wide range of rights recognised in international law. Criticism can fairly be levelled at the *Victorian Charter of Rights* on the basis that it does not provide everything that might be hoped for from a comprehensive protection for human rights. But this is to miss the point. Like the *ACT Human Rights Act* before it, the *Victorian Charter of Rights* is only the beginning of a journey to better protect freedoms in Victorian law. It is a first step that will provide valuable insights for government and the community as to how effective the law can be in protecting human rights. It will also show how any law has its limits, and indeed how the law can be ineffective in dealing with some of the most pressing, but intractable, problems. This will reveal how any strategy for better human rights protection must also pay close attention to political culture and leadership, the media and community education and attitudes. Without reinforcement from these quarters, the positive impact of the *Victorian Charter of Rights* will be blunted.

Over time, I hope that the *Victorian Charter of Rights*, through education and other means, will contribute to increasing respect and tolerance in the community for others, especially for those who are perceived to be 'different' as a result of their culture, religious beliefs or otherwise. The fact that the *Victorian Charter of Rights* has been arrived at after a grassroots community process may be

2006]

Victorian Charter: Origins and Scope

905

significant in whether this is achieved.¹¹² One of the weaknesses of other instruments, such as the *New Zealand Bill of Rights Act 1990* (NZ) and the *UK Human Rights Act*, that have been enacted without significant community debate or engagement, is that they can lack a crucial ingredient of community ownership necessary to their long-term effectiveness. After all, the most important way that human rights are protected is usually not by institutions of government or in the law, but by how they are respected in relationships between people in their everyday lives. What people often find the most hurtful is not how they are affected by government but when they are ill-treated by other members of the community, such as a result of racism. These are problems that no law, by itself, can remedy.

¹¹² It may also assist in avoiding some of the myths and misconceptions that have affected public perceptions of the *UK Human Rights Act*: see Department for Constitutional Affairs, United Kingdom, *Review of the Implementation of the Human Rights Act* (2006).