Human rights protection in Australia: momentary glimmers of hope in Victoria and the Australian Capital Territory, in the context of the retreat from human rights by the federal government

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Victoria and the Australian Capital Territory, within an Australian federal system of government, have recently passed legislation to improve human rights protection. Both enactments are partly based on the United Kingdom’s human rights legislation. This article looks at the processes that led to the introduction of legislation in both of these jurisdictions. It will also examine some key differences from the United Kingdom Human Rights Act 1998 especially around the extent to which ‘public function’ has been defined in Victoria. The article will also discuss the reticence of a Conservative federal government to protect human rights in Australia and some of its retrograde steps in this regard, and the challenges and conflicts that these present for a state-based human rights system.

Introduction and background

There is minimal human rights protection for the citizens and non-citizens who are on Australian shores. It is one of the last countries in the western world to have little constitutional or legislative human rights protection on a national level. Although there is an Australian Constitution, this document largely governs the separation of powers between the state, the federal government and the judiciary; there is very little in the document that pertains to the relationship between the citizen and the state.

In Australia, United Nations human rights instruments do not become law until incorporated into the statutory system within Australia by an Act of Parliament. Where however there is some ambiguity in the manner in which legislation can be interpreted, there is High Court authority which states that international human rights law can be used as a tool of interpretation, on the basis that the legislature would not intend to act inconsistently with fundamental human rights. Some United Nations human rights conventions
and covenants have been either fully or partly incorporated into Australian laws: these include equal opportunity legislation, provisions in the Family Law Act 1975 (Commonwealth) pertaining to the need to act in ‘the best interests of the child’, and the Racial Discrimination Act 1975.

It is in this context that in recent years two jurisdictions in Australia have decided to improve the protection of human rights. Both the Australian Capital Territory in 2004 and Victoria in 2006 have passed human rights legislation: much of this legislation is modelled on the United Kingdom’s Human Rights Act 1998 (HRA UK), with some key differences around implementation and the availability of individual remedies and compensation for a litigant. One limitation on this state based human rights based protection is that it can only apply to areas within state law. This includes areas such as criminal law, prisons, freedom of speech, discrimination and some parts of the civil law, but not areas such as immigration or social security.

Like the HRA UK, the legislation in these two jurisdictions covers civil and political rights only and does not extend to economic and social rights. This is the subject of some controversy and in Victoria, as a result, a legislative review is to occur four years after the legislation comes into force to consider whether economic and social rights should be included. As in the United Kingdom, this absence of economic and social rights does not preclude arguments that pertain to such rights being made when they are intrinsically linked to civil and political rights being litigated.

What makes the situation in Australia difficult is that it is a federation: there is a federal centralised government in Canberra and six states and two territories, each of which have power to control policy and legislation in certain areas of policy. As the main recipient of taxation revenue, the federal government has been able to maintain control over state spheres of influence by tying the receipt of funding to conditions: these are commonly referred to as ‘tied grants’ or ‘special purpose grants’. The states’ areas of influence can overlap with those of the Commonwealth government, for example, in health, education and housing. In addition, various interpretations of the Constitution by the High Court in recent years have vested greater powers in the Commonwealth government, as it has taken a more centralised view. For example, recently the High Court awarded the Commonwealth government power over industrial issues, stating that the Commonwealth could rely on its ‘corporations power’ under the Constitution to make laws in respect of industrial relations. Industrial relations was traditionally an area in which state governments had retained their sphere of influence.
Further difficulty arises from a provision contained within the Constitution which states that if a state law comes into conflict with the Commonwealth law, then the Commonwealth law will prevail.9 This may have problematic implications for Victorian and Australian Capital Territory human rights instruments. Some of the difficulties of the federal system for human rights will be discussed later in this article.

The process which led to human rights protection in the Australian Capital Territory

In discussions between the author and the new Attorney General of Victoria, Rob Hulls, in November 1999, Mr Hulls indicated that he was not averse to a formal recognition of indigenous Australians in a Victorian constitutional document, nor was he dismissive of the idea of Victoria becoming the template for other states to introduce human rights protection along the lines of that in Canada or the United Kingdom.10 He remarked upon the inertia on human rights protection at federal level and said perhaps it was for the states, led by Victoria, to take the initiative. In 2000, Mr Hulls commenced a process for the development of the justice statement for the state of Victoria, with the idea of having a strategic plan and direction for the next ten years of government.11 In this document he wanted to include ideas for the development of the human rights framework.

In the end, it was the Australian Capital Territory (ACT) which was the first jurisdiction in Australia to introduce human rights legislation. Although Victoria followed the 2004 ACT legislation with its own Act in 2006, there are marked differences between the two Acts which were adopted, even though they are both based on the HRA UK.

The Labor party in the ACT in 2001 had indicated that it intended to establish some form of consultative process to discuss whether or not a bill of rights should be developed for the territory. The Attorney General of the ACT, John Stanhope, had been an acknowledged supporter of human rights for many years. An ACT Bill of Rights Consultative Committee was convened by the newly elected Labor party with a respected law academic from the Australian National University, Professor Hilary Charlesworth, being appointed as its chair. Other members of the committee were Professor Larissa Behrendt, with expertise in law and indigenous studies, Penelope Layland, a journalist and poet, and Elizabeth Kelly of the ACT Department of Justice.

The terms of reference for the committee reflected the political sensitivity of the government in the ACT, which feared an electoral backlash that could be created by conservative talkback radio hosts and newspaper columnists, who were traditionally averse to any discussion of greater human rights protection
and argued that any human rights document would detract from the role of the Parliament and the elected people’s representative. The consultative committee was to examine whether it was ‘appropriate and desirable’ to have legislative human rights protection. Further, if such a bill of rights was considered to be appropriate then, what form should it take, what would be the effect of such a bill on the ‘exercise of executive and judicial powers’, should there be a legislative override and what rights and responsibilities should be included in such a bill were it enacted.12 A website was established for the committee with items such as ‘What are the issues?’, ‘Reports’, and links to other websites with information on human rights and other models.13

The consultative committee produced an issues paper. In this paper, information about what human rights are and the various models of protection that have been adopted around the world were discussed and questions were asked as to what models might be appropriate. There was a call for both written and oral submissions in response to the paper and the committee also held town meetings. In a different route to that taken in Victoria it also held a ‘deliberative poll’.14 As a result of the consultations, it was found that a majority of the territory’s residents were in favour of a bill of rights. There was however a minority who were opposed to any form of a bill of rights.

The consultative committee recommended a draft bill which was largely modelled on the HRA UK. Because of existing resistance to any form of entrenched constitutional human rights protection in political circles in the ACT, on the grounds that this compromised the sovereignty of Parliament, the committee opted for an ordinary piece of legislation rather than a constitutional bill of rights. As in the United Kingdom, the committee suggested that judges should be able to interpret statutes and the common law in a human rights context. The committee also recommended that the judges be empowered to issue declarations of incompatibility. It was also proposed that judges be given the power to invalidate subordinate legislation that did not comply with human rights standards contained in the bill, but not to invalidate legislation. The committee suggested that any person be able to bring an action for a declaration of incompatibility. It also suggested that a person aggrieved could bring a case for a remedy including compensation against the executive if their rights were breached. The committee recommended that the new legislation would include economic, cultural and social rights within the definition of human rights for the new Act. This last measure reflects a growing view in Australia about the interconnectedness of economic social and cultural rights and civil and political rights.15

As is often the case, the brave and innovative proposals for the form that the new bill would take were not all accepted or adopted. Most notably, economic
and social rights were not included in the definition of human rights. Remedies and actions for compensation by litigants in their own right were also omitted. The power to invalidate subordinate legislation was also excluded from the final Act.

The provisions of the ACT Human Rights Act and its operation

The Human Rights Act 2004 (ACT) (HRA ACT) came into force on 1 July 2004 and defines human rights in essence as the rights contained within the International Covenant on Civil and Political Rights. Evans has observed that in the final Act most references to the executive have been removed, leaving a level of uncertainty as to the effect the Act will have on administrative action. In the Australian Capital Territory, in contrast to the UK and Victoria, there is a unicameral system of Parliament, namely the Legislative Assembly. Clearly, this makes the legislative process much quicker and easier. In the United Kingdom and Victoria, however, proposed laws are arguably subject to greater scrutiny – for instance because of the presence of minor political parties, which can dominate the upper house in Victoria.

In the ACT, under s38 HRA ACT the Standing Committee on Legal Affairs (SCLA) is required to report to the Legislative Assembly on human rights issues raised by proposed bills. Unfortunately, no additional resources were allocated for the SCLA to undertake this task. Evans questions whether the committee will be able to carry out its obligations effectively. She observes however that in the past the SCLA did have an obligation to report on where bills ‘unduly trespass on personal rights and liberties…’. These provisions, she observes, are still narrower than those required under the Act and so the resource issue remains pertinent.

Like the situation in the United Kingdom, s31 HRA ACT requires the courts, when interpreting human rights, to make reference to international law and the judgments of foreign and international courts and tribunals where appropriate. If lawyers are appropriately trained and start to include human rights in their repertoire of legal arguments, then this provision may extend the common law precedents to include human rights concerns which have not been routinely presented in the Australian courts. Time will tell whether the ‘run of the mill’ Australian lawyer will be prepared to rise to this occasion. The Act however does not require the SCLA to consider delegated legislation.

S33 HRA ACT requires the Attorney General to issue a compatibility statement on whether ‘in the Attorney General’s opinion, the bill is consistent with human rights’; if it is not consistent with human rights then they must state how it is inconsistent. Also, under s33 if the court makes a declaration of incompatibility, the Attorney General is required to present copy of that declaration to the
Legislative Assembly within six sitting days and to provide a written response to the declaration within six months. Evans has raised a concern that in a unicameral parliament such as this there is a risk that reports to the Legislative Assembly may become a matter of form rather than substance.\(^9\)

She also states that the Act does not require the Attorney General to give written reasons for his or her view as to the inconsistency or consistency with human rights. This situation is different to the legislative regime in Victoria where detailed reasons are required to be given by the Attorney General. Evans does note, however, that when the Legislative Committee has made an indication that a bill is not consistent with human rights, and the Supreme Court later affirms their view, then this would be very embarrassing and is an incentive for government to avoid introducing bills that are inconsistent with human rights. She goes on to argue that this has been the case in other jurisdictions such as in New Zealand where the new and formal system of declarations introduced by the Human Rights Amendment Act 2001\(^{20}\) (NZ) in respect of discrimination cases provides evidence that the declarations can have a real influence on government policy. Evans observes that although declarations have not been all that frequent in the United Kingdom, in a number of cases it has led to legislative change that has enhanced rights.\(^{21}\)

The more challenging area in all jurisdictions is how the human rights frameworks will apply to the actions of the executive and its delegates. This author has a particular interest in how human rights frameworks can be used by people who are vulnerable, disempowered and marginalised so as to improve their treatment and the respect and dignity that is accorded to them. One of the difficulties for people who are in this position is that the government and its departments often play a significant part in their lives. Poor and disadvantaged people rely on government services to a greater degree than the rest of society. They rely on governments for income support, public housing, health care, and, given the services that are provided to them, are often accordingly subject to significant government scrutiny over how they lead their lives and how accountable they are. Such a scenario sets up a situation of dependency whereby these people are so frightened of challenging their treatment by government agencies and so unaware of their rights\(^{22}\) that they tolerate inappropriate intrusion and treatment. Often those most likely to litigate using human rights are those who are already involved in the legal system and so disposed to using it, for example defendants, prisoners and asylum seekers. Whilst they are entitled to do so, for many of vulnerable, disempowered and marginalised people even the notion of going to a lawyer for help is alien and so effort is needed to include such groups in the benefits of human rights protection.\(^{23}\)
In the ACT, as in the United Kingdom, there is a limitation on the scope of scrutiny of action by delegates of the executive. In view of the above, this is a matter for concern. The Victorian legislation goes further in providing a broader definition of ‘public authority’ than exists in the United Kingdom or the ACT. This will be discussed later. Clearly, the requirement that the Attorney General has to turn his or her mind to whether or not a bill is consistent with human rights means that more thought about human rights will be given in the preparation of a bill than was previously the case. The ACT government is preparing a pre-enactment scrutiny policy and procedures to apply across government. Under the legislation a Human Rights Commission was established but without a complaints handling mechanism. The legislation underwent a twelve-month review recently and this review took submissions. In the final report various recommendations were made. Recommendation one states that ‘it is clear that the HRA is achieving results within the Executive and Legislature and that it should continue to operate as a dialogue model’. In recommendation two it states that ‘while there is a case for improving community engagement, the focus at the moment should remain on the dialogue with the Assembly’. Recommendation three states that the executive should encourage agencies to make greater use of explanatory statements in relation to compatibility and give a summary of reasons (recommendation four).

There was significant discussion on the benefits of the inclusion of economic and social rights as well as environmental rights but in the end the committee recommended government should explore only direct enforceability in specific areas of health, education and housing and not include other economic, social or cultural rights (recommendation ten).

Exactly how the scrutiny of policies and procedures will be evaluated and measured is an interesting question. A significant cultural change within the public service which considers the impact on people’s human rights of their actions on the ground is needed if the human rights legislation is to truly have an impact. Recently in the Victorian context, the author was informed by a very senior public servant that they had little to worry about as their policies and procedures were consistent with human rights. This comment revealed a uniformed and cursory response to human rights compliance as there are policies and procedures which are inconsistent with the civil and political rights contained within the new Victorian Charter. The comment perhaps highlights the immense role of education and training that needs to be undertaken on human rights within the civil service, but also reflects a lack of understanding of how the policies and procedures operate on the ground and the potential scope for challenge that exists. If the government and public servants only take a formulaic approach in checking that its policies and procedures are consistent with human rights, and if these approaches are not properly scrutinised and
assessed for accuracy, then little will change on the ground for citizens.\textsuperscript{26} The difficulty here is that full and proper audits require independent scrutiny, proper and appropriate complaints mechanisms and reporting of statistics and an empowered citizenry to inform on the impact of policies. Such audits are expensive, resource intensive, time consuming and potentially embarrassing to the government and the public servants. To have any real effective on the human rights framework a detailed examination of human rights compliance as experienced by the people on the ground would be needed.

S34 and Schedule 2 HRA ACT include a requirement that all government departments and units must include, in their annual reports, statements of the ‘measures taken by the administrative unit during that period, to respect, protect and promote human rights.’ This is a good provision but again, as Evans points out, could also run the risk of being a merely formulaic response rather than one which has involved self reflection and consideration.\textsuperscript{27}

The ACT legislation fails to explain in any provision what the human rights implications will be where a body is carrying out a public function. This is similar to the questions that have been asked in the United Kingdom regarding the definition of a ‘public authority’. For example: does it apply to private bodies exercising public powers? Will it cover the statutory exercise of a private role? These matters will have to be clarified by the courts.

McKinnon,\textsuperscript{28} in a paper examining the HRA ACT in its second year of operation, stated that 18 cases\textsuperscript{29} had been considered since 1 July 2005, compared to 14 in the first year of the Act. She notes that the majority of these cases, 13 out of 18 were in the Supreme Court. Two were in the Administrative Appeals Tribunal and two were in the Residential Tenancies Tribunal. She indicates that it was hard to gauge how many cases have been heard in the magistrate’s courts as these decisions were not often recorded. She expresses the view that in the first year there was only a superficial deference to the Act and it was not necessarily decisive in any of the cases. She notes however that this appears to be changing as cases have increasingly included references to comparative and international human rights case law.

In the criminal jurisdiction the only reported decision involving the HRA ACT concerned the criminal prosecution of a young person for a sexual offence. The case was abandoned for want of prosecution.\textsuperscript{30} The child’s representative argued the proceedings should be stayed as there has been an inadequate investigation that had prejudiced the child’s ability to defend the charges which was a breach of s20(3) HRA ACT. \textit{Eckle v Germany}\textsuperscript{31} from the European Court of Human Rights was cited. McKinnon observes that this case illustrates that the courts may now be prepared to use the inherent powers of the HRA ACT to enforce human
rights. There have been several other cases which demonstrate this development of the court’s role.32 McKinnon states that ‘while there have been more cases under the Human Rights Act in its second year there is still some reticence in the legal profession in the ACT to actively apply the Act.’33

In terms of the impact on the legislature, McKinnon argues there are significant challenges.34 These include the new counter terrorism regime where the Attorney General promisingly sought advice on its compatibility with the HRA. However, there have been problems emerging, as discussed above, from the nature of state based human rights protection with, for example, the federal government overriding ACT laws recognising civil unions between gay and lesbian couples.

McKinnon notes that other Parliamentary committees have also started to use the new human rights regime regarding environmental planning and its impact on residential areas and rights to privacy and the protection of family. In their deliberations these committees have also used analysis of judgments from the United Kingdom courts and the European Court of Human Rights.35 She raises the concern that the policy of the government has been to require that human rights issues are addressed in explanatory statements prepared by the department responsible for the legislation. She notes this reflects limited resources but states that the current sharing of responsibility for human rights across departments does not involve challenging the preconceptions that civil servants may have. She laments that the Attorney General’s statements have not always given reasons for incompatibility.36

The process which led to human rights protection in Victoria

As stated above, the process towards a Charter of Human Rights and Responsibilities in Victoria commenced in the late 1990s. Discussions commenced when the current Labor government was still in opposition.

Articles appeared in Victorian newspapers37 arguing for human rights protection at a state level because it was unlikely, in the political climate, that a federal government would initiate such protection. When the government decided to launch a justice plan considerable effort was made by non-government organisations, individuals and academics to shift the justice statement from being a functionary document to one that actually reflected a vision incorporating human rights and access to justice. The justice statement in its draft form was a document where the main focus appeared to be on the mechanisms of the legal system, rather than on the effect of the legal system on the people.

In the early days of the preparation of the justice statement in 2002-2003, the Equal Opportunity Commission was called on for its expertise to provide input
into its formulation. Once it was accepted by the civil servants that human rights protection should be a pivotal element of any justice statement progress was significant. In the author’s view the support of some senior civil servants augers well for the future of the human rights frameworks as their involvement in the process gave them a sense of ownership and understanding of human rights. The then director of the Equal Opportunity Commission, Dr Di Sisely, and her staff organised round table meetings with a number of individuals and members of the Department of Justice who were charged with the preparation of the justice statement. These meetings involved providing the civil servants with information on why human rights protection was important, how it could be implemented and details of other models of human rights protection around the world. There was some reticence about the loss of control that departments would have if the members of the public were able to challenge them. Initially it was suggested that the human rights protections would only be applied to the Department of Justice and would not apply across all government departments. Forceful arguments were presented to the contrary that the government could not pick and choose in this way. It was strongly argued at these meetings that human rights protection in the context of a dialogue between the legislature, the courts and the executive would lead to improved decision-making, greater accountability and could actually be of benefit to civil servants. Once they were trained in human rights issues civil servants could prevent potential negative impacts of policies on the ground and also avoid critical public scrutiny. The argument was that through proper consideration of human rights prior to legislation and the introduction of administration policies and processes, there would be an advancement of good public sector management.

The difficulty in these early days of discussions was that for many civil servants the only exposure that they had to human rights was the United States Bill of Rights, which quite justifiably had many critics. Models from elsewhere were discussed at these meetings including the Canadian Charter of Rights and Freedoms, the New Zealand Bill of Rights and the South African constitutional protection of human rights under the bill of rights in chapter two of the Constitution. The United Kingdom’s legislation was also raised but was still in its infancy at the time.

One major concern of both the politicians and the civil servants was the fear that the unelected courts could be viewed as telling the government what to do. This reservation was a major obstacle in the discussion of human rights and remains an issue mainly in the tabloid press and with conservative commentators, even though the actual legislation makes government more accountable to the people but still retains the ultimate sovereignty in legislation and policy. An increasing awareness of the possibilities for human rights protection in Victoria emerged after discussions about the dialogue model that operates in Canada and
the United Kingdom, along with a variety of academic articles and evaluations of other models in force which were provided to those in charge of drafting the justice statement. Many of the key civil servants shifted their position on human rights protection from the extremes of cynicism, hesitancy and fear to a sense of optimism and preparedness to explore other models. This proved to be a time of great opportunity and these key civil servants rose to the occasion.

During 2003, the non-civil servant participants at these meetings started to have early morning meetings. It became known as the ‘Breakfast Club’. This group eventually expanded to include members of the legal profession, charities and churches working with the underprivileged, social service agencies, academics and other non-government organisations and statutory bodies. The membership at times varied and, as the efforts to improve human rights protection in Victoria gained momentum and more meetings and documents needed to be drafted, much of the work was done by email. All of the participants volunteered their time and their expertise. The expanded group became known as the ‘Charter Group’ in 2004. The group’s strategies included conducting meetings with other human rights organisations; holding workshops on how to write submissions; and hosting a website with an online petition.40 Professor Zifcak, the chair of the Charter Group stated ‘One of the flaws in prior inquiries was that there was never enough community interest,’ ‘We set out to change that.’41 A pivotal development was the state government’s commitment in the justice statement 2004-2014 to discuss and consult with the Victorian community about a charter.

With the Attorney General, Rob Hulls, very keen on the idea of human rights protection, the challenge was to convince the rest of his Cabinet, many of whom were initially quite conservative and sceptical. In such a political climate it was a prudent move by the Attorney General to establish a Human Rights Consultative Committee in April 2005 to consult with the community and report on how human rights and responsibilities could best be protected and promoted in Victoria. Also strategic was the makeup of this committee. It was chaired by Professor George Williams, a constitutional law expert from the University of New South Wales. The other members of the committee were chosen to reflect what the general community might find appealing. They included Andrew Gase, an Olympic sportsman, Rhonda Galbally, an admired community philanthropist and former founder of the Australian Health Institute, and Haddon Storey, a former liberal party member of the Legislative Council from 1971-1996. The Solicitor General, Pamela Tate SC, was appointed Special Council to the Human Rights Community Consultative Committee.

The government however provided a ‘Statement of Intent’ to guide the committee. This sadly was more circumscribed than the model the Attorney
General had foreshadowed and indicated the cabinet would not favour extension to economic and social rights but rather just civil and political rights. In June 2005 the committee released a community discussion paper and called for submissions. Booklets and pamphlets were produced to inform people of the process and how to engage in it. There were also advertisements placed in the daily newspapers. The committee took submissions via the internet, letter and postcard and in the end the number of submissions totalled 2,524.42 This was the largest number of submissions ever received in Australia canvassing human rights issues43 and one of the highest numbers of submissions on any issue in Victoria for an independent inquiry. More than 84 per cent of the people who made submissions wanted the law changed to better protect their human rights. All submissions to the committee were published.

Despite all of this, the main opponents of the human rights movement continued to claim that the process was undemocratic and that it would mean the loss of Parliamentary sovereignty.44 However, the preferred model in the final recommendations of the committee was a non-entrenched legislative model where the court, as in the United Kingdom, could only issue a declaration of ‘inconsistent interpretation’ rather than strike legislation down.45 It created the dialogue model, as exists in Canada and the United Kingdom, between the executive, Parliament and the judiciary. Some Parliamentarians claimed that the human rights legislation was ‘contrary to the bible’ and would prevent debate on human rights, encourage costly litigation and undermine the separation of powers.46 In an odd twist the Leader of the Opposition, in the Parliamentary debates, argued that he was in favour of improved human rights protection but then voted against the bill47 stating it did not go far enough.

The Attorney General was very aware that human rights protection had traditionally been resisted by conservative parties and by talk back radio hosts and the tabloid press. He wanted to ensure that the committee consulted widely with the public, not just in metropolitan Melbourne but also in the rural community.48 He wanted to send the message that human rights belong to all people, not just some, and that he wanted their input first into whether human rights protection should occur, if so in what form, and what sorts of models might be considered if the community wanted further human rights protection.

In May 2006 the Attorney General introduced the Charter of Human Rights and Responsibilities Bill 2006 into State Parliament. In July 2006 the Charter was enacted and came into effect as law. From 1 January 2007 all new Victorian legislation had to be certified as complying with the Charter. On 1 January 2008 the Charter will take effect across all state government activities. The staggered time delay was necessary to enable time for training and processes to be put in
place before the legislation comes into full force. This is similar to time delays in the UK to ready its instrumentalities for the new Act in 1998.

The provisions of the Victorian Charter of Human Rights and Responsibilities Act 2006 and its operation

The Victorian Charter of Human Rights and Responsibilities Act 2006 (the Charter) defines human rights as the civil and political rights set out in Part II of the Act. These are close to the rights contained in the International Covenant on Civil and Political Rights but do not include all of the rights. They include equality before the law (s8), the right to life (s9), protection from torture, cruel and inhumane punishment (s10), freedom of thought, conscience, religion and belief (s14), protection of families and children (s17), cultural rights with explicit recognitions of indigenous rights to identity and culture (s19), the rights to liberty and security of person (s21), the right to humane treatment when deprived of liberty (s22), the rights of children in the criminal process (s23), the right to a fair hearing (s24) and rights in criminal proceedings (s25). The Preamble sets the tone for the legislations stating:

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.

It also outlines key foundational principles such as the rule of law, human dignity, equality and freedom.

S1(2) states the main purpose of the Charter is to protect and promote human rights by:

(a) setting out the human rights that Parliament specifically seeks to protect and promote; and
(b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and
(c) imposing an obligation on all public authorities to act in a way that is compatible with human rights; and
(d) requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.

S2(3)(a) states that the Charter enables Parliament, in exceptional circumstances, to override the application of the Charter to a statutory provision.
Unlike the situation in the United Kingdom, the initiating legislation gives further power to an existing Equal Opportunity Commission, which is renamed the Equal Opportunity and Human Rights Commission (the Commission), to monitor and promote the human rights culture and its implementation. The Charter gives the Commission the power to intervene in proceedings before a court or tribunal which relate to the application of the Charter (s40), to report annually on the Charter to the Attorney General, to review programmes at the request of public authorities and to assist the Attorney General in any review of the Charter (s41). This should avoid some of the gaps that have developed under the English model due to the absence of a human rights commission and will hopefully hold agencies to account and improve practice. The normal opportunities exist for other interveners under the Court’s rules.

Again, unlike the situations in the United Kingdom, with the constrained definition of ‘public authority’ used by the legislature and limited by the House of Lords, the Victorian legislature has gone further to extend its definition of public authority in Division IV of the Charter. S4 not only defines what a ‘public authority is but also gives examples to guide the courts. It states:

(2) In determining if a function is of a public nature the factors that may be taken into account include …

(a) that the function is conferred on the entity by or under a statutory provision;

Example
The Transport Act 1983 confers powers of arrest on an authorised officer under that Act.

(b) that the function is connected to or generally identified with functions of government;

Example
Under the Corrections Act 1986 a private company may have the function of providing correctional services (such as managing a prison), which is a function generally identified as being a function of government.

(c) that the function is of a regulatory nature;

(d) that the entity is publicly funded to perform the function;

(e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.
Example

All the shares in the companies responsible for the retail supply of water within Melbourne are held by or on behalf of the State.

(3) To avoid doubt:

(a) the factors listed in sub-section (2) are not exhaustive of the factors that may be taken into account in determining if a function is of a public nature; and

(b) the fact that one or more of the factors set out in sub-section (2) are present in relation to a function does not necessarily result in the function being of a public nature.

(4) For the purposes of sub-section (1)(c), an entity may be acting on behalf of the State or a public authority even if there is no agency relationship between the entity and the State or public authority.

(5) For the purposes of sub-section (1)(c), the fact that an entity is publicly funded to perform a function does not necessarily mean that it is exercising that function on behalf of the State or a public authority.

S5 notes that the human rights in the Charter are in addition to other rights and freedoms and do not derogate from other rights. Most importantly s7 requires that limitations on human rights must be demonstrably justifiable, having regard to factors such as the nature, extent and purpose of the limitation. This was reinforced in one of the few decisions thus far under the Charter.50

S32 of the Charter states that so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights and that international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision. The section does not however affect the validity of an Act or provision of an Act that is incompatible with a human right; or a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

Finally, another similarity with the HRA ACT is that a complainant cannot bring an action in its own rights on the grounds that an act is unlawful under the Charter: it can only arise where other relief or another remedy are being sought (s39). Similarly, a person is ‘not entitled to be awarded any damages’ (s39(3)). Time will tell how the Charter will impact upon human rights51 but already in Victoria an education and training campaign of civil servants, Parliamentarians, the judiciary and non-government agencies is under way.52 Such training must be ongoing especially in view of the high turnover of staff in some of these authorities.
There were encouraging signs in Victoria even before the introduction of the Charter. The President of the Court of Appeal, in a case requiring the balancing of human rights, called on the lawyers making submissions to refer to and expound upon international human rights jurisprudence to assist the court in the exercise of its discretion. The Charter presents a legislative imperative for the judiciary to consider human rights beyond ambiguity.

Problems of a federal government that is resistant to human rights protection for state and territory based human rights frameworks

There have been a number of failed attempts to attain human rights protection in Australia. At best, there is national human rights legislation establishing a Human Rights and Equal Opportunity Commission (HREOC). However, since 1996 HREOC has lost much of its funding, been strongly criticised by the federal government and has been the victim of many failed attempts in the Senate to water down its powers. In addition, the HREOC has experienced significant budget cuts in 1996 and in 2003. Fortunately, most of these attempts have been blocked in the Senate by the Opposition and some of the minor of parties or by the proroguing of Parliament.

The Conservative Liberal government currently holds the majority of seats in the Senate and the House of Representatives, thus making it very difficult since 2004 to block government legislative reform. A federal election is due on 24 November 2007.

The Racial Discrimination Act 1975 was recently disregarded with the passage of legislation in the Australian Parliament with the support of the federal Opposition Labor Party. The new provisions remove the right of indigenous peoples to social security benefits in certain circumstances in the Northern Territory. The legislation purported to take action on the lamentable situation of child abuse in Aboriginal children. As part of a series of bills passed by Parliament indigenous people will now face restrictions on finances (despite the fact that many are already destitute), removal of rights of appeal and changes to land entitlements, all in the guise of preventing child abuse. For over the last decade, the government has tried to remove land rights and minimise the control of indigenous communities over their daily lives. This last example highlights the precariousness of human rights in Australia – especially for its most indigenous people who are vulnerable and marginalised and who have been subjected to a long history of infringement of their human rights, significantly sub-standard living conditions and lower health and well-being indicators (compared to the rest of the population) and paternalistic control by governments.
Conclusion

Poor and disadvantaged people rely on government services to a greater degree than the rest of society. They rely on governments for income support, public housing, health care, and often are, accordingly, subject to significant government scrutiny over how they lead their lives. Such a scenario sets up a situation of dependency whereby these people, frightened of challenging their treatment by government agencies, in fear of losing their benefits, and also often unaware of their rights, tolerate inappropriate intrusion and sometimes poor treatment. For this reason, the extent to which the actions of civil servants and their agents are required to conform to human rights standards is a critical element if human rights are to be enforced for all. This may be where there is most potential for vulnerable and marginalised people to improve their human rights given the cost and other barriers which exist in their being able to litigate. If departmental agencies in their day to day dealings with people improve their policies, processes and decision-making to ensure they are human rights compliant, then although largely invisible this may mean a real difference. Perhaps policy improvements will needed to be celebrated when they occur. What must be bought home to the Australian public, to avoid some of the negative reaction there has been to human rights by some in the United Kingdom, is the message that human rights belong to all of us and not just selected groups who tend to be already before the courts. They should remember what history reveals: once human rights are derogated from we are all diminished and it can be a slippery slide downwards if we are all placed at risk.

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Notes
1 Chu Kheng Lim v Minister for Education, LG and Ethnic Affairs (1992) 67 ALJR, 125, 143; Polites v The Commonwealth (1945) 70 CLR 60, 68-69 and Dietrich v The Queen (1993) 67 ALJR 1, 6-7, 15, 31, 37 and 44.
2 As part of the implementation of the Convention on the Elimination of all Forms of Discrimination Against Women.
3 As part of the implementation of the need to act in the ‘paramount interests of the child’ in the Convention on the Rights of the Child.
4 As implementation of the Convention on the Elimination of all Forms of Racial Discrimination.
8 New South Wales v The Commonwealth [2006] HCA 52.
9 S109 The Commonwealth of Australia Constitution Act 1900 (Commonwealth).
10 A Labor government was elected in Victoria in September 1999. A meeting between the author and the new Attorney General Mr Hulls took place in late November 1999 when these matters were raised.
14 Such a poll was mooted for Victoria but there were questions around the funding. Some academics indebted to conduct a survey but this did eventuate for similar reasons around funding availability.
18 In the United Kingdom there is some concern that in deprived communities the legal profession respond to the Human Rights Act (HRA UK) in a rigid and uninformed way. In an article outlining a survey which was conducted in the Cynon Valley with local solicitors it was revealed that many, although aware of the Human Rights Act, did not really considered it as a necessary tool in their work and lost many opportunities to present arguments in their client’s cases. The conclusion was that this attitude involved a lack of practical application training, and the distance and cost of training events for these lawyers. There was also uncertainty about how to access rights and misinformation about how the HRA UK was to be used: for example, many believed that they had to go to the European Court of Human Rights. There was also a perception amongst local lawyers that human rights arguments would be problematic due to pressures of time and that the lower courts would be not be receptive to human rights arguments. and a fear that using human rights arguments would give the impression they only had a weak case. This meant that the local lawyers were reticent to use the legislation. Despite this, 79 per cent of lawyers surveyed indicated that they would welcome training on the Act. See R Costigan, P A Thomas, ‘The Human Rights Act: A View from Below’, Journal of Law and Society, Vol 32 No 1, March 2005, p51.
19 See n16 above, p6.
20 The Bill of Rights in New Zealand has no statutory basis for declarations to be made that they have developed through judicial rulings. This is a different situation to that in the United Kingdom and Victoria.

25 For an illustration of non-compliance, Victoria has a good system called a ‘dual track’ system for youth offenders that enables a judge to place a ‘vulnerable’ young offender between the age of 18 and 21 in a youth justice facility rather than an adult prison. This is not available to people of the same age who are on remand.

26 Evans highlights that the New Zealand attempts to audit government compliance with human rights proved time consuming, controversial and expensive. See C Evans, n16 above, p7.

27 See n16 above, p.8.


29 See http://acthra.anu.edu.au

30 Perovic v CW No CH 05/1046 (1 June 2006) unreported.

31 S EHRR 1.


33 See n28 above.

34 Ibid.

35 Ibid.

36 Ibid.


41 Ibid.


43 See The Herald Sun, 21 February 2006 where Peter Farris QC claimed that the rights of Australians were fully protected by law. He has since used the Charter in a client case. Piers Ackerman claimed that almost every dictatorial and authoritarian nation could boast of a Bill of Rights, Daily Telegraph, 28 March 2006. These claims ignored the 84 per cent of Victorian submissions, many with detailed comment stating the contrary, and yet still argued the process was undemocratic.


45 For details as to how the community members were consulted and galvanized see G Williams, ‘The Victorian Charter of Rights and Responsibilities: Exegesis and Criticisms’, [2006] 30 (3) Melbourne University Law Review, 28.
The House of Lords has considered the term ‘functions of a public nature’ contained in s6(3)(b) HRA UK in *Aston Cantlow Parish Church Council v Wallbank* [2003] UKHL 37, per Lord Nicholls at 912 and Lord Hope at 63, *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936 and *YL v Birmingham City Council* [2007] UKHL 27.

Two other cases have raised issues pertinent to the Charter since its enactment. They are *R V Williams* [2007] VSC 2 (15 January 2007) which raised the issue of a right to legal counsel. It was the first case where substantive attention was given to the Charter. It involved a prominent convicted murderer and his choice of lawyer. The Crown submitted that as the Charter was still transitional it ought not be considered. The court however did consider issues raised by the Charter including whether the judge in his administrative capacity was a public authority within the meaning of the Act, whether there were limits on the rights to counsel and at what date did Parliament intend the courts to be actively involved in interpreting human rights. The court decided that the judge was acting in a judicial capacity. The court found Parliament did not intend the legislation to come into force until 1 January 2008 in this regard but noted that the court might be bound to consider human rights as the provisions around a fair trial and criminal process came into force on 1 January 2007. The issue however was not determined. King J discussed at length the concepts of human rights being absolute and provisions of the new charter in the case. King J ruled that even with or without the Charter in force the right of an accused to choose counsel at public expense was not a right but the right to a fair trial was a human right. She referred to Canadian jurisprudence and indicated that Williams would be given time to secure other legal aid counsel. In the case of *R v White* [2007] Bongiorno J stated that the incarceration of a person with a severe psychiatric illness in a prison may amount to an infringement of the Charter. The plaintiff was remanded in custody in a remand prison due to a shortage of beds in a psychiatric hospital. In a strong judicial statement Bongiorno J stated it was not appropriate that persons found not guilty on the grounds of a mental impairment be imprisoned. He said it appeared to not only be contrary to the spirit but also to the letter of the Charter. As there were no beds the judge said he would remain on remand but that the situation was unsatisfactory.


Human Rights Bills which downgraded the Commission were placed before the Senate three times in 1996, 1998 and 2003 but has never become legislation. The bills sought to restrict commissioner powers and the rights of the HREOC to intervene in cases involving human rights issues. It was not supported in any of these attempts by the HREOC which stated that it ‘threatens human rights commission independence.’ See, ‘Human Rights Bills Threatens Human Rights Commission Independence’, Human Rights and Equal Opportunity Commission press release, 27 March 2003.


Legislation on indigenous issues before Parliament as at 16 August 2007 include the *Northern Territory National Response Act 2007*; *Social Security and other Legislation Amendment Act 2007* and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment Act 2007*.
