

# VICTORIA'S CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES: LESSONS FOR THE NATIONAL DEBATE

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George Williams<sup>\*</sup>

## INTRODUCTION

Thank you for the opportunity to address you today about an important development in Australian constitutional history. That development is the drafting and enactment of Australia's first Charters of Rights. The first such law was passed here in the ACT in the form of the *Human Rights Act 2004*. It was Australia's first Bill of Rights and, unlike the recent civil unions law, survived the possibility of disallowance by the federal government. Australia's second, and the first in a State, is the Victorian Charter of Human Rights and Responsibilities. It has been passed by the lower house of the Victorian Parliament and is about to come on for debate in the upper house. The Bracks Government in Victoria has a majority in both houses so it is expected that the law will be enacted to come into force on 1 January 2007 (with some parts delayed to 1 January 2008). Tasmania has also started a process to consider whether it should enact a Victorian-style Charter, and Western Australia and NSW may not be far behind.

I was fortunate to chair the community process that recommended enacting the Victorian Charter. Today, I want to reflect on the state of the Bill of Rights debate generally in Australia as well as the lessons that can be learnt from the Victorian initiative. After setting out some background and explaining what occurred in Victoria and what its Charter will look like, I will explore some lessons for the national debate. While these lessons relate to how a Charter of Rights could be pursued at the national level, they also apply to other debates involving legal change aimed at addressing issues of social injustice or symbolic reform, such as those over an Australian republic and a treaty with Indigenous peoples.

Before I continue, I should state clearly my position on a Bill of Rights. My view is that we do need better formal legal protection for human rights at the national level and in each of the States and Territories. In a federal system, such protection is needed wherever government exercises significant power. Such change would be important in modernising our democratic process and in improving the performance of parliaments and governments in exercising power on behalf of the people.

I also believe that such change is needed because it has become all too clear that Australia does have a range of serious human rights problems, such as the detention of young children seeking asylum, the indefinite detention of asylum seekers who cannot be deported and our overreaching terror laws (which in some respects like the new powers for ASIO go beyond even the laws enacted in the United States). There are also problems in regard to the undermining of our most important political freedoms. A good example is the right to vote,

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<sup>\*</sup> Anthony Mason Professor and Director, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales; Barrister, New South Wales Bar.

with this Parliament at the last sittings enacting law that, unusually since Aborigines were denied the vote in 1902, narrowed rather than expanded the franchise. That law, enacted as a so-called 'electoral integrity' measure, removes the vote from prisoners and also forces the closure of the electoral roll on the day that the election is issued, thereby denying thousands of Australians the chance to change their enrolment details and many young Australians the chance to vote for the first time.

When it comes to change to our system of government, people often say 'if it ain't broke, don't fix it'. However, when it comes to the protection of our fundamental freedoms, our system of government is broken and we do need to fix it.

## BACKGROUND

Australia is now the only democratic nation in the world without a national Bill or Charter of Rights. Some comprehensive form of legal protection for basic rights is seen as an essential check and balance in democratic governance around the world. Indeed, I am not aware of any democratic nation that has gained a new constitution in the last two decades that has not included some form of Bill of Rights, nor am I aware of any such nation that has ever done away with its Bill of Rights once it has been enacted.

Why then is Australia the exception? Why has Australia not gone down the rights protection path like other nations? The answer lies in our history. Although we like to think of Australia as a young country, constitutionally speaking, we are one of the oldest in the world. Our national Constitution remains almost completely as it was enacted in 1901, while the Constitutions of the Australian States go back as far back as the 1850's.

By contrast, over 56 per cent of the member States of the United Nations made major changes to their constitutions between 1989 and 1999. Of the States making such changes, over 70 per cent even adopted a completely new constitution.<sup>1</sup> It is not surprising then that Australia was described by Geoffrey Sawer as far back as 1967 as 'constitutionally speaking ... the frozen continent'.<sup>2</sup> This is even more applicable today, with the last successful vote to change the Constitution 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 that Australia has gone without any change to the 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.

To go back to when we drafted our national Constitution and considered inserting guarantees of human rights is to return to the 1890s. At that time, apart from the United States, other nations commonly did not have anything like a Bill of Rights as part of their system of government. The United Kingdom, upon which our own system is based, then did not have its *Human Rights Act 1998* and instead relied upon the common law tradition and the notion that parliamentarians could be trusted to protect human rights. It made sense in Australia at that time to rely upon the same.

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<sup>1</sup> Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press, 2000), 12.

<sup>2</sup> Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967), 208.

There was an additional reason why rights guarantees were not included in the new Australian Constitution. The framers sought to give the new federal and the State Parliaments the power to pass racially discriminatory laws.<sup>3</sup> This is clearly demonstrated by the drafting of certain provisions. For example, the Constitution, as drafted in 1901, said little about Indigenous peoples, but what it did say was entirely negative. Section 51(xxvi) 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 'aboriginal natives shall not be counted' in taking the census.

Section 51(xxvi), the races power, was inserted into the 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 clearly racist. Edmund Barton, our first Prime Minister, 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.'<sup>4</sup>

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'.<sup>5</sup> This clause might have prevented the federal and state Parliaments from discriminating on the basis of race, and the 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 gold-field.'<sup>6</sup> Clark's provision was rejected by the framers who instead inserted section 117 of the Constitution, which merely prevents discrimination on the basis of state residence. In formulating the words of section 117, Henry Higgins, one of the early members of the High Court, argued that 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.'<sup>7</sup> While in a 1967 referendum Australians chose to strike out the words 'other than the aboriginal race in any State' in section 51(xxvi) and to delete section 127 entirely, the racist underpinnings of our Constitution remain. We have yet to fully move on from a system of government founded upon values and policies like the White Australia Policy.

## **VICTORIA'S CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES**

One way to make a break with our past is to recognise that the accepted wisdom and values of the 1890s do not hold true today. More than a century later, it is not sufficient to trust our political leaders to do the right thing. We also need law that protects our freedoms from the misuse of power and provides a way for parliaments to pass laws and governments to apply them based upon modern human rights principles like freedom from racial discrimination. The Victorian Charter of Human Rights and Responsibilities is just such a law.

### *The Community Consultation*

The origins of the Victorian Charter lie in the Justice Statement issued by Victorian Attorney-

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<sup>3</sup> George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999), 33-45.

<sup>4</sup> *Official Record of the Debates of the Australasian Federal Convention, 1891-1898* (Sydney: Legal Books, 1986), vol. 4, Melbourne 1898, 228-29.

<sup>5</sup> *Ibid.*, vol. 1, Sydney 1891, at 962.

<sup>6</sup> *Ibid.*, vol. 4, Melbourne 1898, at 665.

<sup>7</sup> *Ibid.*, vol. 5, Melbourne 1898, at 1801.

General Rob Hulls in May 2004. This proposed new directions for the Victorian justice system over the following decade. It dealt with a range of matters, including the idea of a Charter of Rights for Victoria. The Statement did not say that a Charter was needed, but that there should be a public discussion to address the issue.

One year later, the Attorney-General announced the appointment of a four person committee to consult with the community. It included Rhonda Galbally AO, renowned for her community leadership in addressing disadvantage in Victoria, Andrew Gaze, a basketballer and Captain of the Sydney 2000 Olympic team, The Hon Professor Haddon Storey QC, a former Victorian Liberal Party Attorney-General, and myself as the chair of the committee. The time-frame was tight, with only six months given to consult with the community across the State and to report back to the Attorney-General by 30 November 2005.

We were appointed to operate independently of the Attorney-General and of government. However, the Victorian Cabinet did release a Statement of Intent upon our appointment that set out the government's preferred position on any human rights model for the State. The government indicated its support for the protection in any law of only a limited set of human rights, rights taken from the International Covenant on Civil and Political Rights, and not for the protection of other rights taken from other international 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). The government also said that it was interested in a model in which the courts would have a role to play, but which retained parliamentary sovereignty. It specifically said it was interested in a model like that in the United Kingdom and New Zealand, as adapted recently to the ACT, and that it did not favour anything like the 1791 constitutional Bill of Rights found in the United States.

As a committee, we wanted to have a genuine grassroots consultation about the issue. We felt that people who often felt alienated from government should be given a say. We were also aware, however, of the challenges facing us. These included the reluctance of some people, including young people, to be involved and lack of information many Australians have about basic issues of government and human rights. A 1987 survey, for example, conducted for the Constitutional Commission found that 47 per cent of Australians were unaware that Australia has a written Constitution.<sup>8</sup> Similarly, the 1994 report of the Civics Expert Group<sup>9</sup> found that only 18 per cent of Australians have some understanding of what their Constitution contains. Significantly, only one in three people felt reasonably well informed about their rights and responsibilities as Australian citizens.

To deal with these challenges we designed a community process very different from how other inquiries, such as a parliamentary committee, might work. 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 community organisations. This sometimes involved what we called 'devolved consultation' whereby we provided small amounts of funding to groups to assist us to get people with special needs involved, such as homeless people. This 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 in Melbourne and to the Country Women's Association in Gippsland.

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<sup>8</sup> Constitutional Commission, *Bulletin*, No 5 (September 1987).

<sup>9</sup> Civics Expert Group, *Whereas the People: Civics and Citizenship Education* (AGPS, 1994).

On the road, we held up to four meetings per day, with each typically lasting two hours. These were not open town hall meetings, but meetings arranged through local groups or in some cases through information in the local media. The meetings were structured so that a large part of the meeting was spent listening to people and what they knew about the question, followed by us providing the basic information they needed to have a say. We then directed the conversation to ten key questions we needed their help to answer, which were open-ended questions like whether change was needed and what rights they thought were the most important to be protected. We also sought information from them on broader issues such as the role of education and of the community in the rights protection process. We also developed a website and invited young people to engage with the process over the internet. One of the great successes of the process were the many young people who took part in this way.

We also ran a parallel process of consultation with the Victorian Government. We believed that the journey people need to come on in terms of understanding the issues in order to form an opinion applied equally to government. I met with the senior executives of all government departments, sometimes on a number of occasions, in order to inform them of the process and to factor in their views. 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 make sure that our thinking was informed by current practice.

Overall, the consultation process was very successful in its engagement with the community. We held 55 community meetings around the State as well as 75 more focused meetings with government, peak organisations and the like. In most of these meetings, and indeed for most of our process, our efforts were directed not to those who already believed that such change was needed but to groups who felt disconnected from the political process or ambivalent or antagonistic to change. Hence, much of our work involved bodies such as victims rights groups or the Country Women's Association or within government bodies such as Victoria Police. The process led to a report, *Rights, Responsibilities and Respect*, informed both by community thinking and by what could actually work in government.

All up, we have received 2524 written submissions from across the community. 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. By comparison, the parliamentary committee that considered a bill of rights for New South Wales in 2000–2001 received 141 submissions.

### *What the Community Told Us*

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) said that they wanted to see the law changed to better protect their human rights.

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 strive 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 our basic rights and responsibilities.

### *The Charter*

Based upon what we have heard, we recommended that the Victorian Parliament enact a Charter of Human Rights and Responsibilities. The Bracks government accepted this recommendation in December 2005 on the day that our report was released. Then, after five more months of working the implications of our report through government, it introduced the Charter into Parliament in May this year.

The Charter 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 Victorian Constitution. Instead, the Victorian Charter will be an ordinary Act of Parliament like the human rights laws operating in the ACT, New Zealand and the United Kingdom. This will ensure the continuing sovereignty of the Victorian Parliament.

The United Kingdom has a system of law and government similar to Victoria and its *Human Rights Act 1998* has been a success without giving rise to the litigation and other problems sometimes associated with the United States Bill of Rights. Its law has also proved effective in balancing issues such as the need to fight terrorism with the democratic and other principles required for a free society. In Scotland, which has a similar population size to Victoria, a recent article surveying the impact of the United Kingdom *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’.<sup>10</sup> Overall, the authors concluded that ‘it seems clear that human rights legislation has had little effect on the volume of business in the courts’.

The Charter of Human Rights and Responsibilities is generally written in clear language. It also includes 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;

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<sup>10</sup> Tom Mullen, Jim Murdoch, Alan Miller and Sarah Craig, ‘Human Rights in the Scottish Courts’ (2005) 32 *Journal of Law and Society* 148, 152.

- 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.

In this form, the Charter can be used in schools and for broader community education, such as for new migrants to Victoria.

The Charter protects those rights that are the most important to an open and free Victorian democracy, such as the rights to expression, to association, to the protection of families and to vote. These rights are contained in the *International Covenant on Civil and Political Rights* 1966, to which Australia has been a party for many years. Some of the rights in this instrument have been modified or even not included so that the Charter matches the contemporary aspirations of the Victorian people and so that it contains only those rights that have broad community acceptance. The Charter, for example, does not deal with the issue of abortion, instead maintaining the status quo.

The rights in the Charter are not absolute and can be limited, as occurs in other nations, where this can be justified as part of living in a free and democratic society. Elected representatives in Victoria 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. The Charter even recognises the power of the Victorian Parliament not just to balance such interests but to override the rights listed in the Charter where this is needed for the benefit of the community as a whole.

Many Victorians said that the Charter should also contain rights relating to matters such as food, education, housing and health, as found in the *International Covenant on Economic, Social and Cultural Rights* 1966, as well as more specific rights for Indigenous people, women and other groups. While we agreed that these rights are important, we did not recommend that they be included in the Charter at this stage. We recommended, and the Charter reflects, that the focus should be on the democratic rights that apply equally to everyone.

This needs to be seen in light of the fact that the Charter includes a mechanism for review and change in four and then eight years. This will enable these rights and other issues to be considered again down the track. Indeed, I do not expect that the Charter will remain unchanged, but that it would be updated and improved with the benefit of experience and in line with community thinking. The Charter will be the start of incremental change, not the end of it.

An important aim of the Charter of Human Rights and Responsibilities is to create a new dialogue on human rights between the community and government. The Charter will mean that rights and responsibilities are taken into account from the earliest stages of government decision-making to help prevent human rights problems emerging in the first place. The key aspects of this dialogue, as adapted and improved from best practice in the ACT and nations such as the United Kingdom, Canada and New Zealand, will be:

- The **community** will receive the benefit of the rights listed in the Charter.
- Public servants will take the human rights in the Charter into account in developing new **policies**.
- **Public authorities** like government departments will be required to comply with the Charter. If they fail to do so, a person who has been adversely affected by a government

decision, as is possible now under Victorian law, will be able to have the decision examined in court. There will be no right to damages.

- Government departments and other public authorities can undertake **audits** of their programs and policies to check that they comply with the Charter.
- Where decisions need to be made about new laws or major policies, submissions to Cabinet will be accompanied by a **Human Rights Impact Statement**.
- When a Bill is introduced into the Victorian Parliament, it will be accompanied by a **Statement of Compatibility** made by the person introducing the Bill setting out with reasons whether the Bill complies with the Charter. Parliament will be able to pass the Bill whether or not it is thought to comply with the Charter.
- Parliament's **Scrutiny of Acts and Regulations Committee** will have a special role in examining these Statements of Compatibility. It will advise Parliament on the human rights implications of a Bill.
- Victorian courts and tribunals will be required to **interpret** all legislation, so far as is possible to do so, in a way that is consistent with the Charter. In doing so, they will need to take account of why the law was passed in the first place.
- The Attorney-General and renamed Victorian Equal Opportunity and Human Rights Commission will be able to **intervene in a court or tribunal** that is applying the Charter to put submissions on behalf of the government and the public interest. Community and other groups might also be given leave to intervene.
- Where legislation cannot be interpreted in a way that is consistent with the Charter, the Supreme Court will be able to make a **Declaration of Inconsistent Interpretation**. This will not strike down the law and Parliament could decide to amend the law or to leave it in place without change.
- Where the circumstances justify it, Parliament will be able to pass a law that **overrides** the rights in the Charter. This will prevent a Declaration of Inconsistent Interpretation being made in respect of the law for five years. The override can be renewed.

## LESSONS FOR THE FEDERAL DEBATE

If we were to pursue a Charter of Rights or other like major changes at the federal level, I think we can learn from what has been achieved in Victoria. My five lessons are:

*First*, start with a community-based process in which people have a real say and ownership of the outcome. This may require an independent panel rather a parliamentary inquiry in order to dispel concerns about the motivation for change being a self-serving one on the part of politicians. In an event, such reform cannot and should not be imposed on the community. It must gain wide support before moving forward. Indeed, the only Charter processes that have succeeded in Australia, in ACT and Victoria, both had this.

*Second*, keep the process short and sharp. Momentum is crucial and support can dissipate quickly. A reason that the Victorian process worked was that it took place over six months with then another six or so months leading to the introduction of the law. This timeframe maximised the chances of maintaining energy, commitment and discipline around the issue. The multi-year timeframe that has been put forward by some for an Australian republic, by contrast, is just asking for trouble.

*Third*, commit to a process around a sound and achievable model. We should jettison the US



and a constitutional bill of rights. If that is to ever occur, it is a generation away. We should focus the community debate around the ordinary acts of parliament in the UK and elsewhere as the start of incremental change. This is achievable and the right place to start. By contrast, the debate about any treaty with Indigenous peoples is often hampered by a lack an acceptable model.<sup>11</sup>

*Fourth*, locate the debate in values and good governance. Many Australians care about human rights not for their own sake but because they are part of a larger debates, such as about responsibilities and issues of governmental accountability. Human rights works well as a concept for the converted and the well-educated, but a broader set of tools needs to be deployed in talking to the community at large.

*Fifth*, get your language right. The debate should not be about a bill of rights at all, but a charter of rights or an ordinary human rights act. The language we use will signal to people whether the proposal is like the US Bill of Rights, which they rightly do not want in Australia, or a different approach. For example, when NSW Attorney General Bob Debus said in March this year that he would take a proposal to Cabinet for a community process like that in Victoria, Premier Morris Iemma said in a media report that ‘he does not support the introduction of a bill of rights but is willing to consider Attorney-General Bob Debus’s proposal for a charter of rights’.<sup>12</sup>

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<sup>11</sup> But see Sean Brennan, Larissa Behrendt, Lisa Strelein and George Williams, *Treaty* (Federation Press, 2005).

<sup>12</sup> ‘Iemma Willing to Consider Charter of Rights Proposal’, AAP, 20 March 2006.