

Giving Rights, But Not Without Limits

Comment: *The New Victorian Charter of Human Rights and Responsibilities*

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In a historic moment for Victorians, the Victorian Government enacted the *Charter of Human Rights and Freedoms 2006* (Vic) (the 'Charter'). As Professor George Williams noted this is unique legislation in that it actually gives citizens something – statutory protection of their human rights – rather than regulating some aspect of their lives or taking something away.

The Charter confers statutory protection of civil and political rights, based primarily on the rights contained in the *International Covenant on Civil and Political Rights* (1966) ('ICCPR'), such as, the rights to life, liberty, fair trial, equality and non-discrimination, and freedoms of expression and association.

The Charter recognises that rights are not absolute. Section 7 acts as a general limitations clause, providing that human rights may be subject 'to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.' Resolution of such conflicts comes down to a balancing act, with s 7 specifying the following factors: (a) the nature of the right; (b) the importance of the purpose of the right; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purposes; and (e) minimum impairment. Some individual rights also contain limitations powers, such as, the freedom of expression which allows restrictions necessary to protect the reputation of others, and for the protection of national security, public order, public health or public morality.

Generally, limitations powers are aimed at resolving clashes between competing rights themselves, or between protected rights and other non-protected, collective values. Rights are not conferred without recognition of individual responsibilities to the broader community and for the protection and promotion of the rights of others.

There are two major ways in which the protected rights impact on the Victorian system of government. The first impact relates to legislation. Section 32 imposes an interpretative obligation on the judiciary, which requires all statutory provisions to be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose. This gives rise to a rebuttable presumption in favour of rights-consistent interpretations of legislation, which is avoided only by clear legislative words or intention to the contrary.

Where legislation cannot be read compatibly, the judiciary is *not* empowered to invalidate it; rather, it may issue a declaration of inconsistency under s 36. A declaration does not affect the validity, operation or enforcement of the legislation, and does not affect the outcome of the case in which it is issued, with the judge applying the incompatible law to the case at hand. A declaration is an alarm bell of sorts, allowing the judiciary to warn the executive and parliament that a law

is inconsistent with the judiciary's understanding of the protected rights. It is then up to the executive and parliament to decide whether the law should be amended or repealed.

In limiting judicial power to declarations of incompatibility, rather than judicial invalidity, the sovereignty of parliament is preserved. However, the power of interpretation under s 32 may prove to be more potent than a power of invalidation or the power to issue declarations. This is because the judiciary can achieve particular legislative outcomes with interpretation which it cannot achieve through invalidation or declaration. The challenge for the judiciary is to find the correct balance between achieving compatibility through s 32 interpretations and resorting to s 36 declarations. The line between judicial interpretation and judicial re-writing of legislation to avoid a declaration is not clear. This may result in allegations of illegitimate judicial activism and law-making.

There are two additional elements relevant here. Section 28 requires a statement of compatibility or incompatibility to be laid before Parliament when each new Bill is presented. Section 31 allows an Act of Parliament to override the Charter; that is, an Act or provision thereof may have effect despite being incompatible with one or more of the protected rights. Overrides are subject to a 5 year sunset clause, at which time they can be re-enacted. Part 3, which contains ss 28, 31, 32 and 36, is designed to create a dialogue about human rights amongst the executive (in policy making and legislative drafting), the parliament (in legislative scrutiny and law making) and the judiciary (in interpreting and applying the law). Each institution is expected to have its say on rights issues, without any one institution having the final say.

The second impact relates to the behaviour of public authorities. Section 38 provides that it is unlawful for a public authority to act incompatibly with, or to fail to give proper consideration to, a human right. An exception to this duty is where the public authority could not reasonably have acted differently, such as, where the public authority is simply giving effect to incompatible legislation. Section 39 outlines the legal consequences of unlawfulness. No new cause of action is created under the Charter, unlike in Britain where an action for breach of statutory duty (i.e. *Human Rights Act 1998* (UK)) is available and where the unlawfulness can be relied upon in any legal proceedings. Rather, a person can only seek redress if they have pre-existing relief or remedy in respect to the act of the public authority, in which case that relief or remedy may also be granted for Charter unlawfulness.

The most significant shortfall of the Charter is the absence of economic, social and cultural rights. It is trite to recite the indivisibility and interdependency of economic, social, cultural, civil and political rights. Each set of rights cannot be fully enjoyed without the other. The only positive which comes from this ghastly omission is the legislative obligation to review the position of economic, social and cultural rights in 2011 (section 44).