

## WHAT CAN A CHARTER CONTRIBUTE TO THE REALISATION OF HUMAN RIGHTS?

Matthew Carroll  
Legal, Policy and Systemic Initiatives Manager  
Equal Opportunity Commission Victoria  
Law Institute of Victoria  
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The Commission observed in its submission to the Human Rights consultation process that the present time is exhilarating for human rights in Victoria. Alongside the current consultation about the possible adoption of a Charter of Human Rights is the review and modernisation of the *Equal Opportunity Act* – a process that is intended to better equip it to deal with systemic discrimination, moving it from a focus on discrimination as an inter-personal phenomenon, to an understanding that often it is structural and embedded. Both these initiatives require a timely – and some might say overdue - reflection on both the values we hold as a community and how we wish to approach protecting and promoting those rights in the future.

Today, with the benefit of Liz's perspective, we want to focus on the practicalities of a Charter – how and what does it actually contribute to the realisation of fundamental rights? By way of providing a brief introduction to this, I will elaborate on two of the ways the Commission believes a Charter could make a meaningful contribution to what the writing and analysis of these instruments often terms a culture of human rights – firstly, the promotion of effective and efficient human rights compliant public administration, and secondly, human rights leadership by Government.

## **HUMAN RIGHTS COMPLIANT PUBLIC ADMINISTRATION.**

In arguing that a Charter can promote greater and more effective compliance with human rights in the course of public administration the Commission is not suggesting that they are currently ignored. Indeed, a considerable portion of the Commission's time is spent providing advice and participating in inquiries and reviews that, amongst other things, are seeking to understand the human rights implications raised by a particular policy, program or issue. Based on this experience, as well as the reported experience of jurisdictions where Charters have been adopted, the Commission's view is that our approach to these matters, and substantive results could be significantly enhanced by the benchmarking, consistency, clarity and understanding that would be provided by a Charter. In particular a Charter would:

1. Provide a consistent and known set of standards regarding what is expected of Government and the public sector, and a framework within which the current ad-hoc consideration of human rights issues can move directly to substantive issues rather than needing to start with defining what human rights are;
2. Ensure that human rights are accorded consideration and attention in the development and implementation of public policy rather than being side-lined by other concerns eg economic issues, crisis triggers; and
3. Provide a clearer, more defined chain of reasoning for assessing whether particular departures from human rights can be justified, or alternatively should be curbed.

*In relation to each of these it is timely to reflect on the current national consideration of broader anti-terrorism laws in response to the London bombings earlier this year. Whilst it is reassuring to note that all states and territories have argued for a more robust consideration of human rights issues than has previously featured in Australia's evolving*

*response to the threat of terrorism, the Commission would argue that the ability of the ACT to approach this debate through the prism of their Human Rights Act adds considerably to this process. In particular-*

- *The ACT response is based on a defined set of human rights standards, objectively expressed in legislation which was of course the product of a parliamentary process, and the government that moved it has since then had to face the electorate as part of the democratic process. Accordingly the relevant standards are known, they are transparent, and they must be regarded as an expression of community values, in other words they are an extremely legitimate reference point from which to be approaching this issue.*
- *As noted, the approach of all states and territories is commendable, however the ACT has the added driver, or the issues are given increased prominence, by the fact that whatever provisions states and territories agree to enact, in the ACT, as far as possible, they will need to be interpreted in light of the Human Rights Act and as such it is critical that its requirements are given detailed consideration in the planning stage. In relation to this it is important to note that human rights principles are not given precedence or over-ride status, but they are given a prominence that mitigates the risk of being displaced from the public policy discourse by other considerations.*
- *The Human Rights Act also provides an objective and transparent framework for making critical decisions on whether or not, and the extent to which we should permit departure from human rights principles. The Commission would argue that far from tying the hands of Government, requiring answers to questions such as “is there a legitimate and sufficiently important objective to justify restricting rights?”, and “is there a*

*rational link between that objective and the means being used to pursue it?" actually contributes to making the best possible decisions on fundamentally important matters.*

*In the context of the current proposals regarding further anti-terrorism laws, human rights principles and the Human Rights Act do not summarily dismiss further measures, both in fact recognise that protecting the Australian public from terrorist violence is in fact a measure that advances the fundamental right to life. The proportionality of our response is enhanced however, by ensuring equal focus is given to issues such as minimising intrusions on other rights (eg why isn't it possible for mechanisms to be subject to judicial scrutiny and control?), remaining vigilant of the principle of non-discrimination (eg by design or implementation is there a risk of singling out racial or religious minorities?) and avoiding arbitrariness (eg does the proposed law meet the fundamental requirement for any law of saying what it means?).*

4. Moving away from the specific issue of terrorism, I want to highlight one further contribution to public administration that can be made by an instrument such as a Charter – and that is contributing to the development of a pool of knowledge and experience across public authorities regarding what types of issues might give rise to human rights concerns, and how those concerns might be then be addressed in the development and implementation of public policy. Whilst contexts will clearly vary enormously, it is also true to say that public administrators are rarely Robinson Crusoe when it comes to confronting and then resolving the implications of human rights. It is particularly informative and encouraging to look at the constantly evolving resources in both NZ and the UK – and one would anticipate that with time the ACT – providing practice based advice on human rights compliance that have a scope, consistency and standing that

simply would not occur in the absence of the relevant Charter, Bill or Act.

## **HUMAN RIGHTS LEADERSHIP BY GOVERNMENT.**

Currently, whilst we have a healthy and robust democracy, many argue that there is no real need for a comprehensive and robust mechanism to both minimise departures from human rights, and ensure that when departures do occur they are scrutinised bureaucratically, politically and if necessary legally. The Commission acknowledges that a Charter which simply transfers power, or the final say from one arm of Government to another is not desirable as a tool for advancing human rights, however, an instrument that ensure scrutiny and ownership of any decisions to override or depart from human rights - which would thereby hopefully minimise or limit such departures – is a necessary response to the myth that democracy is synonymous with human rights. In recognising this reality, and in response adopting an agreed and objective set of standards or rules, Government steps up to the mark and takes on its appropriate role of leadership in relation to human rights.

In Victoria, this need for leadership is highlighted particularly vividly in the context of anti-discrimination – one of the subsets of rights that would be covered by a Charter. Currently in Victoria, by virtue of section 69 of the *Equal Opportunity Act*, the entity with the broadest discretion to discriminate is Government. Discriminatory conduct by Government will not be unlawful in the event it is authorised by legislation or other statutory instrument. In the past the NSW Law Reform Commission has observed that this provision effectively negates the operation of anti-discrimination law. More recently, following its *Inquiry into Discrimination in the Law under section 207 of the Equal Opportunity Act*, the Victorian Parliamentary Scrutiny of Acts and Regulations Committee has recommended that this situation be changed – the Commission's view is that a Charter would be the most effective means of achieving this end.

Such a change is not simply an end in itself, it goes to the heart of leadership around these issues. As I noted at the beginning, pursuant to the Attorney-General's Justice Statement, there is an intention to review and modernise the *Equal Opportunity Act* to promote improved outcomes and compliance, particularly in relation to systemic issues. If the *Equal Opportunity Act* can be characterised as the instrument that regulates the conduct of private and corporate citizens vis-à-vis human rights, a Charter is the human rights (self) regulation instrument of government. In the absence of a Charter – in the absence of Government leadership in relation to its own conduct – attempts to raise the bar for other citizens will be open to cynicism, criticism and attack.

## **CONCLUSION.**

I am going to conclude by addressing a question that many would suggest rightly belonged at the beginning of today's proceedings, and that is responding to the question why should we do this? Or alternatively – on what basis can we say we have added to public administration by adhering to human rights principles? There are many responses the Commission might make to this, but the most influential and pragmatic is one that refers to the views and assessments of those from jurisdictions that have adopted such instruments, in particular the findings of an independent evaluation of human rights protections in New Zealand, commissioned by the Associate Minister for Justice in 2000 which found:

*If taken into account early in the policy making process, human rights tend to generate policies that ensure reasonable social objectives are realised by fair means. They contribute to social cohesion and, as the Treasury's Briefing to the Incoming Government (1999) observes:*

*'Achieving and maintaining a sense of social cohesion and inclusion is an important aspect of welfare in the broadest sense...Fairness to all parties involved extends both to the processes by which things are done and to*

*the outcomes themselves. Social cohesion is low when individuals or groups feel marginalised.'*

*Policies which respect and reflect human rights are more likely to be inclusive, equitable, robust, durable and of good quality. Critically, such policies will also be less vulnerable to domestic and international legal challenge.*

I really don't think I can add to that.