

# The Victorian Charter of Rights and Responsibilities and the ACT Human Rights Act: Four Key Differences and their Implications for Victoria

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**Abstract:** This paper critically analyses four key differences between the proposed Victorian Charter of Human Rights and Responsibilities 2006 and the Human Rights Act 2004 (Australian Capital Territory): at the parliamentary stage, it requires reasoned statements of compatibility rather than Ministerial assertions of compatibility; it explicitly provides that government and those discharging public functions act unlawfully if they fail to give effect to human rights; it explicitly provides for the remedies that are available if they do not; and it provides that the Parliament may legislate to override the rights contained in the Charter. The first three differences may assist in fostering a rights-culture in the Victorian government; the impact of the fourth is less clear. Ultimately the key to, and the measure of, the success of the whole Victorian Charter will whether it leads to the development of a robust rights-culture in Victoria.

The proposed Victorian Charter of Human Rights and Responsibilities contains three significant improvements over the Human Rights Act (ACT):<sup>2</sup>

- At the parliamentary stage, it requires reasoned statements of compatibility rather than Ministerial assertions of compatibility.<sup>3</sup>

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<sup>1</sup> I gratefully acknowledge the support of the Australian Research Council through a Discovery Project grant for research on Australian Parliaments and the Protection of Human Rights.

<sup>2</sup> Respectively, Charter of Human Rights and Responsibilities Bill 2006 (Vic); *Human Rights Act 2004* (ACT).

- It explicitly provides that government and those discharging public functions act unlawfully if they fail to give effect to human rights.<sup>4</sup>
- And it explicitly provides for the remedies that are available if they do not.<sup>5</sup>

These provisions may well assist in fostering a rights-culture in the Victorian government. They will be my main focus today.

There are other specific improvements in the detail of the Charter:

- A more expansive provision defining the circumstances in which rights can be limited.<sup>6</sup>
- Broader rights to assistance with communication in criminal legal proceedings, not limited to a right to an interpreter.<sup>7</sup>
- The specific recognition of Aboriginal cultural rights.<sup>8</sup>
- The protection of property rights.<sup>9</sup>

(It is perhaps worth noting that these last two points have been a focus for some of the political opposition to the Charter.)

There are also some differences that are probably of limited significance, for example the specific limitation clause for freedom of expression.<sup>10</sup>

Finally, however, there are areas in which the proposed Charter reflects an ambivalence about rights:

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<sup>3</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 28.

<sup>4</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 38 read with ss 6 and 4; cf *Human Rights Act 2004 (ACT)* s 6.

<sup>5</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 39.

<sup>6</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 7; cf *Human Rights Act 2004 (ACT)* s 28.

<sup>7</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 25(2)(i), (j); cf *Human Rights Act 2004 (ACT)* s 22(2)(h)

<sup>8</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 19(2); cf *Human Rights Act 2004 (ACT)* s 27.

<sup>9</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 20.

<sup>10</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 15(3); cf *Human Rights Act 2004 (ACT)* s 16

- The failure to reconstitute the Scrutiny of Acts and Regulations Committee as a Human Rights Committee or to commit to a legislative timetable that will allow for effective human rights scrutiny.<sup>11</sup>
- The exclusion of a right to compensation for wrongful conviction and unlawful arrest or detention.<sup>12</sup>
- A cluster of provisions that limit the scope of some rights by reference to existing legislation. These provision take the rights issues raised by that legislation out of the scope of the Charter. These include the right to vote which is limited to every eligible person (rather than every citizen);<sup>13</sup> the power to exclude media or public from court or tribunal hearings where authorised by another law;<sup>14</sup> and the right to legal aid which is qualified by reference to the Legal Aid Act’s eligibility criteria.<sup>15</sup>
- And finally, the override provision.<sup>16</sup>

I will come to the override provision in due course. First, I want to talk about the three specific improvements that I identified at the outset. In particular, I want to highlight some unresolved issues.

### **(1) Statements of Compatibility**

Section 28 of the Charter requires

- Members of Parliament who propose to introduce a Bill into either House to cause a ‘statement of compatibility’ for that Bill to be prepared;<sup>17</sup> and

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<sup>11</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 30. I note that SARC retains significant non-human rights responsibilities and that the human and material resources of the Victorian Parliament may preclude the establishment of a specialist human rights committee.

<sup>12</sup> cf *Human Rights Act* 2004 (ACT) s 18(7).

<sup>13</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 18(2); cf *Human Rights Act* 2004 (ACT) s 17.

<sup>14</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 24(2); cf *Human Rights Act* 2004 (ACT) s 21(2).

<sup>15</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 25(2)(d); cf *Human Rights Act* 2004 (ACT) s22(2)(f).

<sup>16</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 31.

<sup>17</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 28(1); cf *Human Rights Act* 2004 (ACT) s 37.

- Members of Parliament who introduce a Bill to lay the statement of compatibility before the House before the second reading speech.<sup>18</sup>

The statement of compatibility must either state that (in the member's opinion) the Bill is compatible with the human rights in the Charter or that (again in the member's opinion) any part of the Bill is incompatible with human rights.<sup>19</sup> In the first case, the statement must identify how the Bill is compatible with human rights; in the second case, the statement must identify 'the nature and extent of the incompatibility'. (This requirement is rather more stringent than the ACT requirement in that it requires the member to explain how the Bill is consistent, not just whether it is consistent, and in that it requires the member to explain the nature and extent of any incompatibility, not just 'how [the Bill] is not consistent with human rights'.<sup>20</sup>)

The purpose of a statement of compatibility is twofold. First, it ensures that Ministers (and other members introducing Bills) take responsibility for the human rights impact of their legislation. Secondly, it provides information to the Parliament that can help inform its deliberations on the legislation. Statements of compatibility are not binding on courts or tribunals.<sup>21</sup>

Officers preparing statements of compatibility for Ministers will need to consider three issues. First, how the process of preparing statements is integrated into the policy process. Secondly, the form and content of statements of compatibility. And, thirdly, what approach is used to determine whether any part of a Bill is incompatible with human rights.

***Integration into the Policy Process:*** The Human Rights Consultation Committee had proposed that:

For legislative changes and policy and other decisions, the responsible Minister should ensure that a Human Rights Impact Statement is included in Cabinet submissions. ... The Statement should include:

- (a) a statement of the purpose of the Bill, regulation, policy or proposal;
- (b) a statement of its effect upon any of the human rights in the Charter;  
and
- (c) a statement of any limitation placed upon any human right in the Charter by the Bill, policy or proposal, the importance and purpose of this limitation, the nature and extent of the limitation, the relation

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<sup>18</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 28(2); *Human Rights Act 2004* (ACT) s 37.

<sup>19</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 28(3).

<sup>20</sup> *Human Rights Act 2004* (ACT) s 37(3).

<sup>21</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 28(4).

between the limitation and its purpose and whether there is any less restrictive means to achieve the purpose.<sup>22</sup>

This format follows the analysis required by section 7 in determining whether a limit on a human right is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.<sup>23</sup> Assuming that such Human Rights Impact Statements are backed up by appropriate analysis, such a requirement would ensure that the human rights impact of legislation is integrated into the policy process and provide the analytical foundations for Statements of Compatibility.<sup>24</sup> It would parallel the existing Regulatory Impact Statement process and the mooted Family Impact Statement process.<sup>25</sup> Assigning responsibility for Statements of Compatibility to portfolio Ministers assists in integrating human rights analysis into the policy process from the outset.

There is no legislative requirement for Human Rights Impact Statements. The Consultation Committee recommended that '[t]he requirement for and details of such a Statement should be set out in the Cabinet Handbook.'<sup>26</sup> Victoria is one of the States that still regards its Cabinet Handbook as a confidential Cabinet document (unlike the Commonwealth for example which publishes its on the web). This may change. That would be a welcome addition to the transparency of government in general and the Cabinet processes in relation to human rights in particular.

Another transparency issue is raised by the absence of any requirement to publish Human Rights Impact Statements. Regulatory Impact Statements are published and inform parliamentary and public debate<sup>27</sup>; there is no reason that Human Rights Impact Statements should not also be published.<sup>28</sup>

The Human Rights Impact Statement process holds much promise for improving human rights analysis in the policy process. There are risks, however, many of which are already apparent in the Regulatory Impact Statements:

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<sup>22</sup> Human Rights Consultation Committee, *Rights, Responsibilities and Respect: Report of the Human Rights Consultation Committee* (2005) 71.

<sup>23</sup> See Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 7(2).

<sup>24</sup> See Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes' (2005) 29 *Melbourne University Law Review* 665, 690–3.

<sup>25</sup> *Ibid* 679–86.

<sup>26</sup> Human Rights Consultation Committee, *Rights, Responsibilities and Respect: Report of the Human Rights Consultation Committee* (2005) 71.

<sup>27</sup> Department of Treasury and Finance, *Victorian Guide to Regulation* (2005) 4-20–4-23.

<sup>28</sup> It may be objected that the obligation to publish Statements of Compatibility is sufficient, especially as in Victoria these statements are reasoned rather than unreasoned.

- There is a risk of an inappropriate use of cost-benefit analysis. Human rights impact assessment requires a less quantitative approach than regulatory impact assessment (even assuming that quantitative approaches are desirable or anything less than arbitrary in the regulatory impact assessment context).
- There is a risk that human rights impact statements will be prepared as an after-thought rather than as an integrated part of the policy development process, though this is mitigated by the devolution of responsibility for Statements of Compatibility to portfolio Ministers.
- There must be an ongoing audit of the quality of HRISs, as there is for RISs.<sup>29</sup> This is particularly important as portfolio Ministers (rather than a central specialised human rights office) are responsible for the preparation of Statements of Compatibility.
- Human rights impact statements need to be prepared (and summarised in statements of compatibility) in ways that do not overload parliamentarians with too much information.

***Form and Content of Statements of Compatibility:*** The Human Rights Consultation Committee recommended that Statements of Compatibility ‘should address the same matters as would be required in respect of a Human Rights Impact Statement’.<sup>30</sup>

That would be an appropriate starting point. It would also be appropriate to follow the approach of proposed amendments to the *Subordinate Legislation Act* 1994 (Vic) that require ‘human rights certificates’ in relation to most statutory rules.<sup>31</sup> Such certificates must state whether (in the Minister’s opinion) the proposed statutory rule limits human rights, and if it does, provide the following information:<sup>32</sup>

- (i) the nature of the human right limited;
- (ii) the importance of the purpose of the limitation;
- (iii) the nature and extent of the limitation;
- (iv) the relationship between the limitation and its purpose;
- (v) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

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<sup>29</sup> Department of Treasury and Finance, *Victorian Guide to Regulation*, above n 27, 4-23–4-26.

<sup>30</sup> Human Rights Consultation Committee, *Rights, Responsibilities and Respect: Report of the Human Rights Consultation Committee* (2005) 73.

<sup>31</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) Sch 1 Cl 7.1

<sup>32</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) Sch 1 Cl 7.1

Just like the proposed format of Human Rights Impact Statements, this format follows the analysis required by section 7 in determining whether a limit on a human right is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.<sup>33</sup> If a right is limited in a way that is consistent with section 7, the Bill is compatible with human rights. The statement of compatibility should outline the basis of the Minister's section 7 analysis.

Clearly, more is required than an unreasoned statement of the mould usually adopted in the ACT and formerly adopted in the United Kingdom. That went something like this:

In accordance with section 37 of the Human Rights Act 2004 I have examined the Civil Law (Property) Bill 2005. In my opinion the Bill, as presented to the Legislative Assembly, is consistent with the Human Rights Act 2004.<sup>34</sup>

In the United Kingdom, reasoned statements of compatibility now appear in the Explanatory Notes on Bills. The Revised Guidance for Departments states:

The Notes should describe, in general terms, the most significant Convention issues thought to arise on the Bill, together with the Minister's conclusions on compatibility. In some cases, it may be sufficient simply to state that an issue has been considered, and that a particular conclusion has been reached ... . In other cases, Departments may refer to the policy justification for what is proposed, which will be central to any assessment of whether ... a possible interference with [a right] is justified ... . Departments are not expected to list every human rights point which could be taken on the Bill, or to cite case-law supporting the Minister's conclusion on compatibility. Legal advice should not be disclosed.<sup>35</sup>

This approach seems preferable to the New Zealand approach of publishing the legal advice on which the Attorney-General relies in determining the consistency of Bills with human rights.<sup>36</sup>

***Approach to Determining Incompatibility:*** Obviously, officers will seek legal advice in preparing statements of compatibility. The Charter is a legal instrument and there is an extensive jurisprudence (for now at least mostly from overseas) that is relevant to determining what it means and requires.

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<sup>33</sup> See Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 7(2).

<sup>34</sup> Jon Stanhope, Attorney-General, Australian Capital Territory, *Compatibility Statement* (2005) <<http://www.legislation.act.gov.au/updates/compatibilitystatements/CSTreeProt.pdf>>.

<sup>35</sup> Department of Constitutional Affairs, *Section 19 Statements: Revised Guidance for Departments* <<http://www.dca.gov.uk/hract/guidance/guide-updated.htm>> at 16 June 2006.

<sup>36</sup> See Ministry of Justice, *Advice provided by the Ministry of Justice and the Crown Law Office to the Attorney-General on the consistency of Bills with the Bill of Rights Act 1990* <<http://www.justice.govt.nz/bill-of-rights/index.html>> at 16 June 2006.

Nonetheless judgements of compatibility also turn in part on empirical questions that jurisprudence cannot resolve – the nature and extent of the social problem that the legislation addresses; the likely effectiveness of the legislation in addressing that problem; the likely impact of the legislation on human rights in the course of addressing that problem. Legal analysis is indispensable in identifying and isolating the rights issues. But it cannot provide the evidence necessary to resolve the ultimate questions about whether the rights impact is justified.

A more significant question is whether Statements of Compatibility should be based on predictions of whether a court would regard legislation as compatible with the Charter, or whether instead they should be based instead on the Minister’s own assessment of compatibility. There are good reasons for favouring the latter approach:<sup>37</sup>

- It takes seriously the dialogical model, under which legislature and courts have separate and complementary roles in understanding human rights.
- It avoids the risks of over-legalisation identified in Canada where governments have taken an overly deferential approach to the Supreme Court’s approach to human rights,<sup>38</sup> and have failed to bring forward legislation that *might* be found to violate the Charter.<sup>39</sup> This approach fails to assert the Parliament’s role in determining the meaning of human rights and the limits on rights that are justified.<sup>40</sup>
- It recognises that legal analysis can provide no more than a very rough prediction in many cases of the likely outcome of Charter scrutiny in the courts.<sup>41</sup>

This is not to say that Ministers should ignore the approach of the courts. The model is dialogical – not two institutions engaged in mutual soliloquies.

## (2) Public Authorities

Section 38(1) of the Charter provides:

Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

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<sup>37</sup> That is not to say that there are not also good reasons for the former approach.

<sup>38</sup> See Janet L Hiebert, *Charter Conflicts: What is Parliament’s Role?* (2002) 43

<sup>39</sup> *Ibid* 222.

<sup>40</sup> *Ibid* 17.

<sup>41</sup> *Ibid* 54–5.

There is therefore a general obligation for public authorities (including public service employees, police, councils and Ministers) to act in a way that is compatible with human rights.<sup>42</sup> Moreover, there is a general obligation on public authorities in making a decision ‘to give proper consideration to ... relevant human rights’.<sup>43</sup> Of course, if a law prevents the public authority from acting differently or making a different decision, these obligations do not apply.<sup>44</sup>

This obligation is a good deal clearer than the position in the ACT where there is no direct obligation imposed on government by the HRA to comply with human rights. I agree with my colleague Carolyn Evans that the Legislation Act does not fill this gap.<sup>45</sup>

- The rights in the ACT HRA are expressed in declarative terms. “Everyone has” certain rights. But the Act does not say against whom these rights may be exercised. It does not indicate who bears the correlative obligation.
- The maxim *ibi ius ibi remedium* (where there is a right there is a remedy) cannot supply the missing link.
- The Assembly chose to omit the application to government provision recommended by the Consultation Committee.

The ACT should act to clarify this aspect of the HRA in the course of the current review of the first year of the HRA’s operation.

When it does, it will face the same difficult decision as faced the drafters of the Charter – how to define the ambit of the obligation to comply with human rights. As I have noted, the Charter obligation applies to ‘public authorities’. That is also the term used in the UK HRA. However, there the term is not comprehensively defined.<sup>46</sup> The Joint Committee on Human Rights in a recent report recommended that (for the time being at least) the legislative definition should not be amended but should be left for the courts to develop.<sup>47</sup>

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<sup>42</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 38(1).

<sup>43</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 38(1).

<sup>44</sup> Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 38(2).

<sup>45</sup> Carolyn Evans, ‘Responsibility for Rights: The ACT *Human Rights Act*’ (2004) 32 *Federal Law Review* 291, 292, 305–8.

<sup>46</sup> Section 6(3) of the Human Rights Act defines public authority as (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature.

<sup>47</sup> Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act*, Seventh Report 2003–04 Session (23 February 2004) HL Paper 39, HC 382, 51.

In Victoria, notwithstanding the definition, the ambit remains somewhat unclear. This is because the definition of public authority includes ‘an entity established by a statutory provision that has functions of a public nature; and ... an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)’.<sup>48</sup> There are two areas of particular uncertainty: what is a function of a public nature and when is a function being exercised on behalf of the State or a public authority? The Charter sets out a multi-factor test for determining when a function is of a public nature:

- (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;
  - (b) that the function is connected to or generally identified with functions 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.

Whether factors (a), (c), (d) and (e) apply in any individual case will be relatively clear (but not always free from doubt). Factor (b) will be called on to carry a good deal of the analysis. But it is doubtful that it can provide much assistance (outside of some clear cases – notably, privately operated prisons). What constitutes ‘the functions of government’ is ultimately a deeply contested political question about the proper role of the government and the state in contemporary society. The functions of government have never been static and uncontroversial. It therefore remains to be seen how widely the obligation to comply with human rights will reach into the ‘private’ contracted-out sphere as the courts work out what constitute the functions of government.

### **(3) Remedies**

Of course, the obligation to comply with human rights would not be of much comfort to members of the public if there were not some mechanism for seeking redress when it is breached. Indeed, the ICCPR – the key international instrument on which the

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<sup>48</sup> Section 4.

Charter is based – obliges States Parties to provide effective remedies for non-compliance with the rights that it protects.<sup>49</sup>

The government signalled from the outset its opposition to a Charter that would lead to increased litigation and an obligation on government to pay damages. It preferred an approach that focussed on education and conciliation. (It is surprising then that the Charter does not confer a complaints handling or conciliation function on the Human Rights Commissioner — an additional title for the Equal Opportunity Commissioner rather than a new substantive office.<sup>50</sup>)

One message from the consultations was that unless a Charter clearly articulated the remedies that it made available, the Courts would be likely to imply a right to remedies and (as in New Zealand) that set of remedies may not accord with the government's preferences. Section 39 therefore sets out the remedies that are available (and not available) for failure to comply with human rights.

The meaning of section 39 requires some considerable unpacking:

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

(3) A person is not entitled to be awarded any damages because of a breach of this Charter.

(4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.

The position appears to be as follows.

Where a rule or law attaches consequences to the fact that government conduct is unlawful, those consequences can attach to conduct that is made unlawful by the Charter. For example (fleshing out one of the examples given in the Explanatory

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<sup>49</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 2(3), (entered into force 23 March 1976).

<sup>50</sup> The conciliation mechanism under the *Equal Opportunity Act 1995* (Vic) is available only where a complaint is made under that Act. Complaints can only be made in relation to contraventions of Parts 3, 5 and 6 of the EO Act: s104. While this mechanism, as with all the existing functions of the Equal Opportunity Commission, is to continue unmodified, there is no provision for the conciliation mechanism to deal with complaints based on the Charter. However, Fiona Smith pointed out to me that other agencies (eg the Privacy Commissioner and the Health Services Commissioner) will likely acquire a human rights angle to their existing conciliation functions. The Ombudsman is specifically given an expanded human rights role: Charter of Human Rights and Responsibilities Bill 2006 (Vic) Consequential Amendment 2.

Memorandum),<sup>51</sup> if evidence is obtained as a result of unlawful or improper conduct, there is a discretion to exclude that evidence. At present, the kinds of conduct that trigger that discretion include tortious conduct (eg trespass) or improper pressure. The Charter will expand the kinds of conduct that trigger the discretion to include breaches of the right to privacy (eg by way of covert surveillance not amounting to a tort) or breaches of the rights to security of the home (eg by way of an overly intrusive execution of a search warrant).<sup>52</sup>

There is an important exception however. The common law will sometimes make damages available for breaches of statutory obligations. Section 39(3) ensures that a breach of the Charter will *not* trigger any entitlement to damages. This provision probably also prevents payment of exemplary or punitive damages on the basis that otherwise wrongful conduct is also a breach of the Charter. However, if the same conduct is independently unlawful and compensable, the Charter does not take away that right to damages.

In short, the mere fact that conduct is a breach of the Charter will not establish a liability in damages – there is to be no freestanding action sounding in damages for breach of the Charter, no tort of ‘breach of human rights’, no Australian *Baigent*<sup>53</sup> or *Bivens*.<sup>54</sup> So there will be no damages for breach of a detainee’s human rights if a prison or mental health institution fails to respect the detainee’s right to liberty and security of the person and freedom from arbitrary arrest or detention. But if the result of the breach of human rights is that the prison or mental health institution acts outside the scope of its authorising statute (interpreted in light of the Charter), it may commit a tort (eg battery, assault, false imprisonment). Section 39 can hardly be taken to have excluded the right to seek compensation for those torts. Section 39(4) can be regarded as preserving precisely these rights.

It will also be possible to seek a declaration that a public authority has acted unlawfully by failing to comply with human rights and, if necessary, an injunction to

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<sup>51</sup> Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28.

<sup>52</sup> See Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 39(2). This appears to be the intention of s 39(2). But the point is not free from doubt. In Victoria, for now at least, the law of evidence is largely governed by the common law. The Charter does not apply to the common law: it does not apply directly to judicial decision making by the courts, though it will affect the interpretation of statutory discretions; nor can it be taken into account in developing the common law (because the High Court has insisted that there is a single Australian common law). (It can of course directly *modify* the common law where that is what the Parliament intends.) But it seems to me, especially in light of s 39(2), that the Parliament intends that s 39(1) operate in relation to common law entitlements to relief or remedies as well as statutory entitlements to relief or remedies. That is not inconsistent with the basic proposition that the Charter does not apply to the common law. I am grateful to Therese Henning for her question which has helped me clarify my thinking on this point.

<sup>53</sup> *Simpson v Attorney-General* [1994] 3 NZLR 667 (*Baigent's case*).

<sup>54</sup> *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388 (1971).

prevent any further unlawful conduct. In that sense, the Charter ‘confers’ a free-standing cause of action to complain of a human rights violation. Some, including opposition speakers in the Parliamentary debate, have suggested that this will not be possible and this may have been the government’s intention. But it seems to me that section 39(2) puts it beyond doubt that a declaration of unlawfulness will be available. The right to seek a declaration or injunction in relation to unlawful government conduct arises under the general law and falls within the inherent jurisdiction of the Supreme Court. No statement has been made (as would be required by section 85 of the Constitution Act) to cut down its jurisdiction.

Finally, it will be possible to seek judicial review of a decision of a public authority (if it is otherwise amenable to judicial review) on the grounds that it has failed to comply with human rights or has failed to give proper consideration to relevant human rights.<sup>55</sup> The latter ground is particularly interesting. ‘Proper consideration’ is not an expression that has previously featured in Australian cases on judicial review on the ground of failure to have regard to relevant considerations. That ground has been characterised by a ‘tick-a-box’ approach: the courts will not invalidate a decision because a decision-maker gave a relevant consideration too much weight or too little weight unless the weight given to the relevant consideration was utterly unreasonable.<sup>56</sup> The expression ‘proper consideration’ has instead featured (as part of the larger expression ‘proper, realistic and genuine consideration’) in a series of cases concerning a statutory ground of review in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) relating to dictation: there the issue is whether the decision maker has given proper consideration to the merits of the case or instead (and unlawfully) acted in accordance with some overriding policy or dictation.<sup>57</sup> The Victorian courts are therefore faced with the opportunity to develop a novel ground of review of failure to give proper consideration to relevant human rights. It is possible that some judges may take a narrow approach – proper consideration might simply be that required by the common law ground of review. But equally it is possible – and I would argue preferable – for the judges to develop this ground of review as requiring something like proportionality in administrative decision-making affecting human rights. That would be entirely in keeping with the statutory language; in line with developments in the UK<sup>58</sup> and to some extent in Canada<sup>59</sup>; and (because of the

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<sup>55</sup> See Charter of Human Rights and Responsibilities Bill 2006 (Vic) s 39(2) read with s 38(1).

<sup>56</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40–1 (Mason J).

<sup>57</sup> *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426, 435–9.

<sup>58</sup> But note the inconsistency between the analysis mandated by the proper consideration ground and the recent decision in *R (on the application of Begum (by her litigation friend, Rahman)) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 (Unreported, Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Scott of Foscote, Baroness Hale of Richmond, 22 March 2006) especially [26]–[32] (Lord Bingham of Cornhill) (‘If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger’s task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it.’ Ibid [31])

statutory basis) would not be an illegitimate development fragmenting the unity of the Australian common law.

#### **(4) Override**

Finally I come to the override provision, section 31. It provides:

- (1) Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter. ...
- (6) If an override declaration is made in respect of a statutory provision, then to the extent of the declaration this Charter has no application to that provision.
- (7) A provision of an Act containing an override declaration expires on the 5th anniversary of the day on which that provision comes into operation or on such earlier date as may be specified in that Act.
- (8) Parliament may, at any time, re-enact an override declaration, and the provisions of this section apply to any re-enacted declaration.

At one level, this provision is a strikingly inapt borrowing from the Canadian Charter. In the Canadian context, a similar provision gives the national and provincial parliaments the ability to legislate notwithstanding a determination by the courts that legislation is inconsistent with the Charter and is therefore invalid.<sup>60</sup>

Under the Victorian Charter the courts cannot determine that legislation is invalid. A declaration that legislation is inconsistent with the Victorian Charter does not affect its validity or operation. The Victorian Charter is not entrenched and probably cannot be entrenched (at least not without a fundamental shift in the concept of legal authority in the Australian states). The Parliament can always enact legislation that is incompatible with the Charter and does not need the authorisation of section 31 to do so.

What, then, is the function of section 31?

It seems to me that its key function is political, signalled in particular by section 31(4):

- (4) It is the intention of Parliament that an override declaration will only be made in exceptional circumstances.

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<sup>59</sup> *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

<sup>60</sup> Section 33 of the Canadian Charter.

Section 31(3) reinforces this provision by requiring a statement from the proponent of legislation containing an override declaration explaining the exceptional circumstances. From the point of view of the proponent of legislation (usually government), section 31 allows derogation from rights within the framework of human rights. The exception stands within the law, as it were, and must be justified in terms of the law, rather than standing outside the law as an exercise of brute government power. Conversely, section 31 provides a point of political reference requiring government to justify derogation from rights. Of course, the constraints here are purely political. There is nothing to stop government making the requirement of exceptional circumstances a hollow requirement – except the political consequences. And those consequences are likely to be slight unless the human rights values of the Charter become part of Victorian political culture.

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That ultimately will be the key to, and the measure of, the success of the whole Victorian Charter. The Charter will not be effective unless its values are internalised by the public service as part of the policy process and as a key to administration. The Charter will not be effective unless parliamentarians take rights seriously as a constraint on legislative action. Reading the debate on the Charter in the Victorian Parliament and the interventions in the Federal Parliament this week, the signals have been mixed on both sides of the chamber. There is a long way to go.