# THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES SO FAR: A JUDGE'S PERSPECTIVE

## SPEECH BY JUSTICE MAXWELL, PRESIDENT, VICTORIAN COURT OF APPEAL, 2009 ANNUAL CASTAN CENTRE CONFERENCE, 17 JULY 2009

The Victorian Charter of Rights and Responsibilities has been justiciable for just over 18 months. Contradicting those who predicted that the courts and tribunals would be flooded with litigation, the rate of Charter litigation has been modest – at least from the Supreme Court's perspective.

It has been a thoughtful, exploratory period. There has been no sign whatsoever of extravagant or fanciful human rights arguments being advanced. Fears of judicial adventurism under the Charter have also proved to be wholly unfounded. As our judicial colleagues from England and New Zealand counselled us to do, we are hastening slowly.

Judges are not in a headlong rush to utilise the Charter and impose their own human rights perspectives. On the contrary, we are adhering – as we try always to do – to the rule of parsimony. That means that we decide no more than is necessary to dispose of the case at hand.

There are various reasons why Charter points have not had to be decided. In particular, this has occurred because

- the point has been raised then abandoned (most notably in the *Underbelly* injunction case in the Court of Appeal, where Channel 9 sought to rely on the free speech guarantee in s 15 of the Charter[1]);
- the Charter provisions did not apply, as the commencement of the proceeding (or the circumstance to which the Charter was said to be relevant) predated the commencement of the Charter;[2]
- the institution of proceedings was followed by constructive negotiation and, ultimately, satisfactory resolution of the Charter issue without the need for adjudication;[3] or
- most relevantly for today, the issue to which the Charter argument was directed was able to be decided without recourse to the Charter.

---

1 *General Television Corp v Director of Public Prosecutions* (2008) 19 VR 68, 80 [38].

2 *R v Williams* (2007) 16 VR 168, 167 [48]; *Tomasevic v Travaglini* (2007) 17 VR 100, 113 [70]; *Nolan v MBF Investments Pty Ltd* [2009] VSC 244, [176]–[177].

3 Rachel Ball, "Outside Classrooms and Courtrooms: The Good News on Human Rights" (2009) 34 Alternative Law Journal 92.

In the last class of cases, we have been able to dispose of human rights arguments without recourse to the Charter precisely because there is already, in the common law, a well-developed human rights jurisprudence – most notably in the criminal law.

The common law of Australia has a rich tradition, mostly inherited from England but in part developed domestically, of recognising and protecting human rights. This has two important consequences, as follows.

First, the task which the Charter has conferred on courts and tribunals, of considering the scope of human rights and of interpreting legislation compatibly with human rights, is as old as the common law itself.

Secondly, by enacting the Charter, which both defines and qualifies human rights protection, Parliament has asserted legislative authority over a field which hitherto the judges have had all to themselves. Legislating on human right is not a transfer of power to the judiciary. It is an assumption of power by the legislature.

It is, I think, of the first importance to the current debate about a national charter of rights for the community to know that the task of interpreting and applying human rights is something that, for centuries, the community has relied on judges to perform. As the first Commonwealth Attorney-General, Alfred Deakin, said in 1902, "many of our most fundamental principles and liberties are founded directly upon judicial decisions."[4]

Let there be no misunderstanding. I am not dealing here with the question of whether the common law's protection of rights is adequate. Opponents of legislative protection of human rights do, of course, assert that the common law gives adequate protection.[5] Supporters of legislative protection highlight the common law's deficiencies.

I am not entering that debate. My point is a quite different one. I am dealing with the character of human rights adjudication – at least in the civil and political rights field. I am making the point, which seems too often to be overlooked, that there is nothing novel about judges adjudicating on human rights.

I have so far only participated in one appeal where Charter arguments were developed. It concerned the *Serious Sex Offenders Monitoring Act*, under which a convicted sex offender can be subjected to an extended supervision order following the completion of the sentence imposed for the relevant offending. In the event, Weinberg JA and I decided the relevant question of

---

4 Second Reading Speech on the Judiciary Bill, House of Representatives Hansard, 18 March 1902 p 10983.

5 The ACT Bill of Rights Consultative Committee noted this argument in its 2003 report (para 2.69–2.70).

statutory construction on ordinary principles, without the need to decide any of the Charter questions. We applied the common law rule that, where alternative interpretations are available, the court should prefer (because Parliament is presumed to have intended) the interpretation which least infringes human rights.[6]

My second example comes from a recent appeal against a refusal of bail.[7] The appellant relied on the anticipated delay before trial, and the Court's attention was drawn to the provisions of s 21 and 25 of the Victorian Charter, declaring the right of a person charged with a criminal offence to be tried without unreasonable delay. Counsel for the Victorian Attorney-General, who intervened in the proceeding pursuant to s 34 of the Charter, drew attention to overseas authorities dealing with cognate human rights guarantees.

In substance, the Attorney-General's submission was that the Charter did not require a departure from the existing approach to the treatment of delay as an issue in bail applications. Justices Vincent and Kellam and I agreed. We noted what Justice Kellam had said in a different bail case:

> *"Our society will not, and should not, tolerate what is effectively the indefinite detention awaiting trial of persons such as the applicant whilst an investigation such as that currently under way takes place.*
>
> *The issue of detention by reason of unacceptable risk is an issue which must be balanced with the likelihood of the allegations against an accused man being brought before a court in the near future. The question of unacceptable risk is to be judged according to proper criteria, one of which is the length of delay before trial; that is, although the risk might be objectively the same at different times, the question of unacceptability must be relative to all the circumstances, including the issue of delay.*"

The third example comes from the Benbrika terrorist trial. Bongiorno J drew on the established body of common law regarding the right of an accused to a fair trial (to which I will refer again later) to conclude that the accused in the case were "being subjected to an unfair trial" because of the circumstances of their incarceration and because of the circumstances of their transport to and from Court. His Honour specified certain minimum alterations to the conditions of incarceration and travel and said that, unless they were made, the trial would be stayed.[8] His Honour was able to reach these conclusions without reference to the Charter.[9]

---

6 *RJE v Secretary to the Department of Justice* [2008] VSCA 265.
7 *Director of Public Prosecutions (Cth) v Barbaro* [2009] VSCA 26.
8 *R v Benbrika* (2008) 18 VR 410, 428 [91], 430–1 [100]–[101].
9 Ibid 416,[20].

You will be aware of the provisions of s 38 of the Charter, under which it is unlawful for a public authority to fail to give proper consideration to a relevant human right or to act incompatibly with a relevant human right. Section 39 enables that ground of unlawfulness to be relied on in an application for a "relief or remedy in respect of an act or decision of a public authority".

Kyrou J – who, with Cavanough J, is in charge of the new judicial review docket in the Supreme Court – advises that there has as yet been no decision on any such claim. I understand that there have been proceedings issued in which a ground of that kind was advanced, but so far none of them has gone to judgment. Nor has any question of interpretation been referred to the Court under s 33.

The only detailed consideration and determination of Charter questions of which I am aware is that of Bell J, in his capacity as President of VCAT, in *Kracke v Mental Health Review Board*.[10] His Honour's conclusion was that the Board had breached Mr Kracke's right to a fair hearing under s 24(1) of the Charter, by failing to review his involuntary and community treatment orders within a reasonable time.

In the remainder of this address I will give some examples of the kinds of human rights jurisprudence in which Australian courts are routinely engaged.

**Statutory interpretation**[11]

The common law, it should be recalled, developed some very strong rules to prevent legislative infringement of basic human rights. As early as 1910, O'Connor J said in *Sargood Bros v Commonwealth*:[12]

> *"It is a well recognised rule in the interpretation of statutes that an Act will never be construed as taking away an existing right unless its language is reasonably capable of no other construction.*"

Almost 100 years later, Gleeson CJ said in *Plaintiff S157/2000 v Commonwealth*[13] said:

> *"…Courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by an unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or*

---

10 [2009] VCAT 646.

11 I acknowledge the great assistance I have derived (as always) from Pearce & Geddes, *Statutory Interpretation in Australia* (6th ed, 2006).

12 (1910) 11 CLR 258, 279.

13 (2003) 211 CLR 476, 492.

> *freedoms in question, and has consciously decided upon abrogation or curtailment…In the absence of express language or necessary implication, even the most general words are taken to be 'subject to the basic rights of the individual'."*[14]

In *Melbourne Corporation v Barry*, the High Court was dealing with a by-law of the City of Melbourne purporting to prohibit "processions of persons" through the streets except with the previous written consent of the town clerk. By majority, the High Court held that the by-law was invalid. Higgins J said:

> *"It must be borne in mind that there is this common law right [of the King's subjects to pass through the highway, whether singly … or in processions]; and that any interference with a common law right cannot be justified except by statute – by express words or necessary implication. If a statute is capable of being interpreted without supposing that it interferes with the common law right, it should be so interpreted."*

In *re Bolton; ex parte Beane*,[15] Brennan J was referring to the common law of *habeas corpus* when he said:

> *"Many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much a part of the accepted constitutional framework that their terms, if not their very existence, may be overlooked until a case arises which evokes their contemporary and undiminished force."*

His Honour went on to say:

> *"The law of this country is very jealous of any infringement of personal liberty … and a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right.*
>
> …
>
> *The Constitution of the Australian Commonwealth does not contain broad declarations of individual rights and freedoms which deny legislative power to the Parliament, but the courts nevertheless endeavour so to construe the enactments of the Parliament as to maintain the fundamental freedoms which are part of our constitutional framework. It is presumed that that is the intention of Parliament, although the courts acknowledge*

---

14 His Honour made similar statements in the indefinite detention case, *Al Kateb v Godwin*. (2004) 219 CLR 562, 577 [19].

15 (1997) 162 CLR 514, 520-1.

> *that the balance between the public interest and individual freedom is struck not by the courts but by the representatives of the people in Parliament."*[16]

It was this common law rule we applied in interpreting the *Serious Sex Offenders Monitoring Act.* The question for the judge at first instance was whether the offender, if released without supervision, was "likely to commit a relevant offence". Did the word "likely" mean "more likely than not" or did it, as the Secretary contended, connote some lower degree of probability? On ordinary principles of construction, we should favour that interpretation which produces the least infringement of common law rights – in this case the right to be at liberty."[17]

I cannot leave this topic without reciting the memorable statement from *Maxwell on Statutes*, first cited by the High Court in *Potter v Minahan* and which has echoed down the decades. In *Potter*, O'Connor J said:

> *"It is always necessary, in cases such as this where a statute affects civil rights, to keep in view the principle of construction stated in Maxwell:*
>
> > *'…It is in the last degree improbable that the legislature would overturn fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words,*
>
> *Simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."*

That statement was endorsed by the High Court in *Bropho*[18] and again in *Coco*.[19]

It can now be seen that there is nothing new, or radical, about s 32 of the Charter which requires Victorian courts and tribunals to interpret all statutory provisions "in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose."

**Embedded rights to a just and fair hearing**

Of course, the common law's vigilant protection of human rights extends far beyond statutory interpretation.

---

16 Ibid 523.

17 [2008] VSCA 265 [37], citing *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

18 (1990) 171 CLR 1 at 18.

19 (1994) 179 CLR 427 at 437.

Take the rules of natural justice, which protect a person's right to a fair hearing before an unbiased tribunal.

Take the privilege against self-incrimination, that is, the common law right to refuse to answer questions on the ground that it would incriminate the person concerned.[20]

Take the right to a fair trial, with which Bell J was concerned in *Tomasevic*. As his Honour said,[21] the right of every person to a fair criminal or civil trial, and the duty of every judge to ensure it, is deeply ingrained in the law. "Expressed in traditional terms, the right is inherent in the rule of law".

His Honour cited what was said – once again in the early days of the High Court – by Isaacs J in *R v McFarlane; ex parte O'Flanagan*:[22]

> *"…[That] the elementary right of every accused person to a fair and impartial trial ... exists as a personal right seems to me so deeply rooted in our system of law and so elementary as to need no authority to support it. It is a right which inheres in every system of law that makes any pretension to civilisation. It is only a variant of the maxim that every man is entitled to his personal liberty except so far as that is abridged by a due administration of the law. Every conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle.*"

I can give you no better example from my own experience than the decision in *Thomas*.[23] In that case, the Court set aside the conviction because the accused's confession had not been shown to have been made voluntarily. We applied long-established common law principles to that effect, relying on the account of those principles given by Dixon J in the 1948 case of *McDermott v The King*.[24]

The Court rejected applications by Amnesty International and by the Human Rights Law Resource Centre to intervene, since the arguments for Mr Thomas were founded on established principles of the criminal law principles "which themselves embody important notions of individual rights."[25]

**International law**

And then there is the human rights impact of international law.

---

20 See *Crafter v Kelly*[1941] SASR 237; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

21 Ibid [68].

22 (1923) 32 CLR 518, 541-2.

23 (2006) 14 VR 475.

24 (1948) 76 CLR 501, 511-12.

25 Ibid 510, [126].

Long before the Charter came into force, I said in the *Royal Women's Hospital*[26] case*:*

> *"That there is a proper place for human rights-based arguments in Australian law cannot be doubted. As the Hospital's well-researched submission pointed out, over the past two decades Australian courts have been prepared to consider the use of international human rights conventions in:*
>
> *(a) exercising a sentencing discretion;*[27]
>
> *(b) considering whether special circumstances existed which justified the grant of bail;*[28]
>
> *(c) considering whether a restraint of trade was reasonable;*[29] *and*
>
> *(d) exercising a discretion to exclude confessional evidence.*[30]
>
> *In John Fairfax Publications Pty Ltd v Doe,*[31] *Gleeson CJ (as Chief Justice of New South Wales), in considering whether the means of protecting privacy of communication under Part VII of the Telecommunications (Interceptions) Act 1979 (Cth) lacked proportionality, referred to the international recognition of the need for stringent controls in the interests of privacy.*
>
> *There are three important ways in which such instruments, and the associated learning, can influence the resolution of disputes under domestic law*[32]*. This is so notwithstanding that, unless an international convention has been incorporated into Australian municipal law by statute (as has occurred with the Commonwealth's Racial Discrimination Act 1975 and Sex Discrimination Act 1984), the convention cannot operate as a direct source of individual rights and obligations under Australian municipal law.*
>
> *First, the provisions of international treaties are relevant to statutory interpretation. In the absence of a clear statement of intention to the contrary, a statute (Commonwealth or State)*

---

26 (2006) 15 VR 22, 38-9 [72]-[77].

27 *R v Togias* (2001) 127 A Crim R 23, 37 [85] per Grove J; 43 [123] per Einfield AJ; *R v Hollingshed* (1993) 112 FLR 109,115, contra *Smith v R* (1998) 98 A Crim R 442, 448.

28 *Schoenmakers v Director of Public Prosecutions* (1991) 30 FCR 70, 75; see also *Re Rigoli* [2005] VSCA 325.

29 *Wickham v Canberra District Rugby League Football Club Ltd* (1998) ATPR 41–664, [64]-[70]; *McKellar v Smith* [1982] 2 NSWLR 950, 962F.

30 *McKellar v Smith* [1982] 2 NSWLR 950, 962F. See now the much faller list set out by Bell J in *Tomasevic* (2007) 17 VR 100, 114 [73] and fn 49.

31 (1995) 37 NSWLR 81, 89D-F, 90B-C.

32 See generally, H Charlesworth, M Chiam, D Hovell and G Williams, *"Deep Anxieties: Australia and the International Legal Order"* (2003) 25 Syd.L.R. 423.

> *should be interpreted and applied, as far as its language permits, so that it conforms with Australia's obligations under a relevant treaty.*
>
> *Secondly, the provisions of an international convention to which Australia is a party – especially one which declares universal fundamental rights – may be used by the courts as a legitimate guide in developing the common law. The High Court has cautioned that the courts should act with due circumspection in this area, given that (ex hypothesi) the Commonwealth Parliament itself has not seen fit to incorporate the provisions of the relevant convention into domestic law.*
>
> *Thirdly, the provisions of an international human rights convention to which Australia is a party can also serve as an indication of the value placed by Australia on the rights provided for in the convention and, therefore, as indicative of contemporary values.*"

I shall conclude with one final example. In *Brown v Classification Review Board*,[33] the present Chief Justice of Australia (then a judge of the Federal Court) said this:

> *"The value currently given by the common law to freedom of expression is high. Freedom of expression, particularly the freedom to criticise public bodies, is regarded by the Courts as one of the most important freedoms - Halsburys Laws of England 4th Edition Vol 8(2) para 107. This is no doubt attributable in part to the influence of the body of International Conventions which have accorded the freedom explicit recognition and protection and the designation "fundamental". That designation may be traced from Articles 1 and 55 of the Charter of the United Nations to the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights. It has legislative recognition in Commonwealth statutes - Human Rights and Equal Opportunity Commission Act 1986 (Cth), and the Racial Discrimination Act 1975 (Cth). Courts applying common law principles may be expected to proceed on an assumption of freedom of expression and look to the law to discover exceptions to it - Attorney General v Observer Ltd [1990] AC 109 at 203."*

[33] (1998) 82 FCR 225, 234-5.