Chapter Six
Who gets the Bill? The Lawyers' Bill of Rights in Victoria

Ben Davies

On May 2 the Victorian Labor government introduced to Parliament the *Charter of Rights and Responsibilities Bill* 2006. This purports to be the first Bill of Rights in an Australian State. It is also a landmark Bill in that it will give many lawyers (and more than a few judges) what they have always wanted – the ability to play politics with the lives of ordinary Victorians without ever having to face a ballot box.

The Charter largely incorporates the rights found in the *International Covenant on Civil and Political Rights* (*ICCPR*) but stops short of including rights in the *International Covenant on Economic and Social Rights* (*ICESR*). However, it provides that it should be reviewed in four and eight years time to consider whether those rights should be included, as well as other rights such as the right to "self determination" of indigenous peoples.

It also requires that every piece of legislation introduced to the Victorian Parliament in future must have an accompanying statement outlining its human rights impact; that every statute in Victoria must be interpreted in a manner consistent with the Charter; and that government decisions may be challenged on the basis that they are inconsistent with the Charter. It also establishes the office of Human Rights Commissioner to help facilitate and encourage these kinds of processes, and to work towards what has been described as a "rights culture" in Victoria.

The first and most straightforward objection to the *Charter of Rights* is that it does absolutely nothing to increase the capacity of Victorians to actually have legally enforceable rights to redress if their rights are breached.

Under this Charter, it is made abundantly clear that if your rights are being breached, there is:

- No right to have an oppressive statute over-ruled;
- No right to have an oppressive government decision overturned; and
- No right to damages or any other kind of compensation if your rights are found to have been breached.

All that a court can do under the Charter is issue a "declaration of incompatibility", stating that a particular government act or piece of legislation is inconsistent with the Charter. A court cannot strike down a law, and if a declaration of incompatibility is issued there is absolutely no obligation on the Government to amend the legislation.

On the day of the introduction of the Bill, Victorian Attorney-General Rob Hulls stated that:

> "Some important rights, such as freedom of speech and religion and freedom from forced work and degrading treatment, have no clear legal protection".[1]

Unfortunately for Mr Hulls, and all Victorians, they still don't. A government which passed the *Forced Work and Degrading Treatment Act* would have no problem in persecuting Victorians under its terms – no court could strike it down under the *Charter of Rights*, and does Mr Hulls seriously believe that a government which passed an Act allowing for such treatment would really take any notice if a powerless court issued a non-binding declaration that it breaches the *Charter of Rights*?

The fact that the *Charter of Rights* does not actually enforce or uphold rights is reason enough on its own for it to be rejected, but there are many more profound and complex reasons why it will significantly diminish both the political and legal systems of the State, and it is these reasons which deserve much closer scrutiny.

Our previous speaker, Professor James Allan once warned in relation to Bills of Rights that:

> "People sell Bills of Rights on the basis of these incredibly emotionally attractive phrases, 'freedom of expression', 'freedom of religion'…. But that is not what gets to court. You never get a court case where someone says, 'Are you for or against freedom of expression?' Everyone's in favour. You get court cases about things like hate speech, campaign finance rules, defamation, and what the judges are involved in

is narrow social policy line drawing".[2]

The Victorian *Charter of Rights* confirms this view. It is clear to anyone who has experience with similar Bills of Rights that in practice this Charter will be a vehicle to open up a second front in the political process, in which issues of public policy can be pursued through non-political forums, namely the courts. It will be a vehicle in which social policy agendas – in many cases dressed up as issues of "rights" – which could not be achieved through the parliamentary process will effectively migrate from the political realm to the legal. What it will mean is the legalisation of politics, and the politicization of the law, an outcome which will be highly detrimental to both.

Just as "Vote No to the Politicians' Republic" proved to be an effective campaign slogan in the 1999 constitutional referendum, "Vote No to the Lawyers' Bill of Rights" accurately sums up the reasons to oppose Victoria's *Charter of Rights*. The only problem is that Victorians won't actually get to vote on this issue. From the government's point of view, it seems, human rights are fine so long as they don't extend to the right to vote on the method by which they are to be upheld.

Unfortunately, there has not been a great deal of public debate about the Charter. But one should not equate a lack of fanfare with a lack of significance, for the Victorian *Charter of Rights and Responsibilities* will effect a fundamental change in the Victorian legal system.

We have heard few voices on the proposed legislation. This is because the change is being driven by only a few. Those who stand to benefit most are politically activist Victorians frustrated by their lack of popularity in the political process, and their activist lawyers who will hand out the bills.

This is the lawyers' Bill of Rights, made for legal stakeholders. At every stage they are present in the process, trying to implement what Kirby J once called "lawyerly conscience". At every stage the government has given them what they want. And they can be confident that, as a result of policies of judicial appointment by the present government, they will have a judiciary prepared to give them exactly what they want – a judiciary prepared to keep the wheels of "rights" jurisprudence ticking over for the benefit of every lawyer wanting to give voice to their social conscience.

The government's policy agenda

The government officially announced its intention to pursue a *Charter of Rights* in a "Statement of Intent" released in May, 2005, which stated that:

> "The commitment [to a Charter of Rights] also supported the Government's agenda to restore democracy in Victoria and strengthen its democratic institutions".[3]

The Government seemingly believes that democracy in Victoria had been lost and was in need of "restoration". That seems an interesting conclusion to reach, given that it was the same democracy that was kind enough to elect a Labor government in 1999 and then return it with a record majority in 2002.

Although the State Attorney-General Rob Hulls has claimed the *Charter of Rights* has "overwhelming community support",[4] the government's commitment to "restoring democracy" obviously does not extend to giving citizens the right to vote on it.

There is also a fundamental paradox in the government's support for the *Charter of Rights*. Whilst on the one hand it was assuring us of the need for such a Charter in order to protect the fragile freedoms of Victorians and restore democracy, its actual ambitions in practice turned out to be rather modest. The government's Statement of Intent told us that:

> "The Government will focus on prevention and dispute mediation rather than litigation by ensuring that its policies and programs reflect good human rights practice and are therefore not likely to be challenged as breaching human rights standards".[5]
>
> "The Government's approach is to address human rights issues through mechanisms that promote dialogue, education, discussion and good practice rather than litigation. It is through such mechanisms that acceptance and support of human rights will be promoted in the community".[6]

For those Victorians suffering heinous breaches of their rights, the outlook under a *Charter of Rights* appears bleak. Instead of enforceable rights, which individuals can seek to uphold against an authoritarian or uncaring government, these poor oppressed individuals are instead offered a "dialogue" with the government, in which the judiciary is encouraged to join in.

Attorney-General Rob Hulls has told us that the Charter "promotes a dialogue between the three arms of the government – the Parliament, the executive and the courts".[7] For everyone who has ever suffered from

actual repression and persecution, I'm sure there's nothing they would have loved more than a good "dialogue" with their oppressors to put things right.

The government's eager promotion of a *Charter of Rights* will ultimately have the result of ceding significant parts of its role in the political and public policy process to the courts. It is, of course, possible to dress up almost any philosophical position, or frustrated political agenda as a question of "rights", then go off to court and demand that these "rights" be upheld. This is much easier than the task of pursuing change through the political process. Yet the government seems to be blind to its actions. It is effectively dealing itself out of debates that it should be primarily responsible for.

The "consultation" process

Perhaps not wanting to appear too hasty in implementing its agenda, the government chose to delay the liberation of the Victorian community so that it could embark on a process of "community consultation". The words "community" and "consultation" are two of the most abused in the political language, and this process certainly did little to restore their credibility.

The government purported to seek the views of Victorians through what it repeatedly described as an "Independent Committee". This "Independent Committee" was charged with the process of consulting Victorians on "whether change was needed in Victoria to better protect human rights".[8]

As part of the consultation process the government invited submissions from interested Victorians, and produced several documents entitled "Human Rights for Communities", inviting input from various "communities" which it obviously considered most in need of the benefits of a *Charter of Rights*.[9]

Several such communities had information statements published for them:

- Human Rights and Disability.
- Human Rights and Faith Based Groups.
- Human Rights and Homelessness.
- Human Rights and Indigenous Peoples.
- Human Rights and Multicultural Communities.
- Human Rights and Older People.
- Human Rights and Sexual Identity.
- Human Rights and Women.
- Human Rights and Young People.

The document "Human Rights and Young People" makes for some interesting reading. Please forgive the stylistic aspects, for these are direct quotes, but they are instructive insights into the thinking of whoever drafted them. For example:

> "….under 18s can be discriminated against on the basis of their age when it comes to:
>
> …being treated as a threat, or being harassed *when hanging around shops or using public transport*". (emphasis added)

I am sorry to report that any concerned under 18s who may have read this document in the hope that they will receive greater protection when hanging around shops and using public transport, are destined to be sadly disappointed, as the *Charter of Rights* unfortunately does not include the right to loiter at train stations.

Young people who read this document may also have been interested in the following comment:

> "Human rights are also about your right to privacy. This means your right to have private letters and diaries not read by others, whether they be family members, teachers or other adults".

Unfortunately, such young people are again destined to be disappointed, given that the *Charter of Rights* does not include an Adrian Mole amendment to enshrine the right of dysfunctional adolescents to keep secret diaries. But as silly as it seems, the Adrian Mole human right is a symbol of a disturbing frame of mind which underpins such sentiments; namely, the idea that virtually every issue of interaction between humans – even within families – and every issue of social regulation – whether public or private – can be turned into a question of "rights", which can then be litigated through the court system.

The Independent Committee

We now move on to the actual process of consultation, which was a tale of two parties – the consulters and the consulted. On both counts the consultation process was an unrepresentative farce.

First, the consulters. The government appointed four people to undertake the consultation process, insisting on many occasions that it was an *independent* committee:[10]

> "The Government believes that the views of Victorians can best be sought by the establishment of a committee of independent persons who are eminent in their fields and respected in the community".[11]

It soon became apparent that the committee was "independent" only in the sense that it was most certainly independent of anyone who opposes a *Charter of Rights*. Consider for example the case of the Chairman.

Professor George Williams: The Chairman of the Committee was Professor George Williams of the University of New South Wales. Some Victorians may have been intrigued that an academic from New South Wales was appointed as Chairman of the Committee to consult with them about their rights. Some may have been even more surprised that Professor Williams could be passed off as in any way "independent".[12] A cursory search of his writings over the years reveals that, as of January, 2006 Professor Williams had authored or co-authored:

- Four books in favour of a Bill of Rights.
- Two Parliamentary Library publications in favour of a Bill of Rights.
- Seventeen journal articles (and five more with passing references) in favour of a Bill of Rights.
- Forty-seven opinion pieces in the daily press since 1994 in favour of a Bill of Rights.

Andrew Gaze: A curious appointment to the four person Committee was the basketballer Andrew Gaze. Without meaning any disrespect to Mr Gaze as a sportsman, one wonders whether a career spent in the professional basketball leagues of Australia and overseas has given him any particular insight into the plight of the downtrodden, or any appreciation of the sophisticated legal and political issues involved in a *Charter of Rights* to qualify him to be one-quarter of the Committee considering such a significant legal and constitutional change.

Apart from the shortcomings of its personnel, there are many other features of the Committee's work to convince us that its independence was lacking. Its recommendations, not surprisingly, were entirely in line with the Government's stated preferences (see over).

It is particularly noteworthy that the government expressed a desire for a *Charter of Rights* that was a mere Act of Parliament, in which courts could not invalidate legislation. Not surprisingly, the "Independent Committee" recommended exactly that. This may be surprising for a report of a Committee chaired by Professor George Williams. Anyone familiar with his book, *A Bill of Rights for Australia*, would be aware that his preferred model is a constitutionally entrenched Bill of Rights in the Australian Constitution, which would apply to both federal and State jurisdictions.

It would appear that Professor Williams himself is nothing if not a pragmatist. When the ACT *Human Rights Act* was introduced, albeit with no power for the judiciary to overrule Acts of Parliament, he declared it "just the first step in the right direction"[21] towards a constitutionally entrenched Bill of Rights. Similarly, his own report into the Victorian *Charter of Rights* assures us that "the Charter should be the start of incremental change, not the end of it".[22] This presumably means the first step on the path to a constitutional Bill of Rights which was, of course, his preferred model all along. From Professor Williams' point of view, the ACT and Victorian models appear to be just expedient devices to soften-up public opinion to accept a "real" constitutional Bill of Rights.

Government's preferences	The Independent Committee's recommendations
".....the sovereignty of Parliament is preserved in any new approaches that might be adopted to human rights. …The Government is interested in a model similar to that used in the United Kingdom, New Zealand and most recently, the Australian Capital Territory, in which rights are contained in an Act of Parliament".[13]	".....the Victorian Charter should be an ordinary Act of Parliament like the human rights laws operating in the Australian Capital Territory, New Zealand and the United Kingdom. This would ensure the continuing sovereignty of the Victorian Parliament".[14]
".....it is attracted to the procedures used in the UK, New Zealand and the ACT whereby legislation being introduced into Parliament is certified as complying with the jurisdiction's human rights obligations".[15]	"The Committee is persuaded by the submissions, the Government's Statement of Intent, and the practice in the United Kingdom, New Zealand and the ACT, that there is a role for the Attorney-General to provide a statement to the Parliament indicating an opinion as to whether the Bill is compatible with the Charter".[16]
"does not wish to adopt a human rights model such as applied in the United States of America where the rights expressed in the constitutional *Bill of Rights* can be used to invalidate laws without recourse to the legislature".[17]	"This Charter would not be modeled on the United States *Bill of Rights*. It would not give the final say to the courts, nor would it set down unchangeable rights in the Victorian Constitution".[18]
"Legislation for the protection of *International Covenant on Economic and Social Rights*, such as the right to adequate food, clothing and housing, is complicated by the fact that such rights can raise difficult issues of resource allocation and that many deal with responsibilities that are shared between State and Commonwealth Governments. The Government also believes that Parliament rather than the courts should continue to be the forum where issues of social and fiscal policy are raised and debated".[19]	"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 …. Whilst we agree that these rights are important, we have not recommended that they be included in the Charter at this stage".[20]

As Professor Williams' comments show, the campaign for the Victorian *Charter of Rights* is simply one step in a longer-term strategy. This is very much a political campaign, using what were once described in "Yes, Prime Minister" as "salami tactics", in which one small step into a "human rights culture" is taken at a time, in such a small way that hopefully nobody will notice too much, then gradually slicing off further slices bit by bit until eventually the whole salami is gone – an outcome which, if it had been attempted in one go, would have been met with fierce resistance.

Presumably the strategy is to put up a weak *Charter of Rights* to start off with, then in a few years time have it reviewed, perhaps by another "independent committee", who will no doubt tell us that it's working fine and we should now take the next step.[23]

The consulted

The consultation process was predictable in terms of who made submissions. It was a self-selecting process in which those who cared strongly enough to make submissions got consulted. In a process such as this, those interested in being consulted will invariably be those with vested interests in a certain outcome – activists wishing to pursue issues, and activist lawyers who will profit from them. Not surprisingly, of those who made submissions, lawyers figured prominently.

The consultation questionnaire was very broad, and included asking respondents, "If Victoria had a *Charter of Rights*, what rights should it protect?"[24] – effectively asking them to pick their favourite items from the human rights menu.

Asking activist lawyers what rights they want in their Bill of Rights is akin to asking tax accountants what additional loopholes they would like in the *Tax Act* in order to provide greater work and career development for themselves.

As outlined previously, the effect of the *Charter of Rights* will result in the government giving up its power over social policy issues to unelected judges and lawyers with agendas. It is effectively a ceding of political power from the political arm of government to the judicial. A government setting itself up in this way through a "consultation process" with activist lawyers is not just turkeys voting for Christmas, it is turkeys voting for Christmas after consulting all of the diners about how they would like them to be cooked.

The consultation process revealed that almost every conceivable interest group with any vague connection with "rights" sought to hitch its own agendas to the *Charter of Rights*. For example:

- The ACTU submission advocated that every International Labour Organisation Convention to which Australia is a signatory should be taken into account under the *Charter of Rights*.[25]
- The two-page submission by "Feminist Lawyers" assured us that "human rights should not always be expressed in gender neutral terms. There is a need for womens' human rights to be specifically addressed and this should be considered separately when drafting and implementing the Charter".[26]
- The one-page submission from the Australian Gay, Lesbian, Bisexual, Transgender, Intersex and Queer (GLBTIQ) Multicultural Council (AGMC) is typical of the kind of arguments used:
  "As Multicultural GLBTIQ individuals and groups our experiences whilst diverse due to our individuality has a common thread and this is what binds us. The common thread? The 'twice-blessed' nature of being non-heterosexual and coming from a Multicultural background. However our 'twice- blessed' nature is often 'overlooked' within our immediate families and 'mainstream' multicultural communities. This tendency to overlook creates within us a sense of belonging neither here nor there and leading us to lead a double life. *And for this reason a Human Rights Bill is required*". (emphasis added)

Descartes famously said, "I think, therefore I am". In this case, the view seems to be, "I am a Gay, Lesbian, Bisexual, Transgender, Intersex or Queer Multicultural Victorian, therefore I need a Bill of Rights". That is about the extent of the argument. There was simply no consideration of the adequacy of the *Charter of Rights* in actually upholding rights, nor any analysis of the process by which this would supposedly occur. I should emphasise that it is perhaps unfair to single out the AGMC, as the shallowness of its analysis was typical of dozens of other submissions from those in favour.

Submissions such as this seem to suggest that whenever the words "human rights" are mentioned, some people's critical faculties seem to switch off and see any concept related to them as beyond criticism. This misses the point that "human rights" on their own are simply aspirations which exist entirely in the abstract. It is impossible to adequately consider issues of "human rights" without considering the merits of the mechanisms proposed to uphold them.

Underlying so many of the submissions was the implicit view that there is no difference between supposedly desirable social objectives and how they will actually be achieved in practice. The submissions are fixated with worthy sentiments expressing people's love of rights, but show no appreciation of how those rights will work in practice, or exactly how they will result in more actual, tangible rights for people, as opposed to more opportunities for "dialogue".

The Judiciary

The current state of Victorian politics might be accurately summed up by Yeats' memorable line regarding the Russian revolution, that "the best lack all convictions, while the worst are full of passionate intensity". The current Attorney-General of Victoria, Mr Hulls, probably falls into the latter category. His own contribution to this process is worthy of particular attention, as the *Charter of Rights* appears to be but one half of a two-pronged strategy to substantially re-shape the legal culture of Victoria. The other half of this strategy is based on what could most charitably be described as a passionate pursuit of unorthodox judicial appointments.

On the subject of judicial appointments, Mr Hulls' passionate intensity seems to be focused on one

consistent target, as a small collection of some of his recent comments reveals:

> "We all want judges to be the best and the brightest, but this government certainly knows that the best and the brightest are not always white, Anglo-Saxon, middle-class males. This government wants to appoint judges on the basis of merit rather than on the basis of their *old school ties* or their membership of golf clubs".[27] (My italics here and following).
>
> "I want to head a legal profession in which the best and brightest are awarded on their merit, and not on the basis of their *old school tie*".[28]
>
> "It is important that government agencies engage the best and brightest to do legal work but we continue to kid ourselves if we think the best and brightest are just white, Anglo-Saxon males with an *old school tie*".[29]
>
> "We absolutely kid ourselves as a community if we think the best and brightest are just white Anglo-Saxon males with a newly pressed, freshly pressed *old school tie*, that's just not the case".[30]
>
> "I want to appoint people on the basis of merit, rather than on the basis of their *old school tie*. To the horror of the more crusty corners of the profession, I don't believe that private schooled, middle-aged men are the only ones who have something to offer our courts".[31]

The pre-occupation with school ties seems to be a curious choice of obsession for Mr Hulls, who is incidentally a Xavier College old boy himself. Yet his pet project of appointing a "representative" judiciary, not full of old school ties, hit a stumbling block last year when he appointed as President of the Victorian Court of Appeal, Mr Chris Maxwell, QC, who has the impeccable old school tie credentials of a Melbourne Grammar and Oxford University education.[32] Perhaps it helped that Justice Maxwell was once a staff member to Labor Attorney-General Gareth Evans and represented asylum-seekers in the *Tampa* case. For Mr Hulls and his government, an old school tie would seem to be no impediment to judicial appointment if an applicant can compensate with a sufficient ALP pedigree and commitment to left-wing causes.

In a conference dedicated to the memory of Sir Harry Gibbs, it is appropriate to cite his wise words at the sixth conference of this Society in 1995, words that in Victoria in 2006 seem amazingly prescient:

> "I am not at all sure, however, that a bill of rights would enable the courts to check the worst abuses of political and bureaucratic power. *It is unlikely to prevent a political party which had secured the requisite majority in the Houses of Parliament from stacking the courts and the public service…".*[33] (emphasis added)

It is worth considering some of Rob Hulls' recent appointments to the Supreme Court and their likely approach to the *Charter of Rights*, since these are the judges who from 1 January next year will be entrusted with applying it, and their own previously expressed views are particularly revealing in relation to the sort of jurisprudence we can expect.

Justice Chris Maxwell

Justice Maxwell was appointed President of the Victorian Court of Appeal in 2005. Unlike Rob Hulls, I won't hold it against him that his parents chose to send him to a prestigious school. Prior to his appointment he was president of Liberty Victoria (formerly the Council for Civil Liberties), whose policies include "the enactment of *a Charter of Rights and Freedoms*", and he had commented extensively on his support for such a Charter.

A speech by Justice Maxwell, *Human Rights: A View from the Bench* in October, 2005 soon after his appointment provides a valuable insight into his likely application of a *Charter of Rights*. Even before the Charter is enacted, Justice Maxwell showed himself to be particularly eager to introduce international human rights jurisprudence to his Court as much as possible. In one particular case last year involving the question of whether medical records held by a hospital could be demanded by the Medical Practitioners Board which was conducting an investigation, Justice Maxwell informed counsel for both parties that the Court would be assisted by submissions dealing with the relevance of international human rights conventions, and the associated jurisprudence, to the question before the Court. This must have been a surprise to both parties, who had not prepared submissions on these points, and for which such issues had not been considered in the trial at first instance.

In Justice Maxwell's own words:

> "This example illustrates several important things:
>
> 1. The Court will encourage practitioners to develop human rights-based arguments where relevant to the question before the Court.

2. Practitioners should be alert to the availability of such arguments, and should not be hesitant to advance them where relevant.

3. Since the development of an Australian jurisprudence drawing on international human rights law is in its early stages, further progress will necessarily involve judges and practitioners working together to develop a common expertise".[34]

Clearly, under Justice Maxwell, we can expect "human rights considerations" to find their way into almost every conceivable case before him, but also some rather inconceivable ones as well. Justice Maxwell went on to cite other areas of the law where human rights jurisprudence may be brought to bear, for example:

"…..as the Ansett administration clearly demonstrated – quintessential corporate law issues such as insolvency and the associated sale of assets can throw up human rights issues concerning the fate of employees of the insolvent company".

It is likely to come as quite a surprise to corporate lawyers and insolvency accountants that they are now within the realm of human rights law. Even areas of the law that would be regarded as strictly commercial will now seemingly have to consider what tenuous relationship they can establish with human rights law, or at least, on the basis of this invitation to do so, they will if Justice Maxwell is presiding.

Justice Marcia Neave

Justice Neave is a fellow member of the Court of Appeal, appointed in 2006. Incidentally, she (metaphorically) wears the old school tie of Presbyterian Ladies College, which will no doubt be of great interest to Rob Hulls, but of complete irrelevance to everyone else. Neave was previously appointed head of the Victorian Law Reform Commission (VLRC) in 2001 by the State Labor government and described herself as a member "of the Charter Group which was involved in lobbying the government to establish this consultation process" for the *Charter of Rights*.[35]

Litigants seeking human rights outcomes before Justice Neave would be encouraged by her previous support for expanding the role of the judiciary to correct situations where the political process does not produce the desired outcome. For example, a report of the VLRC published by Professor Neave (as she then was) states that in relation to achieving access to IVF treatment for lesbian couples:

"It may be argued that the best way to achieve change is through litigation. It is independent of party and political processes. *It is also a way of achieving quite significant change, where the processes of revising legislation may become the subject of compromise through the political process*. It may also be regarded as potentially quicker than legislative change, as one case, when it is brought, can change the interpretation of legislation from that point on".[36] (emphasis added)

Some may argue that it is unfair to comment on views expressed by members of the bench before their appointment, and traditionally this has usually been the case. However, the legal paradigm in Victoria has now changed. In future, judges will not only be encouraged, but positively obliged to give expression to their own personal views on matters of public policy when *Charter of Rights* cases come before them. Given that they will be making policy – or at the very least contributing to a "dialogue" on public policy – consideration of their own political views will become paramount. From now on, it will go without saying that Victorians with a keen interest in controversial social issues will be scrupulously analysing the ideological disposition of every prospective appointee to the State's highest court.

In the normal course of events, one would not care less what the view of the average Supreme Court appointee was on the issue of IVF access for lesbian couples. Yet Bills of Rights generate an almost farcical interest in judicial nominees, given the enormous power which they vest in judges to engineer social outcomes.[37] Hence, the personal views of Hulls' appointees, far from being irrelevant, are now fair game, given the capacity that those views will now have to dramatically change the society in which we live.

Given that two of the members of Victoria's Court of Appeal are former heads of organisations which have the most to gain from a *Charter of Rights* (VLRC and Liberty Victoria) and have spent such a substantial part of their careers campaigning for a Charter, it is impossible to ignore their backgrounds and personal views, as these views now have the capacity to significantly re-shape the Victorian legal system and its new "culture of rights" for many years to come.

Even more concerning is the fact that despite Mr Hulls' claims that the judiciary needs to be "more representative", the public record demonstrates that some of his more prominent appointees possess personal and professional agendas that are anything but representative of a majority of Victorians.

Justice Kevin Bell

A third recent judicial appointment of Rob Hulls, Justice Kevin Bell of the Supreme Court, has also expressed strong views on a *Charter of Rights*.

Justice Bell is clearly a believer in the destiny of lawyers and judges to change society. At a recent graduation of law students he told them that:

> "You are law graduates now and your knowledge puts you in a special position to contribute to the development of the community.
>
> "As I speak, the rescuers in Tasmania are still boring through the rock to reach their comrades, to bring them back into their community,…… I wish them well, as I do you, especially those of you who are able, even in the littlest of ways, to use your knowledge to break through the rock of prejudice and discrimination that can create barriers between us".[38]

I spoke earlier about turkeys consulting diners. As far as the diners go, Justice Bell seems to have one of the biggest appetites. In December last year he gave a noteworthy speech to lawyers at Mallesons Stephen Jaques, where he literally ordered every human right on the menu.

His speech began by informing his audience of commercial lawyers that mandatory detention under the Commonwealth *Migration Act* must be over-ruled (despite the bipartisan support for that policy). Bell expressed disappointment with the "timidity" of those High Court Justices sitting above His Honour on the juidicial hierarchy who had failed to over-rule this practice,[39] and exhorted Australia to follow instead the enlightened British example of using the courts to achieve political outcomes that cannot be delivered by the ordinary political process:

> "The take-home message is clear. If you want the judges to better protect the civil liberties of the people, as the House of Lords did, you have to give them the necessary tools - you have to introduce a Bill of Rights".[40]

In other words, give us human rights judges the tools and we will finish the job.

Justice Bell then went on to state that:

- Australia now has a foreign-born population of 24.6 per cent.
- Economic inequality has grown in Australia during the past decade.
- Economic inequality exists in Australia.
- The quality of health in poor areas is significantly less than in wealthier areas.
- Women earn less than their male counterparts.
- Only two women head up the top 200 companies listed on the Australian Stock Exchange.

Unremarkable observations, you might think. Yet for Justice Bell, they prove the need for a Victorian *Bill of Rights*. To complete this rather circular argument, Bell concludes that:

> "For essentially these reasons, most countries with diverse populations, such as the United Kingdom and New Zealand, have seen comprehensive human rights protection as indispensable. Victoria, having an even more diverse population, should see it in the same way.
>
> "What could be the justification for Victoria not to introduce a comprehensive human rights framework, including a *Charter of Rights*, when it shares the social and economic conditions that have led to the establishment of such a framework in virtually every other comparable country?"[41]

So there you have it. We are a diverse community where wealth and opportunity is not perfectly distributed, therefore *ipso facto* we need a Bill of Rights, presumably so human rights lawyers and judges can use it to bore through "the rock of prejudice" and solve every social and economic problem. And by the way, the UK and New Zealand have one, so why shouldn't we? Who said the cultural cringe was dead?

I only hope that Justice Bell, for the sake of consistency, is a committed monarchist, for if New Zealand and the UK still have the House of Windsor, then that surely means that we should too.

These comments were made in December, 2005, when Justice Bell had recently been appointed to the bench. The "Independent Committee" had just finished its report and Cabinet had not yet met to consider what, if any, legislation it would approve. Yet this did not stop Justice Bell demanding that the *Charter of Rights* include all the rights in the *ICCPR*, as well as the *ICSER*. For Justice Bell, the concept of a human rights "dialogue" between government, judiciary and citizens appears to extend to sitting judges giving the Cabinet gratuitous instructions on the type of policies they should be implementing.

Unfortunately for Justice Bell, his wish list was far more extensive than what the Cabinet ultimately delivered. Yet His Honour may still have the last laugh. As a Supreme Court Justice, one shouldn't have to wait

long before Justice Bell's human rights agenda, which the Victorian public has never had a chance to accept or reject, becomes the law of the land.

The *Charter of Rights* in practice

In practice, the effect of the *Charter of Rights* will be profound for statutory interpretation, administrative law and the common law. Social issues will become legal issues. Legal issues require legal solutions. Legal solutions require legal practitioners, and that's where the stakeholders will cash in.

In introducing the *Charter of Rights Bill*, Rob Hulls claimed that it won't lead to more litigation.[42] As the lawyers and judges stand by, eager to re-shape society through the *Charter of Rights*, such a statement is either monumentally naïve or breathtakingly disingenuous. To return once more to the turkey metaphor to describe such a comment, in this case the turkey has walked into a restaurant insisting that the people in there aren't hungry and don't go there to eat anyway.

The likely effect of the Charter on legal proceedings will most likely be seen at two levels. At the higher level, we are likely to see numerous cases involving wannabe hero lawyers (and aspiring hero judges) looking to advance their careers and raise their profiles by involving themselves in high-profile cases, hopefully on the road to celebrity status as a "human rights" barrister, or maybe even a hero judge, for which the example of Mr Justice Maxwell will no doubt be of particular inspiration.

At the lower level, it will encourage new waves of self-represented litigants to pursue whatever gripe they have with the government through the courts as an issue of "rights". Of course, anyone who litigates their rights is always convinced of their success, so we can probably expect court rooms in Victoria full of Dennis Denuto types arguing that "it's the *Charter of Rights*, it's the vibe of the thing". Given that the Charter requires Victorian courts and tribunals to interpret all legislation, so far as it is possible to do so, in a way that is consistent with the Charter, they have every reason to feel confident of at least getting a good hearing.

Statutory interpretation: The *Charter of Rights* is now the fundamental basis for statutory interpretation in Victoria. It requires that all legislation before or after its enactment be interpreted in such a way that it is consistent with it. Professor James Allan has pointed out that:

> "Bills of Rights are usually accompanied by interpretive techniques which do not constrain judges to deciding in accordance with the original intent of the enactors nor to the original understanding at the time of their passage".

As overseas experience shows, this can often result in interpretations that differ greatly from, or are even contrary to, the legislature's intention. Although courts will not have the power to overturn legislation that is incompatible with the Charter, they will be able to bend and manipulate it in all kinds of ways in the name of ensuring it is "consistent".

Common law: The Bill makes clear that any jurisprudence from any jurisdiction that applies the *ICCPR* is now fair game for litigants in Victoria. After decades spent developing a consistent and settled Australian common law, the High Court is unlikely to be amused at the prospect of a State jurisdiction undoing its common law by importing international law jurisprudence. This wide-scale importation is likely to be the legal equivalent of one of those imported rug sales where "everything has got to go".

Administrative law: Under the Charter, all government decisions must accord with it, and any decisions can be challenged in the courts if one aggrieved party believes they are not. Justice Maxwell has indicated his enthusiasm for the doctrine of the High Court's decision in the *Teoh Case* and indicated his desire that Victorian courts follow this precedent in human rights cases involving administrative decisions.[43] In other words, one of the High Court's most controversial decisions, one which both sides of politics have attempted to overrule, and one which would be unlikely to survive challenge before the current High Court, is about to become the new cornerstone for judicial consideration of administrative law in Victoria.

Accounting: If Justice Maxwell's comments on the human rights of employees with unpaid entitlements mean what they appear to mean, then even insolvency practitioners are now operating in the area of human rights law. Every accountant must now be mindful of their human rights obligations, or at least they should quickly become so if they should find themselves involved in litigation in the Court of Appeal.

Conclusion

Given the shortcomings of the *Charter of Rights*, it is difficult to see what real benefits it can actually bring to individuals whose rights are over-ridden by a State Government.

It can't be about enforcing rights, since none of the rights is enforceable by a court, nor is there any scope for individuals to seek any legal remedies to ameliorate any violations of their rights.

It can't be to establish a comprehensive statement of rights, since it concluded that it was not appropriate to have social and economic rights – or, at least, not yet.

What it will mean is that discussion, debate and "dialogue" in relation to social policy will migrate from the political to the judicial arena – an outcome which a great many lawyers and certain judges seem to be eagerly anticipating. Every interest group and social activist now has the opportunity to ignore the elected representatives of the people, and try their luck before Victoria's new-look "representative" judiciary.

Unlike elected representatives, who are free to dismiss the entreaties of zealots, vested interests or unrepresentative minorities if they believe their cause is unworthy, the courts do not have such wide discretion, and will be obliged to provide a forum and a platform for even the most marginal of causes.

Forum shopping is a fact of life in the law. It will become equally common in relation to social policy, but instead become shopping between the political and judicial realms. Those with political agendas will no longer look to the political process to achieve them, but look instead to the courts. The Prime Minister, Mr Howard earlier this year encapsulated this concept well when he argued that:

> "I am a great believer in the practice of politics ... that is one of the reasons I am strongly opposed to a Bill of Rights".[44]

The practice of politics should remain exactly that – politics. Policy agendas that are essentially political should be determined through the political process – not through a quasi-judicial process. Politicians should not forfeit their rights to deal with social issues in favour of the judiciary.

The consequences of political abdication have been illustrated by Robert Bork in *The Tempting of America*, where he gave a first hand account of the ultimate effect of a Bill of Rights combined with a litigious "rights culture":

> " … the [anti-abortionist and pro-abortionist] demonstrators march past the Houses of Congress with hardly a glance and go straight to the Supreme Court building to make their moral sentiments known where they perceive those sentiments to be relevant. The demonstrators on both sides believe the issue to be moral, not legal. So far as they are concerned, however, the primary political branch of government, to which they must address their petitions, is the Supreme Court".

The outlook in Victoria appears to be one of pessimism, yet one should try to end on a positive note. The essence of federalism is that different State governments can embark on different reforms. They can experiment in one jurisdiction without adversely affecting the others. Or to use a metaphor, one little kid burns himself on the fry pan and the others then know not to do it themselves.

We can only hope that when it comes to Bills of Rights, other State governments do not follow the lead of the soon-to-be-devoured turkeys in Victoria, and instead heed the words of their former colleague Bob Carr, who has shown a lot more worldliness and insight than any of his Victorian colleagues have on this issue.

To conclude, it is appropriate to invoke the words of Justice Kirby in the Lionel Murphy Lecture of 1996. Kirby J issued words of caution to those who seek to abandon the established methods of the judiciary in favour of a new kind of activism in pursuit of human rights and other social agendas. Kirby spoke of his desire for an:

> "…..alternative theory of the judicial function which is needed to ensure that we do not replace the mythology of the declaratory theory with the uncontrolled, idiosyncratic opinions of unelected judges".[45]

In Victoria, the only theory seems to be a huge leap into the unknown, in which the theory is to import whatever "human rights" jurisprudence one likes, with no limit on the number of social issues which can be litigated. In response to Kirby J's warning, it is worth emphasising that the only things worse than the uncontrolled, idiosyncratic opinions of unelected judges are the uncontrolled, idiosyncratic ambitions of uncontrolled and unaccountable human rights lawyers.

Endnotes:

1. *Victoria on track for human rights protection*, Media Release, Office of the Attorney-General, May 2, 2006.

2. ABC Radio National, *The Law Report – The ACT's Bill of Rights*, 9 December, 2003.

3. Department of Justice, *Human Rights in Victoria – Statement of Intent*, May, 2005, p. 1.

4. Hulls, R, Hansard, Victorian Legislative Assembly, 2 May, 2006.

5. *Human Rights in Victoria – Statement of Intent*, *loc. cit.*, p. 2.

6. *Ibid.*.

7. Hulls, R, Second Reading Speech, *Charter of Rights and Responsibilities Bill* 2006, Hansard, Victorian Legislative Assembly, 4 May, 2006.

8. Department of Justice, *Human Rights Consultation*, at http://www.justice.vic.gov.au.

9. Department of Justice, *Human Rights Consultation: Information for Communities*, at http://www.justice.vic. gov.au.

10. *Human Rights Consultation*, *loc. cit.*.

11. *Human Rights in Victoria – Statement of Intent*, *loc. cit.*, p. 1.

12. *Victoria on track for human rights protection*, Media Release, Office of the Attorney-General, May 2, 2006.

13. *Human Rights in Victoria – Statement of Intent*, *loc. cit.*, p. 2.

14. *Rights, Responsibilities and Respect*, Report of the Human Rights Consultation Committee, *Summary and Recommendations*, p. 1.

15. *Human Rights in Victoria – Statement of Intent*, *loc. cit.*, p. 2.

16. *Rights, Responsibilities and Respect*, *op. cit.*, p. 72.

17. *Human Rights in Victoria – Statement of Intent*, *loc. cit.*, p. 2.

18. *Rights, Responsibilities and Respect*, *op. cit.*, p. 1.

19. *Human Rights in Victoria – Statement of Intent*, *loc. cit.*, p. 4.

20. *Rights, Responsibilities and Respect*, *op. cit.*, p. 2.

21. Williams, G, *The ACT Bill of Rights is just the first step in the right direction*, Online Opinion, 5 July, 2004, http://www.onlineopinion.com.au.

22. *Rights, Responsibilities and Respect*, *op. cit.*, p. 2.

23. [Editor's Note] Since this paper was delivered, it has come to public knowledge that Professor Williams

appears to entertain ambitions for pre-selection as a Labor Party candidate. See *Constitution expert wants Labor seat*, Andrew Clenell, *The Sydney Morning Herald*, 13 July, 2006:

> "The leading constitutional lawyer, George Williams is making a push for a federal Labor seat ..... [He] has confirmed that he had been told to get involved with the party ..... [He] was elected head of the party's legal and constitutional committee at its State conference last month ..... Mr Williams said ..... he was working to put his name forward .....
>
> "One left-wing source said although Mr Williams was in the party's Right faction, some 'in the Left would worship the ground he walks on' ".

All of this would appear to cast new light upon the claims both of Attorney-General Hulls and Professor Williams himself to bring an "independent" view to Mr Hulls' so-called "Independent Committee".

24. *Have your say about human rights in Victoria – Human rights consultation community discussion paper*, p. 6.

25. Australian Council of Trade Unions submission, p. 1.

26. Feminist Lawyers' submission, p. 2.

27. Hulls, R, Hansard, Victorian Legislative Assembly, 1 May, 2003.

28. Hulls, R, Address to the Women Barristers' Association Dinner, 23 August, 2001.

29. *The Age*, 15 November, 2003, *Time for unity on defamation, says Ruddock*.

30. ABC Television, *Stateline*, 28 November, 2003.

31. Hulls, R, *Law Reform: an agenda for Victoria*, speech at New Internationalist bookshop, 16 June, 2003.

32. *Victorian Bar News*, No. 134, Spring, 2005.

33. Sir Harry Gibbs, *Does Australia Need a Bill of Rights?*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 6 (1995), pp. 143-144.

34. Maxwell, C, *Human Rights: A View from the Bench*, Address to the Annual General Meeting of the Administrative Law and Human Rights Section of the Law Institute of Victoria, 26 October, 2005, p. 2.

35. Marcia Neave and Spencer Zifcak submission, p. 2.

36. *Assisted Reproduction & Adoption: Should the Current Eligibility Criteria in Victoria be Changed?*, Consultation Paper, Victorian Law Reform Commission, December, 2003, at http://www.lawreform.vic.gov.au.

37. Gisonda, E, *The Australian*, 11 January, 2006, *A fiasco best left in the US*.

38. Bell, K, Address to Monash University graduation, 4 May, 2006.

39. *Al-Kateb v. Godwin* [2004] HCA 37.

40. Bell, K, *Human Rights Day Address to Mallesons Stephen Jaques Human Rights law group*, 9 December, 2005, p. 5.

41. *Ibid*., p. 8.

42. Media Release, *Victoria on track for human rights protection*, Office of the Attorney-General, May 2,

2006.

43. Maxwell, C, *Human Rights: A View from the Bench*, *loc. cit.*.

44. Howard, J, press conference, 8 February, 2006, at http://www.pm.gov.au.

45. Kirby, M, *Lionel Murphy – 10 Years On*, Canberra, 21 October, 1996.