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KEYNOTE ADDRESS, VICTORIA'S HUMAN RIGHTS CHARTER

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It has been an interesting time for human rights in recent months:

- the Court of Appeal has delivered its judgment in *Director of Housing v Sudi* [2011] VSCA 266
- the High Court of Australia has delivered its judgment in *Momcilovic v The Queen* [2011] HCA 34
- the Scrutiny of Acts and Regulations Committee of the Victorian Parliament has published its review of the *Charter of Human Rights and Responsibilities Act 2006*, and the Premier has asked his department to co-ordinate the government's response

Few would deny the actual or potential contribution made by these events to the continuing development of human rights in this state. In that contect, I want to make some remarks about the significance of human rights jurisprudence and parliamentary engagement in human rights before going on to the main subject of this address – human rights enforcement and supervision. In that regard, I will make reference to my own recent judgment in *PJB v Melbourne Health (Patrick's Case)* [2011] VSC 327.

Jurisprudence is the treasured possession of a functioning democracy. Jurisprudence is an essential element of the rule of law which protects the fundamental rights and freedoms of individuals and the community. Jurisprudence is the antithesis of the dark and hidden kind of power which is exercised arbitrarily against people in societies which are less fortunate than our own.

In Victoria, the community expects judges fearlessly and independently to state, enforce and maintain the law and that is their constitutional function. It is by that process that jurisprudence is developed, by the higher courts in particular, and in

which the profession plays a vital role. The community expects the process to be accessible, rigorous, transparent and consistent. These are very reasonable expectations and they apply equally to new areas of the law, such as human rights law. Human rights jurisprudence is a particular jewel in that treasure of general jurisprudence which is possessed by Victoria's functioning democracy.

Before the Charter, Victoria (and Australia) had a human rights jurisprudence of which the community should be proud. There was vigorous debate in the decided cases about the relevance of international human rights instruments to the interpretation of legislation and the exercise of administrative and judicial discretions. Human rights conventions were (and still are) increasingly forming the basis of modern social legislation. The principal of legality was (and is) growing in importance in addressing the issues of interpretation which arise when legislation impinges on fundamental human rights. The courts were (and are) working their way through these questions case-by-case in the incremental manner in which jurisprudence is developed in common law systems like our own. The Charter has done nothing to depress and everything to stimulate this ongoing process.

The recent decisions of the higher courts to which I have referred are to be seen as an important and welcome part of the development of Victoria's (and indeed Australia's) human rights jurisprudence. After many decisions of less authority which have contributed to the process, we now have two decisions of binding authority which clarify some essential questions, not least the constitutionality of the Charter (*Momcilovic*) and the limited role of tribunals under the current legislative provisions (*Sudi*). This is the judiciary at work in a functioning democracy. This is human rights being examined by the courts as law, which it is. This is the healthy growth of the body of that law.

The Parliament of Victoria has been engaged with human rights for several decades and since long before the Charter was enacted. Anti-discrimination, child protection and guardianship and administration legislation, for example, have given expression to important human rights values and protected important human rights interests. The enactment of the Charter built on this piecemeal approach to give Victoria a comprehensive human rights framework which represented even stronger engagement by the Parliament with human rights. The recently published review of

the Scrutiny of Acts and Regulations Committee of the Parliament continues that engagement, as does the Premier's response.

Everyone will have their own view about the review report and the recommendations which it made and even whether the review should have been carried out by a parliamentary committee. I have said what I wanted to say about the Charter in the submission which I made to the Committee and other published remarks and I will not here respond to the review report. I do however welcome the intensity of the focus by the Parliament on the issue of a human rights framework for Victoria.

Having made these general remarks about the developing jurisprudence and the parliamentary review, let me now turn to the question of the enforcement of human rights and particularly the human rights in the Charter.

As enacted, the Charter did not create a new cause of action for a breach of human rights (although it did give courts, at the least, some additional enforcement powers, which I shall later discuss). That was a deliberate decision. Human rights were seen to be in their infancy and it was thought the infant should learn to crawl before walking. Further, as *Sudi* has now held, under the design of the scheme as enacted, tribunals – most especially the Victorian Civil and Administrative Tribunal – cannot generally examine the lawfulness of acts or decisions involving a breach of human rights. The issue must arise in the particular exercise of the tribunal's jurisdiction in a way which makes it possible to say that legislation has given the tribunal that specific authority.

Restrictions of this nature raise important questions about giving effect to human rights. Such restrictions raise questions about which judicial institution (if any or all) should have responsibility for the enforcement and supervision of human rights. Under the existing framework of protections in the Charter, the answers given to these questions are not always consistent and, I would suggest, not always satisfactory. There is an ongoing discussion about how something better might be achieved. I would like to raise some issues for consideration in this context.

To some, that something better would be a system in which human rights are aspirational, not enforceable. Without derogating from the important symbolic and educative value of human rights, that is a view which I respect but cannot share. To

me, a human right is like any other legal right in that it should naturally come with an appropriate remedy vindicating the interests which are protected by the right. Certainly, human rights have a particular character which must be considered when specifying the nature of the remedy. But to say that human rights are purely aspirational surely undermines the principle that a human right is a legal right. The question is, what kind of remedy should be provided for the effective enforcement of this kind of right? The answer, in my view, is such enforcement as is necessary to make the human right effective.

A more complete answer to my question would examine the nature of human rights. There are different ways of doing that. One way is to examine who administers human rights in the first instance. Human rights systems everywhere, including in Victoria, are administered in the first instance by ordinary men and women working in public authorities. They should have appropriate training about their obligations in this regard, varying with the level of their responsibilities. Most of them are not and will not be lawyers. Thus the premise of human rights as a body of law is that ordinary people – those involved in the conduct of government administration generally – are perfectly capable of understanding and applying human rights.

It is worth pausing for a moment and asking what it is that people working in public authorities are taken to be capable of understanding and applying. From the plurality judgment of the High Court in *Momcilovic*, we know that the obligation of acting compatibly with human rights necessarily involves the concept of proportionality in s 7(2) of the Charter. Human rights are not absolute and may be limited, but a decision or the conduct of a public authority will be incompatible with human rights if it goes further than s 7(2) permits. Therefore, people working in public authorities are taken to be capable of understanding and applying the concept of proportionality which is an indispensable ingredient of our system of human rights protection.

What I have said is hardly a full examination of the nature of human rights. But it is enough, I think, to make a central point: there is nothing arcane or mysterious about human rights decision-making and ordinary people having appropriate training, decent intentions and common sense can carry it out very effectively. With that observation is mind, we can move to consider the role of tribunals or boards which review decisions or conduct impacting on human rights.

The Victorian Civil and Administrative Tribunal – a Victorian invention, much copied and now to be so (its seems) in South Australia and New South Wales – is a judicial institution of fundamental importance to the community. In making that statement, I need to declare that I was the president of the tribunal for two years from 2008-2010. I want to suggest that the tribunal possesses the institutional competence to engage in human rights adjudication because it does exactly that as a public authority directly bound by the Charter when exercising its administrative jurisdiction. Examples of that include *Kracke v Mental Health Review Board* (2009) 29 VAR 1 and *Patrick's Case* (at first instance) and tens-of-thousands of other cases annually. Within the scope of the particular jurisdiction, it may be a lawyer who carries out that adjudication, such as a lawyer who must constitute the tribunal in a freedom of information case, or a non-lawyer, such as a medical practitioner who might constitute the tribunal in a guardianship and administration case, or a combination of both, such as a lawyer and psychiatrist who might constitute the tribunal in a mental health case. In all cases in which the tribunal is obliged to act compatibly with human rights, the member or members concerned must discharge that obligation.

Yet, under the design of the present system, the Victorian Civil and Administrative Tribunal (and, necessarily, other tribunals and boards) does not have the jurisdiction to review an act or decision for human rights compliance unless that jurisdiction is specifically conferred. That is so even though, as a matter of general obligation, it must act compatibly with human rights in administrative cases. The tribunal's jurisdiction is thus asymmetrical – it must have a specific human rights jurisdiction to conduct such a review in the one kind of case, yet it has a general obligation to act compatibly with human rights in the other kind of case.

That, in my view, is a deficiency in the present system for protection of human rights. It would significantly enhance the scope of human rights protection for the Victorian community if tribunals and boards were to be generally required, by legislation, to take human rights consideration into account in all cases, as they are, for example, in the Australian Capital Territory, the United Kingdom and Canada.

On the other hand, some would argue that it should only be the courts (and specifically the Supreme Court) who should have that authority in certain kinds of cases. Others would dispute the tribunal's general competence to deal with human

rights issues. There would be those who would have human rights issues decided only by the judicial members or at least the legally qualified members of tribunals or boards. In this address I do not suggest there are no countervailing arguments and competing policy considerations to weigh in the balance. Rather I suggest that, in the great unfinished business which is the nature and scope of human rights enforcement under Victoria's human rights framework, the capacity of individuals to have all issues, including human rights issues, dealt with in the one forum, in the one proceeding and at the one time, should receive serious consideration by the legislature.

The Charter does contain one important enforcement mechanism which it is necessary to discuss. By s 39(1), where a person may seek relief or remedy on the ground that a public authority has acted or decided unlawfully, the person may seek that relief or remedy on the ground that the act or decision was unlawful under the Charter. Because the Charter makes unlawful acts or decisions which are incompatible with human rights (s 38(1)) unless a contrary law applies (s 38(2)), the additional ground of unlawfulness which is available is the ground that the act or decision is incompatible with human rights under the Charter.

Some criticisms have been made of the language of s 39(1) and the courts will need to consider the proper interpretation of the provision over time in cases in which the question arises. However, as Maxwell P said in *Sudi* (at [97]), as did I in *Patrick's Case* (at [299]), the provision at least allows relief in the nature of judicial review to be granted under the existing legal procedure on the ground that the act or decision of the public authority was incompatible with human rights. Further, I held in *Patrick's Case* (at [300]) that the provision applied to the relief and remedies which are available under statutory appeals processes (on grounds of error of law) in respect of decisions of the Victorian Civil and Administrative Tribunal and other tribunals and boards. In those processes, the provision allows the relief or remedies to be granted on the ground that the decision was unlawful for being incompatible with human rights, the process of appellate review being analogous to the process of judicial review.

Whatever may be said about the limitations in s 39(1) or the enforcement of human rights under the Charter generally, it is of signal importance to the protection of the

human rights of the community that the Supreme Court, under its existing jurisdiction, and by virtue of this provision, now possesses a 'conditional and supplementary' power, to use the words of Maxwell P in *Sudi* (at [96]), to carry out judicial review (and I would add appellate review) of the lawfulness of a decision on human rights grounds. As I said in *Patrick's Case* (at [297]), the protection of the human rights of the Victorian community have been enhanced to a significant degree by the enactment of this provision.

For those who would wish to understand the operation of s 39(1), I would refer to the analysis and the outcome in *Patrick's Case*. Under the provision as I applied it, Patrick was able to have the court examine the decision of the tribunal to appoint an administrator to sell his home from the point of view of the compatibility of that decision with his human rights under the Charter, especially the right to be free of unlawful and arbitrary interference with his home in s 13(a). The lawfulness of the decision from that point of view turned on the application of the proportionality standard in s 7(2), taking into account the respect which must be afforded the decision of the tribunal and the nature of the court's jurisdiction, which is judicial (or appellate) review and not merits review.

Now Patrick would not have been able to challenge the appointment of the administrator on that ground but for s 39(1). He would have had to establish *Wednesday* unreasonableness – that the decision to appoint the administrator was one that no reasonable tribunal could have made. That is a different and higher standard of review than incompatibility with human rights, one that is regarded in jurisdictions with whom we compare ourselves as being too high in human rights cases. I am by no means sure that Patrick would have been able to raise his case that high. That did not matter. The appeal which he brought on grounds of error of law was (among other things) on the ground of *Wednesday* unreasonableness. Under s 39(1), that was enough to enliven the human rights ground on which the case was decided (along with another ground). The significance of the decision in this respect was that, under s 39(1), the court was able to conduct judicial supervisory review of the proportionality of the decision of the tribunal to appoint the administrator to sell Patrick's home, which it would not have otherwise been able to do.

In conclusion, in this address I have discussed recent decisions of the higher courts of significance to the interpretation and operation of the Charter and the report of the Scrutiny of Acts and Regulations Committee of the Victorian Parliament. We see in these events the mature consideration of human rights at the judicial and the legislative level which is to be expected of our vibrant democracy. I have also made some observations about the present enforcement mechanisms in the Charter and emphasised the importance of s 39(1), as illustrated by my decision in *Patrick's Case.*