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"HUMAN RIGHTS LAW IN MEDICAL PRACTICE"

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DR STERN: I am going to talk about the Charter of Human Rights and Responsibilities that has been brought into Victoria and fairly brave legislation within the Australian legal landscape it is. The particular perspective from which I'll speak is that of the English Human Rights Act. I have practised very much in the field of human rights and healthcare for ten years, so, hopefully, some of that experience may be of assistance to those of you who will be either affected by, or seeking to apply the Charter.

Lord Frogner, the Lord Chancellor of England recently described the human rights legislation in England as "a ratchet reform", that is a reform from which it is impossible to turn back. I think that will be the experience here, so like it or not I think human rights are on the legal agenda here and that they will have a very real and significant effect.

If one were to try and characterise human rights in one way it would be that really it is all about transparency and not about litigation and that is something that one often doesn't hear from the lawyers. The greatest impact of human rights is on ensuring decision-making is utterly transparent and defensible. Probably the greatest shift for those of you who are practising in the medical or related professions is that it's no longer sufficient to simply do something because you think it's right, you have to be prepared to defend it and look at whether it interferes with a human right, and whether or not it's demonstrably justified. You have to articulate the reasoning process, and that. more than anything is what human rights jurisprudence is about and what its effect is.

Before turning to look at some observations based upon the UK experience, what I wanted to do is to try and explain that context is all important in human rights and one can never rely on anything as an absolute. It's an area which is rife with value judgments and that makes it an area which is quite unpredictable in many ways and that can possibly be illustrated by three examples: one from England and two from the European Court of Human Rights.

The case from England was a case called Rieff, and it was about separating a mother from her adult incapacitated child. Quite naturally, on behalf of the child, it was argued that that would be an interference with her right to respect for the family, a right which one will also find in the Charter. The Court said "No, this is nothing to do with the right to respect for a family because that is only a right to respect for all that is benign and positive about family life". Clearly one can never assume that the courts will respond as expected, and that rights will have the meaning that one might give them in ordinary parlance.

The second case is a case which has particular resonance for me as a mother of probably too many children, it is called “Nelson and Denmark” and in that case a mother had her twelve year child hospitalised in a locked psychiatric ward because he didn’t want to live with her anymore. He, quite naturally, brought a case before the European Court of Human Rights and said "This is detention, I'm locked up". The Court disagreed and they held that the hospitalisation of this child didn’t amount to a deprivation of liberty, it was simply a

responsible exercise by his mother of her custodial rights in his interest. Here again, we have a quite surprising case which actually has been argued to be of significant relevance in the psychiatric healthcare context.

The third case is a case about the right of a prisoner to access artificial insemination. It was a case of a person who while he is in prison, meets a woman and gets married. Realising that by the time he's released she'll be beyond child-bearing years he asks the state to provide artificial insemination because otherwise he will not be able to father a family. In a judgment of the European Court of Human Rights, (laden with value judgments), they held that whilst broadmindedness was at the heart of human rights, so also was the maintenance of public confidence in the prison system, which would be undermined were this application to succeed, given that the state had positive obligations to protect the moral and material welfare of children born following such treatment.

Clearly therefore, when looking at human rights, and trying to ascertain what impact it may have on any of us, we need to be aware of the impact, and risks, of value judgments. Probably the only universally applied dictum from the courts in England is that, in law, context is everything and that applies particularly in this area of the law.

Looking at the hurdles that come with bringing in human rights legislation, the first is the wholly new vocabulary that people have to get used to, rather than talking about "duty and breach" or "obligations". Human

rights are all about clearly identifying whether there is a relevant right, and whether there's an interference with that right. It is then necessary to move to discuss what is probably the fundamental concept in human rights, and that is the concept of proportionality. Recognising that this is a new vocabulary on the legal landscape, that will really be the first challenge one is going to see in the courts.

The second hurdle is that it is a wholly new process of mandatory transparency, and having to ask everyone always demonstrably to justify their own conduct, and that's something which is very unfamiliar in the current landscape,, but which is required by the Charter. The third huge hurdle is that the Charter actually permits, and probably requires in many senses, the courts to have regard to international jurisprudence, to look at what the courts have said elsewhere. For lawyers that means that you can't just stick with what you know, you have to find out a lot of what's "out there". That will draw particularly on New Zealand, Canada and the UK and will be very difficult in terms of ensuring predictability of the way the Australian courts, the Victorian courts, go. I want now to look a little at what the Charter does, just so that people can get a sense of what it is that they're all going to be bound by very soon. It benefits human beings. So, all human beings have rights and that's the difference from other jurisdictions. It describes the number of human rights which are to be protected and promoted and I want to look at them briefly and try to see where they might be relevant in healthcare context.

The first is the right to life, and the right not to be arbitrarily deprived of life. This has been argued to be relevant in a number of contexts, from cases at the beginning of life and access to infertility treatment et cetera, to a number of cases at the end of life, such as withdrawal of artificial nutrition and hydration. It was a right which was at the heart of a recent pretty heartrending case about conjoined twins, where surgery to separate the twins would inevitably deprive one of life, whilst creating the only chance of survival for the other. Such examples show you that when you're looking at the right to life there are inevitably going to be very real conflicts, in that case between two rights to life. In the event the Court held that there was no infringement in taking a step which would inevitably lead to the death of one of the twins because, in the circumstances, there was a fair balance between the competing interests. This is a good example of just how real and agonising the choices can be in this area.

The second area which one might have, at first blush, thought wouldn't be relevant to medical care is the prohibition on cruel, inhuman and degrading treatment that one sees referred to on numerous occasions in the healthcare context. Some of the leading cases are about individuals being restrained in the context of having mental health treatment. There are a lot of cases about human rights in the prison context, and one sees a lot of litigation about whether or not a particular treatment, particularly without consent, could be cruel, inhuman or degrading treatment.

One of the cases that I was involved with involved

the issue of secluding psychiatric patients. It was an absolutely agonising case of somebody was behaving very dangerously, brought into a standard general hospital that had a psychiatric ward. It immediately became apparent that he was too dangerous to stay there but nowhere else would take him, despite extensive efforts to find a secure psychiatric ward. In the meantime, the doctors involved discovered that he had a history of sexual assault, and he started walking up to the female end of the ward and telling various vulnerable patients that he was going to have sex with them.

The doctors, clearly concerned by this situation, utterly desperate, did the only thing that they thought they could do, which was to put him into a "seclusion room" and lock him up. They had thought could they lock the ward, but were concerned about the rights of the other patients who wouldn't ordinarily be on a locked ward. They were also concerned that he had already assaulted three members of staff and locking him in with a whole lot of other vulnerable psychiatric patients didn't seem like the best idea.

Ultimately, he successfully succeeded in establishing that what they had done had been a breach of his right to privacy, because they hadn't made sure that right throughout the period of seclusion they were ensuring that it was still objectively justified. He also argued that it was an inhuman and degrading treatment to lock him up in a room with absolutely nothing for ten days. The court said that it was justified by a form of medical necessity, but there were great difficulties with that, and it was a fairly close

run thing in arguing it in court.

The other aspect to consider is the implication of a right which is specifically protected in Victoria but not elsewhere, such as the right not to be subject to medical or scientific experimentation or treatment without full, free, and informed consent. The potential scope of that for medical practice is utterly enormous- since that would probably cover the mentally incapacitated, people who were temporarily incapacitated and people within the mental health context and possibly the public health context who are treated without their consent for a notion of the greater good.

In every single case the courts are entitled to look at, and to ask, whether the justification has been demonstrably achieved. That was a right, that was looked at by the English courts in the context of ECT treatment given to a psychiatric patient, in which the Court concluded that it was not enough for the doctors to come and say "We believe it's in his best interest. We think what we've done is justified". The Court determined that it had to decide for itself.

that again is a wholly new shift in terms of the legal approach to doctors, because in the classic area of clinical negligence the Court is very deferential to what the medical experts say. But here we can see the Court saying "It's not enough to listen to what the doctors say, we're going to decide it for ourselves". It seems to me that that this is likely to have a huge potential impact, and even if not on litigation, it will in terms of transparency, because every time somebody is being treated without consent there will be the need to show

that it's justified, and there will need to be explicit guidance ensuring that that such a decision-making process can withstand scrutiny.

The other right which was recently described by an English judge as the least defined and most unruly of human rights is the right not to have your privacy unlawfully or arbitrarily interfered with. Although this appears to be all about confidential information and not bugging people, this is not so. Man's physical and mental integrity has been held to be part of the right to privacy. So, for example, depriving someone of medical treatment or refusing access to psychiatric treatment, can amount to an interference with someone's right to privacy, and, again, it has to be justified. Clearly this also is something which is capable of having a fairly broad impact.

The right for families to be protected by society in the state, and the right of every child to such protection as is in his/her best interest becomes a question for the courts, that now can decide whether, to their satisfaction something that may have been the subject of advice from a treating doctor is actually in his/her best interest.

The final right which has enormous impact, particularly in the area of psychiatric treatment, is the right to liberty and security, and not to be deprived of such liberty except in accordance with procedures prescribed by law. In the English legal landscape, probably about 60 per cent of the cases which come under a search for human rights and healthcare, involve mental health, and so it's really in that area, where there

actually is very real deprivation taking place, that that right will have an impact.

The way the Charter works is that first of all the right has to be ascertained, and whether it is interfered with, and then the Charter requires that the right be demonstrably justified and the it sets out some of the relevant factors. Probably the most significant, looking at the issues of healthcare, is to be sure that any less restrictive means reasonably available are not being used. So, the issue there is that whether or not you can show that the limitation that you have had to put in effect is the least restrictive means available. That's something which may in many cases be very difficult to justify and, in particular, it's just not in the framework when one is looking at making healthcare decisions in many instances.

One of the critical issues from the point of view of the medical profession and healthcare generally is that the Charter actually only applies insofar as it says things are unlawful to public authorities. And so there will be issues as to whether or not doctors, hospitals, regulators are public authorities so as to be bound by the Charter.

One of the very real issues that has arisen in the UK is whether or not public bodies such as the National Health Service, health authorities et cetera can in fact farm things out to private providers and thereby avoid the impact of human rights legislation. There is case law in the United Kingdom looking at, for example, private care homes. There was a case I was involved in which was looking at whether psychiatrists could be considered as

"public authorities" in order to provide healthcare, to prevent interference with that individual's human rights, and make them personally liable. Whilst I think it's highly unlikely that any individual doctors would be found to be public authorities, I do think that public hospitals are likely to be found to be public authorities, and regulators of doctors are highly likely to be found to be public authorities, and one can't actually say for certain that doctors or private clinics wouldn't be public authorities when they're exercising some form of public functions in providing public healthcare.

The ways in which human rights are protected by the charter are really threefold. One is that there is the scope for declarations of incompatibility if legislation is incompatible with human rights; individual public authorities will be acting unlawfully if they act incompatibly with human rights, and legislation has to be interpreted in a way that is consistent with human rights.

And with that in mind I thought I'd share just a number of observations from the UK experience. The first is that there is a great deal of mythology surrounding human rights and in this area you really don't want to believe too much of what you read in the newspapers. One of the things that became real problem in the United Kingdom is that a lot of people became very resistant to the notion of human rights because they were reading things in the paper which seemed to them to be utterly absurd, and they were utterly absurd. Probably one of the most frequently cited examples related to a

particularly nasty serial killer called Dennis Nilsen, who took a case to court arguing that it was a breach of his human rights not to be provided with homosexual pornographic material while he was in prison, because lots of heterosexual pornographic material was regularly circulating around the prison. Utterly absurd, kicked out of court immediately, but reported in the paper as if it had been a successful case, and that really shows how difficult it is to see that there is any reliable information being provided to the general public about human rights.

There was a second issue about mythology of human rights, and that is that recently there has been a report published in England to say that actually those who are applying human rights legislation in many cases get it wrong because they're terrified of litigation. That was a case about the release – actually by the parole board - of somebody who had been imprisoned and was known to be dangerous and 'lo and behold, eight months after release he killed someone.

There was a public inquiry commissioned into that case, and the public inquiry concluded that in fact the parole board there had been blinded by the notion of individual rights. So clearly, the mythology can work both ways and the government in the UK has recently embarked on a major education program to try and make sure that everybody knows that society as a whole has the right to protection, and it's not just individual rights that deserve focus.

The second thing to note really when making general observations is that usually human rights arguments

actually fit hand in hand with conventional legal argument, and those who are at all concerned or interested in medical negligence may be interested to know that at the moment there's a case going through the English courts where it is being argued that because of the "right to life", in any case where a patient dies a wholly new legal test should be adopted, and the doctors should bear the burden of proving that they haven't interfered with the right, rather than it being the other way round. So far that has been given pretty short shrift in the High Court but it's going to the Court of Appeal and it does raise the fairly difficult issue of how you actually knit together conventional legal principles and human rights. I think really in almost every instance the Courts have swung back to the conventional legal principles, and been very reluctant actually to modify what the common law has done over hundreds of years by reference to the Human Rights Act but it is an area to watch.

The third thing to note is that quite often there are procedural aspects to human rights and that that may well be the most important. When one is, for example, dealing with someone's information it's not just that you can't actually use it in a way that interferes with human rights, it's that that person probably has a right be heard about how you use that information, and in some of the cases I've looked at in this context I think that will have a very real impact in Victoria. The English courts have recently said that it was a breach of privacy to have released information to a court without giving the patient the right to have their say. Even though it

might not ultimately have been disproportionate in human rights terms, the fact that the individual wasn't given a chance to object amounted to a breach.

Equally, in a case concerning the care of a disabled child, the Court- this was actually the European court - held that it was a breach of the right to privacy to have treated the child against the known refusal of the parent, without taking it to court to allow her views to be properly heard. And that again is a highly surprising way that the European court has interpreted privacy and ensuring that people are involved in decision-making processes.

The final thing is to encourage you to look at the issue of human rights legislation in context and to try and see what kind of real impact is it likely to have. Using a pretty basic tool of one of the UK legal research engines, I did a search on human rights and healthcare and I came up with 457 results. I did a search around the whole of Australia using the same terms and I got nothing. So, clearly, there's likely to be a difference. But, equally, again in the report recently published in England, it has shown that actually human rights have made a demonstrable difference in relatively few cases. Whilst they've been referred to in 457 cases, there are probably only ten or 15 in which they've had an appreciable impact on the result. So, the actual impact of human rights is likely to be less although the talk about human rights is certainly going to be more that one has seen to date in Victoria.

Before moving to look at any case studies, the other thing to note is that it's not just patients who might

seek to rely upon human rights legislation. A great proportion of the work I did in England was actually on behalf of doctors trying to rely on human rights legislation either against their regulators, or against the equivalent of the medical board here. There's a great deal of case law in England about doctors potentially having a privacy right to practise their profession. They have got the right to have anything that's been determined in a way regarded as unfairly. For example there's been quite a lot of litigation when doctors want to provide a particular treatment but a regulator won't permit that.

For example, in the infertility sphere in England there's been a great deal of regulation through a government-appointed regulator, and this body found itself succumbing to human rights arguments time and time again, to allow doctors greater freedom to do what they want to in circumstances where the interference by the regulator can't be demonstrably justified. So, one shouldn't always look at it as something which is going to be terribly "us and them". There's quite a significant scope for doctors to rely on human rights as well.

I was involved in a case of Natalie Evans which some of you might have seen in the newspapers. This was a case about "British woman loses right to use ex-fiance's embryos". I want to discuss it, not because the case is likely to have any direct significance here, and similar arguments probably couldn't be raised, but I thought it might be useful to have a look at an example to see how these arguments are raised in court and what the court

does with them.

It was a pretty tragic case where a woman who was then aged 30 was advised that she had serious pre-cancerous tumours in both of her ovaries and that she should have her ovaries removed. She didn't have any children and she was advised therefore that same day to go and talk to the infertility clinic which was associated with the hospital. That's she did, together with her partner who was then aged 24, and the same day they received counselling for about an hour and they received information and they signed the necessary consent forms to undergo treatment to create embryos that could be stored.

The consent forms say "signed provided that the continued storage and use of the embryos would need to be reviewed in the event that they split up" and both of them gave consent that the embryos could be used in the treatment of them together. She said in court, and everybody accepted, that on that day she felt pretty much numb with shock but she didn't try to suggest that the consent forms were in any way undermined by reason of that.

But on that day, while she was numb with shock, she asked about the possibility of egg freezing because they'd only been together a couple of months and she was alive to the possibility that they might break up and what would she do then. In response to that (and in a quite amazing display of evidence in court, her partner said that he was anxious to reassure her because he thought she'd break up with him if he said no) he said "Don't be negative, I'll never leave you, you don't need

to worry about egg freezing or anything like that". They duly went ahead; she had both of her ovaries removed; they had the embryos stored and there were six embryos that had been in storage for a couple of years.

Unfortunately, as she feared, they did break up and, again, this is a great lesson in terms of litigation. It's all how you handle it. After they broke up he wrote to the storage authority and said "Right, you can destroy these now, we've broken up, don't worry about…..", and he didn't tell her he was going to do that. She then heard about it because the storage facility rang her up and said "He's told us to destroy them, what do you think about that?" She said "I'm not very happy about that" but, rather than going to speak to him about that she went to the newspapers, and the front page had a huge display about this poor woman being denied the right to found a family by this nasty 25 or 26 year old ex-partner. This was the first he heard of the fact that there was any real dispute. Understandably thereafter, he took a fairly defensive position about it all and, unfortunately, the dispute ended up in court. It was subject to the most astounding amount of publicity even to the extent that there was a reality TV show that followed the whole case which led to us all feeling fairly heavily scrutinised throughout the litigation.

The case was also heard together with the case of another woman who had a much less sympathy-inspiring situation so it was really Natalie Evans who was stealing the front page over all of this. What she argued was that it was a breach of her right to privacy and respect for family life and a breach of the right to found a

family, (which is actually in Victoria a right which has specifically not been included in the Charter). When one looked at it, any rational balance would favour her right over his because while she accepted that he had a privacy interest as well in avoiding having a child when he didn't want to, she said "For me, this is my only chance" and she had pretty compelling facts behind her.

The Court, however, rejected the argument. It has gone right through the whole stream of courts. To the High Court, Court of Appeal and then through two tiers of court in Europe, which is pretty unusual and shows how seriously all of the courts were taking this. But what is quite significant is there was a blanket prohibition in the legislation that said you can never use embryos unless both parties consent. She argued, on pretty good ground in terms of how courts generally approach human rights, that that was disproportionate because it precluded anyone taking account of her own individual case and, in fact, four dissenting judges in Europe said that she was right about that. But the Court said no, they were prepared to accept a blanket prohibition. And I think in a lot of the Victorian legislation I've looked at in this area there's also blanket prohibition. The court was prepared to accept it in that case because they felt that even though they would scrutinise it much more carefully than anything else it was objectively justified. But they also had regard to the fact that a number of other countries had similar prohibitions and that you couldn't see any consensus against that. Really the first lesson to learn from this is that when you're looking at these things it's quite useful to look at

what's going on elsewhere and seeing how your own legislation or regulations fit with that.

The second significant factor for the Court in deciding that it was justified was the fact that in fact the legislation came in after a very very extensive period of consultation, and courts have drawn a great deal of distinction between whether there's been public consultation or not. When you see guidance against which there hasn't been that form of consultation the courts are much more willing to strike that down as being disproportionate. In this case they said "Look at all that consultation. Look at what everyone said. This is what the UK Government decided to do, so that's all right in those cases".

The third reason was that it was just something relating to social policy and the courts were more willing to defer to what an individual regulator would do in the area of social policy than elsewhere. Natalie Evans in fact lost her case in the end and I think it's probably significant to look at that and try and see what kind of lessons one could learn for the Victorian experience. I think the main lesson is that one doesn't want to be too reactionary and worried about the impact the Human Rights Charter will have, and that when you see regulations and decisions you don't necessarily assume that this is something that the courts will interfere with simply because there are conflicts of rights. Conflicts of rights will always occur and the courts are very willing to defer and to look at what decisions makers say, provided they can justify that.

And the second thing to learn is that it it's always

going to be important to make sure that you have taken account of competing rights. And that was one of the most real discussions in that case at all levels, was that it wasn't something that had just happened without people thinking about the male's right, they had openly taken that into account and reached an appropriate balance.

So, I think when one looks at the case law there's a great deal to be learned from what's happened in the UK. It's important to realise that it is new and it is going to affect everyone and one has to become accustomed to that vocabulary and accustomed to defending and looking at all of the interests involved in healthcare decisions. In the end, it's probably only going to be possible to know in five or ten years' time how it is going to affect everyone in Victoria and I've been speaking in the last few days to some of the leading people implementing the human rights legislation in Victoria and in many areas it is simply impossible to predict.

But I have to advise you, you really are not going to find any simple answers just by looking at the Act or by asking people who are involved in it. There are no answers to the questions like: "What is it? What am I allowed to do? What am I not allowed to do?" The real lesson from the Human Rights Act is in the process and what everyone has to do is just make sure that they look at it, document it and ensure that they can demonstrably justify what they're doing when it can be in the sphere of human rights.

MR GARD: Greg Gard, barrister. My question relates to the interface between the law of negligence and the law of

privacy. Many doctors present will be very interested in the law of negligence as, indeed, we all are. Could a breach of privacy be viewed as negligent? In other words, let's assume that an institution or a doctor acts in contravention of privacy requirements, is there any learning from the English courts as to whether that is negligence and, if so, what are the wider ramifications in terms of professional relationships?

DR STERN: In terms of privacy and medical negligence in the early days there was a great deal of fervour for arguing that you had to do away with the sort of affront on the test for medical negligence because it also interfered with people's privacy if they were the victim of medical mishaps and the courts gave that pretty short shrift and they said that the balance has been drawn by the law as to negligence.

In terms of actual privacy and looking at information, it would be pretty unlikely that a court would say there has been an unlawful interference with that person's human right but that was consistent with reasonable medical practice. So, if in fact you did have something which was shown, once you'd gone through all the hurdles: is there a right; is it interfered with; is it proportionate or can it be demonstrably justified? If you've got through all that and the Court said no, there's something which this Charter tells us is unlawful, it seems to me unlikely that a Court would say "But, hey, you know, lots of other doctors are doing it so don't worry about it".

But the way the Charter actually works is there's no right to any damages claim for breach of a Charter right

and there's this slightly Delphic section 39 in the Charter which says you can only rely on unlawfulness under the Charter if you could have brought that cause of action relying on unlawfulness anyway. So, whether or not you can rely upon that is another question and how a Court would say - I mean in quite a few cases what the courts have said in the UK "you're really talking about human rights, don't dress it up as a negligence claim here". So the courts may be reluctant to allow what would effectively be a damages claim for a breach of a human right by calling it medical negligence. So, I think that probably actually completely doesn't answer your question but at least shows the complexities.

DR TOVEY: My name is Jane Tovey and I'm a psychiatrist and I have to say most of what you said seemed quite alarming to me. For psychiatrists it's been a mine field forever - I've got two questions: certification of a dangerously ill patient who's at risk, is that going to become more cumbersome for us? And the second thing is, sometimes it's much easier and kinder and more useful to say to someone sort of quietly "Look, if you try and leave I may have to certify you", which means they stay with me, it's a better place to stay, they'll get better treatment, I know them but in a way that's not very good for their human rights, is it? Is that a hard question?

DR STERN: There are two questions. One is in relation to certification and if they are going to borrow from the European case law, there are very similar certification processes been upheld as being definitely lawful and proportionate. So, I think the certification process itself won't be anything that will become any more

complex. In relation to what you put so nice and kindly of saying to someone "You're better to stay with me because otherwise you might be certified". There have been cases that have looked at it expressed by those less kind than you that say "If you try to leave I'll just certify you so you'd better stay where you are" and that's been looked at in Europe and they've held that that can amount to detention.

The problem with that is on one hand it's all been very benign and - but where there was detention effected in that way, the difficulty is it doesn't get attached - surrounded by all the safeguards of the mental health legislation, and so there are then questions raised as to whether that's in accordance with law which is one of the requirements.

The sort of situation, when it's not all benign and non-threatening, can give rise to issues under the Human Rights Act, that it's actually the more procedural, where they say "If you're going to do it you'll have to comply with all the legal safeguards". I think the area where in psychiatry there has been been more direct impact of the Human Rights Act is actually in relation to individual treatment decisions. For example, seclusion has had a pretty fair whack from the Human Rights Act: providing treatment without contest, things like ECT, have been looked at fairly closely.

The other real issue, and I don't know whether the same issue would arise here, but there have been quite interesting cases about releasing people from detention because there are instances where you go to the Tribunal and they say "Yes, this person's safe enough to go out"

and all the doctors say "Hey, no, I'm not going to treat them in the community, too dangerous for me" and that's an area where there are real difficulties because, in effect, you're not enabling people to be released.

MS Dr LOFF: Bibi Loff and it's been a long time since I was a lawyer. I work in a university now but in a medical faculty. We all know that courts are a very bad place to make public policy and that we would hope that the public authorities become active in taking up the human rights that are espoused in the Charter and I'm just wondering if, within your experience in the UK, you were able to identify any noticeable change in the way public policies might have been implemented that reflected the obligations in the Charter.

DR STERN: Yes. The experience in the UK is that litigation has achieved very little, and some would say that's the experience worldwide. However actually human rights have had a huge impact on the formation of public policy and that's why I said at the outset it's about transparency, - and I know at the moment there's a massive audit going on to ensure that all legislation is Human Rights Act compliant - Charter compliant - but also that all the guidance and processes that the public authorities undergo are also compliant, and in that process what you tend to find it that new guidance comes out and it says "You must first look for a right. You must then look at whether it's interfered with and you must be able to show that it's justified in the interests of X, Y and Z". So, I think actually in that area you do see huge impact without looking at courts at all. The function of the

courts is that it can scare people very easily. You only need one case over-publicised by the press, then you do get a lot of people reacting and saying "We had better take that guidance more seriously". But it is much more in the area of policy formation that the Human Rights Act in England had an impact, so I think that's entirely right what you said.

MR Moloney I look around the room tonight and see many faces and it is a matter of record that some of you here in your own professional capacity have directly experienced the work of a form of human rights in legislation before the advent of this Charter. Some of you I know will say that the Charter is a development that is not before time and will embrace it enthusiastically. Some of you will be more cautious and say "Where is this going to take us?" and be concerned about that. Some of you may think or may even say that it is a lawyer or a politician's misguided device which has seen the triumph of rights in a world that has gone rights mad. Janet Albrechtson would perhaps fall into that camp when she said in a recent article on 18 April 2007 "Beware, chartered waters can have murky depths". The Australian has been a vocal critic for some time of this development in the law.

Now, we as lawyers and as doctors have at least one thing in common. Indeed, we have many but what we do have in common is that we play the hand that is dealt to us. A doctor does his/her best to cure or ameliorate the condition of the patient. The lawyer defends or advocates the cause of his/her client. These obligations are the very foundation of our collective duties. Now the Charter is here in this Victorian jurisdiction. It

forms and will form the law of Victoria. In this way we have started to make a reconnection with the rest of the world. That is plainly apparent from that which has been ably delivered tonight. The Americans have enshrined constitutional rights and so do the Canadians. The British have statutory human rights, so do the New Zealander, so do the South Africans, Afghanistan has India has, the list goes on.

Rights laws already exist to a certain extent in this country. We have laws which protect against discrimination, against people on the grounds of religion, colour, race, sex and marital status. These legal developments have become and probably always were unobjectionable, at least in the time in the generation that they were passed.

The establishment of Bills of Rights and the enshrining of human rights in law is a developing process which has existed for over 400 years from the time of King James I and Sir Edward Cook. The abolishen of the Star Chamber in 1641 was of monumental significance as was the 1689 UK Bill of Rights. The 19th Century saw the enshrinement of rights in the American constitution and the French declaration of the rights of man. Pardon the omission, but that was its title.

The 20th Century saw the creation of the universal declaration of human rights, the international covenant of civil and political rights in 1966 and the European convention of human rights in 1953. So, by the end of last century certain individual nations commenced or continued to engage in this development. It is hardly surprising that this country would eventually participate

in this development of the law. As Kristina has said, the ACT for goodness sake were the first to do it here in 2004.

One point to remember is that no alleged human right, as has been said tonight, is absolute and the context is always critical. The instrument (the Charter) directs itself to public authorities, the regulation of action of persons that are an emanation of the state. It, therefore, goes to the core of the structure of our society.

End.