Friday 10th June 2011

Attention: Chairperson
Scrutiny of Acts and Regulations Committee, State of Victoria

CC: Attorney General, State of Victoria
    Shadow Attorney General, State of Victoria
    M.L.A. for Oakleigh (Constituency Mail)
    M.L.C.'s for Southern Metropolitan (Constituency Mail)

Re: Enquiry into the Charter of Human Rights and Responsibilities Act 2006

Dear Mesdames et Messieurs,

I write in support of retention and also minor amendments to the Charter of Human Rights and Responsibilities Act 2006.

I ask that this individual submission to this issue be considered by the members of parliament on the Committee.

Yours Sincerely,

[Signature]

Andrew Oliver (copy with signature to follow by post.)
1.0 Introduction

I write from a standpoint not of human rights international law, but more from my intellectual understanding of this issue in political theory.

Bernard Crick has argued that socialists are motivated by outcomes and vision about equality, liberals and left liberals are motivated by rights, and conservatives are motivated by values and traditions. i

Morroe Berger reviewing the history of the United States legal system 1868 to 1968 has argued that litigation inherently offers neither help nor hindrance to the disadvantaged, but that equality by statute enables a path forward for the poor and disadvantaged there. ii It depends whether the judges side with the prejudiced and disadvantaged or not. In Morroe Berger's opinion, the United States Supreme Court in 1937 began to undermine the caste order with its decisions.

I do not think litigation alone will establish a socialist Utopia, and think that it offers nothing to the poor and ordinary people who lack the resources energy and time to litigate their rights.

2.0 Additional Rights: (1) (i)

May I suggest that for economic and social rights that free economic and social action may do more to actually cause the trickle down of the prosperity of our society to the poor and ordinary people than litigation or government action?

For example the Parliament could add rights:-

"the right of free workers to strike for higher wages"

and:-

"the right of business to retrench or lockout workers who do not generate business revenue"

but I recognise that these matters have been referred to the federal parliament, and that such provisions might be considered inappropriate for emergency workers during natural disasters ...

I think the best course of action in the current situation is to retain the Charter with some minor amendments.

3.0 Public Service and Public Authorities Compliance: (1) (ii)

I think no legislative action is indicated here.

In terms of Parkinson's Law iii regarding the situational logic of empire building bureaucrats, I know that argument in the press is made about the costs of the Charter in terms of public service salaries and office supplies etc etc but that is a separate issue, of the government imposing its management will on the public service that there be effective and efficient government with resources targeted on the real social priorities of the government with as little waste as possible.

4.0 Drafting of Statutory Provisions: (2) (i)

I support high standards of grammar and correct clear terse concise legislative drafting. Part of the Scrutiny of Acts and Regulations remit is of quality control of the legislative process, not just for these considerations but also of human rights considerations.

One questions whether the Committee should be split in order that both types of quality control receive the time and consideration each deserves ...

Badly drafted provisions impact on human rights frequently, and the reluctance of Parliament to when absolutely necessary enact retrospective legislation - also problematic - means that there is often no remedy.
5.0 Consideration of Statutory Provisions by Parliament: (2) (ii)

I believe in Parliamentary Sovereignty, in the rights of parliaments to be clothed with powers to address social questions, and that in general Parliament's statutes should take precedence over the Courts' declarations.

I see the Charter as a mission statement by the Parliament, a sort of commitment by the parliament to the people to do the right thing. It outlines human rights standards to be considered by the Parliament in its deliberations. The necessary check and balance is that when Parliament does not do so, the Courts can provide feedback to the Parliament to that effect.

6.0 Effectiveness of the Charter in Bettering the Public Service and Public Authorities: (2) (iii)

Apart from what the press says about public service numbers and expenditures, matters for the Executive to deal with in ensuring effective and efficient government, may I say that in my opinion the educational functions encompassed by the Charter should be able to be carried out by only a total of a few dozen public servants. Sufficient numbers to write and publicise the human rights proclaimed by the Charter and engage the general public in debate about human rights and community values. Persuading the general public and public servants to uphold human rights in their dealings with one another is difficult, but throwing money at this problem and producing loads of advertisements and unread booklets and unread websites does not necessary help. Better targeting of educational publicity on human rights real problems faced in the real world is needed.

7.0 Litigation: (2) (iv)

Better judicial education, and better judicial selection, are needed.

I do not think that litigation is a panacea. Further to what I said in my introduction to this submission, may I say that not only does it offer nothing to the poor and ordinary people who lack the resources energy and time to litigate their rights, it may actually make economic inequality worse.

Consider those on the unemployment scrapheap. I believe that ruthless discrimination in business and commerce is routine whenever they think they can get away with it. Ask any person over forty about age discrimination in employment, for which there is often no effective remedy. Consider employment law, the principle of fairness and the right to non-discriminatory treatment without proper grounds.

Sometimes the real issue in a lawsuit is the precedence and conceded exemptions of conflicting rights.

Sometimes a real issue needs to be addressed and sorted out by statutory provision by the Parliament.

Values education and human rights education may, for some social questions, be a better approach than litigation.

Values education and human rights education need to be addressed in the education system, in judicial education and in appropriate material for the general public.

And take political and social clubs. I do not think anyone since the outlawing of the Hitler youth in 1945 has argued that the government and its local leadership should choose people's friends for them. And as it has been argued, some political jobs require appropriate political commitments. And some social clubs exist for the benefit of particular social groups. Maybe more legislative guidance by the Parliament is needed rather than the precedent of old cases in discrimination law where the principle of hardship is applied rather inconsistently.
8.0 The Conflicting Rights of Religious Freedom and Other Human Rights

I think a distinction need to be made between religious faith and belief and thought and conscience on the one hand and lawful religious practice on the other.

I think that forced and arranged marriages should be unlawful.

However, I do not think that sincere religious adherents should be fined or jailed for refusing to participate in abortions.

Much of the debate about religious freedom centres on schools and hospitals.

Let us consider the example of devout regular church going Catholics who are dying of cancer. What they may want is to go to a Catholic hospital with Catholic staff, with cooks who prepare meals according to the covenants of their faith - fish on Fridays, for example - nurses and doctors who offer religious solace whenever they are attended to in person, etc etc. However this raises another question: if 10% of the population are regular churchgoers and 5% of these are Catholics why are so many hospitals funded by the state run by the Catholic Church?

For the sake of argument, and I do not have any recent Victorian figures, let us assume that:

- 10% of the populations are atheists and agnostics;
- 10% of the population are regular churchgoers;
- 70% of the population are nominal Christians who only go to church for weddings and funerals and baptisms and maybe a few Christmas services;
- 10% of the population hold other faiths;

as a rough breakdown of the truth about the matter what does one do about the fact that so much more money is spent on church hospitals and church schools than seems warranted?

I believe that many parents send their children to nominally church schools because the public secular system is so dumbed down and because some public schools - for example some in the northern and western suburbs of Melbourne - are noted to be sub-standard, not because the parents are regular churchgoers.

I think the cant and insincerity of both parents and the government needs to be contested. And something should be done to raise the standard of such sub-standard schooling.

As to lawful parental rights regarding their children’s upbringing, I would note that politics and religion relate to outcomes about which many people totally disagree.

Some of these matters have to be resolved by the Parliament, which should provide more statutory guidance to the Courts and the Human Rights and Equal Opportunities Commission.

9.0 Remedies: (2) (v)

I think the current model of the Parliament being at the apex of the law is the right one. Putting the Courts at the apex would lead in my opinion to the wrong outcome, inter alia for reasons detailed elsewhere in this submission.

It should be made clear that even if a Court finds some right non justiciable in some lawsuit for specific reason, each party should have an express right to petition parliament together with those who agree with them to get legislative amendments or new statutes enacted as the remedy. The Parliament should deliberate and offer such petitions due consideration.

10.0 Overall Costs and Benefits of the Charter: (3)

The Charter does benefit Victoria through its impact on the legislative process.
11.0 Options for Reform or Improvement of the Charter's Human Rights and Responsibilities Regime: (4)

I think the Charter is best retained with minor amendments. I think some of it looks like it is poorly drafted by the standards of traditional grammar, say *The King's English* by Fowler and Fowler. \(^{iv}\)

Some suggestions for reform and improvement are the Appendix I below.

12.0 Conclusion

I ask that the committee consider the above in its deliberations.

13.0 Appendix I: Suggested Amendments to the Charter

I am no lawyer and have not studied law, but for a start ...

Section 6 (1) should start: "All natural persons ..."

To section 19 should be added:

"(3) Nevertheless this Act declares and enacts English to be the standard language of commerce in Victoria"

Section 20 should end: "the law."

Section 32 (1) should be deleted and replaced with the words:

"(1) So far as it is possible to do so consistently with their purpose, all statutory provisions shall be interpreted in such manner as is compatible with these enumerated human rights as set forth in sections 9 to 27."

Section 39 should be amended by adding at the end:

"(5) Whenever a breach of this Charter be found by any court or tribunal and there be no other relief or remedy the parties to the action shall have the right to petition parliament for legislative amendment or a legislative enactment of a new statute, said petition to be given due consideration by the parliament."

Section 44 should be repealed.

Section 48 should be amended by inserting (1) before its current text and adding:

"(2) In particular in any legal proceedings in relations to damages relating to any lawsuit relating to industrial or transport accidents involving a pregnant woman and the loss of life of any unborn foetus shall be interpreted by the Courts pursuant to section 39 as if the woman were not pregnant if it is adjudged that the unborn foetus's brain were not then electrically active, and as if the woman had lost an unborn child if it is adjudged that the unborn foetus's brain were electrically active, as the case may be.

(3) In particular in any legal proceedings in relation to any loss of life of any natural person pursuant to sections 39 and 9 the court shall deem that if a person were or be adjudged permanently brain dead as the circumstances of the case presented demand then the said person be also judged not to have the protection of this Charter and not being alive."

14.0 Endnotes

\(^{i}\) *In Defence of Politics*, Bernard Crick, 4\(^{th}\) Ed Penguin 1993.


\(^{iii}\) *Parkinson's Law* C. Northcote Parkinson, John Murray London 1958.