Submission to the
Scrutiny of Acts and Regulations Committee

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Executive summary

The Australian Christian Lobby welcomes the opportunity to comment on this review of the Charter of Human Rights.

ACL made a submission in 2006 to the original Committee on a Charter of Human Rights & Responsibilities. ACL also made a submission in 2009 to the National Human Rights Consultation. At those times ACL opposed a charter or a bill of rights.

Some reasons for that opposition included:

- The Charter of Rights interferes with democratic policy making
- The Charter puts courts in a position of being able to exert influence on Parliament
- The Charter potentially undermines parliamentary sovereignty
- The Charter blurs the separation of powers
- The Charter creates political and administrative uncertainty
- The Charter does not of itself protect against the abuse of state power or protect the interests of the vulnerable
- The Charter is vague and abstract
- The Charter can too easily be used by unrepresentative activists to win contestable “rights” that could not otherwise be achieved through democratic processes
- The Charter potentially undermines important freedoms

As well as these concerns about the dangers of a charter of rights, ACL submitted that Australia, as one of the freest countries in the world, has an enviable human rights record and a charter is simply not needed. Rights are protected adequately through the legislative and judicial processes already in place.

ACL’s concerns remain the same, and in some cases the practical effects of the Victorian Charter of Human Rights and Responsibilities Act have vindicated those concerns.

In this submission we reiterate our key concerns and outline some of the problems the Charter has presented.

Human rights are adequately protected in Australia without charters

Australia has ratified various international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), 1 the International Covenant on Economic, Social and Cultural Rights, 2 and the Universal Declaration of Human Rights. 3 Australia’s Constitution explicitly guarantees certain rights, 4 while state and federal legislation protect other rights. 5 The Australian Human Rights Commission is a statutory body responsible for investigating human rights breaches.

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1 International Covenant on Civil and Political Rights, http://www2.ohchr.org/english/law/ccpr.htm
4 The Constitution, ss 41 (right to vote), 51(xxii) (protection against acquisition of property on unjust terms), 80 (right to trial by jury), 116 (freedom of religion), and 117 (protection against discrimination based on state of residency).
These methods of rights protection were all in place before the Victorian Charter came into effect. The common law also protects rights and freedoms such as the right to privacy and political communication. To the extent that human rights breaches do occur in Victoria or Australia, this is due to the failing of those methods, and not the absence of human rights instruments. The Victorian Charter has been unnecessary and ineffective.

**The Charter puts courts in a position of being able to exert undue influence on Parliament**

The Victorian Charter does not give courts the final authority on new legislation. However, it allows them to make a statement of compatibility, declaring whether or not legislation is consistent with human rights according to their interpretation of the Charter. It gives them great influence and the ability to exert moral pressure to comply with their decisions about a law’s consistency or otherwise with the Charter.

In jurisdictions overseas where a similar charter model has been adopted, ACL is not aware of a single instance where politicians have not caved in to the “soft pressure” of a judge’s declaration of incompatibility.

In the context of a federal bill of rights, lawyer and Jesuit priest Father Frank Brennan has said he thinks there is “no doubt the bill of rights of any form does transfer some power from politicians to judges”.

It is a primary concern that the charter transfers too much power from politicians to judges. New Zealand’s Governor-General Anand Satyanand has admitted that “in many cases, the Court has forced major changes in public policy”.

Under the Westminster system, the Parliament is responsible for creating laws while the judiciary’s role is to interpret those laws. Issues of public policy are debated by parliamentarians who are then accountable to the people for their decisions. The checks and balances in the parliamentary system also ensure that parliaments cannot simply abuse human rights for political purposes. Decisions they make are also scrutinised by the press.

The role of judges is not to be a part of this process but to interpret the laws that parliamentarians create. Arming the judiciary with the ability to pronounce laws as incompatible with a charter of rights is a significant transfer of power that violates the separation of powers, one of the pillars of a modern liberal democracy.

There is an assumption in the discussion of rights instruments that judges are more objective and less open to corruption, but as former High Court judge Ian Callinan has argued, “judges are not immune to the narcotic of power.” There is also an assumption questions of human rights must be answered by the law. Human rights do not belong solely to the legal domain, and often involve considerations of morality and values, individual autonomy and community. Judges have expertise in

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8 Callinan, I. (2009). ‘In whom we should trust’. In J. Leeser & R. Haddrick (Eds.), Don’t leave us with the bill: The case against an Australian bill of rights. Canberra: Menzies Research Centre. (p. 81)
the law but hold no moral advantage over any other citizen by virtue of their legal knowledge. As University of Queensland law professor James Allan put it, "charter of rights proponents are betting... that the judges have better moral antennae than voters."9

The Charter politicises the judiciary

Closely related to the above issue is the politicisation of the judiciary. Judicial appointments in Australia, even controversial ones, are rarely matters of wide public interest. This is in contrast to the United States, for example, were judges are often chosen for their ideological tendencies and judicial appointments are often accompanied by bitter partisan battles. President Obama's appointment of Supreme Court Justice Sonia Sotomayor was surrounded by controversy. A few years earlier, President Bush's nomination of Harriet Miers met with so much controversy that Miers eventually withdrew.

As former Australian High Court Chief Justice Sir Harry Gibbs said:

A bill of rights, particularly one that has constitutional status, would tend to have the result that judges would be appointed not so much for their legal ability as for their political or ideological attitudes. When a court is empowered to give a final decision on important matters of social policy there is a great temptation to appoint judges whose views on those questions of policy are views of which the executive government approves. The circumstances surrounding some judicial appointments in the United States show that it has often been impossible to resist this temptation. Thus one of the essentials of a free society – an independent judiciary – tends to be weakened when the judges are given what virtually amounts to political power.10

The courts should be independent of political ideology and judges appointed on the basis of merit and legal skill. Politicians should not be given the temptation to make appointments based on short term ideological considerations.

The Charter potentially undermines important freedoms

A charter of rights is static in time and culture, limited by the priorities and values of the drafters at the point in time of their enactment. Melanie Phillips argues that:

the very idea of setting down in statute what rights we have runs absolutely counter to the foundational principle of English common law and the unique principle of liberty it enshrines – that everything is permitted unless it is expressly forbidden. Human rights law turns that into “only what is codified is to be permitted” – which is deeply illiberal.11

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A case from Canada\textsuperscript{12} shows that rights instruments fail to protect the right to freedom of conscience and religion and may be used to quash them. The Saskatchewan government proposed amendments to the \textit{Marriage Act} which would allow marriage commissioners to decline to solemnise civil marriages if contrary to their religious views. The Court of Appeal said this would violate the \textit{Charter of Rights and Freedoms}. In this case, not only did the Canadian Charter fail to protect religious freedom, it was used as a weapon against it.

In the Victorian context, rather than being the solution to all human rights problems, the Charter has likewise succeeded in undermining certain freedoms.

Shortly after the Charter was enacted, the Victorian Government initiated an inquiry to test, against the new charter, protections for religious freedom, which are expressed as "exceptions" in the \textit{Equal Opportunity Act}. These exemptions allow faith-based organisations such as schools and churches to employ people whose attitude and conduct reflect and share their values and ethos.

The Charter has not protected religious groups from the state attempting to impose itself into the internal affairs of faith-based organisations. This is despite freedom of religion and freedom of conscience being fundamental human rights protected by the Charter itself in section 14, which states:

\begin{itemize}
\item[(1)] Every person has the right to freedom of thought, conscience, religion and belief, including-
\item[(b)] the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.\textsuperscript{13}
\end{itemize}

In the controversial case of \textit{Cobaw Community Health Services v Christian Youth Camps} ("Cobaw"),\textsuperscript{14} a campsite run by the Christian Brethren was successfully sued because it would not allow a pro-homosexual youth group (Cobaw) to use its facilities, saying that the beliefs and practices of Cobaw were incompatible with those of the campsite. The Charter was used by both sides in the case, with Christian Youth Camps citing section 14.

In her decision, Justice Hampel stated that the section 14 freedom of religion is not a "stand-alone" right,\textsuperscript{15} that no right in the Charter is absolute,\textsuperscript{16} and spoke of "the obligation, when rights compete, to determine the least limit which can be imposed on the enjoyment of both rights to achieve a

\begin{footnotesize}
\textsuperscript{13} Section 14, Charter of Human Rights and Responsibilities Act 2006.
\textsuperscript{14} Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination) [2010] VCAT 1613
\textsuperscript{15} Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination) [2010] VCAT 1613, [325]
\textsuperscript{16} Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination) [2010] VCAT 1613, [39]
\end{footnotesize}
balance between them.” Her determination was that the rights in section 8 (non-discrimination and equality) trumped the rights in section 14.

In Cobaw, the right to freedom of religion of a privately owned and run religious organisation was trumped by the right to non-discrimination, even though there were other campsites available (and which Cobaw eventually used). Christian Youth Camps’ right to freedom of religion was not absolute and did not extend to being able to impose that right outside of its own organisation. In contrast, it seems that Cobaw’s right to non-discrimination extended close to an absolute state, allowing them to demand services despite their actions specifically contradicting the beliefs of the private organisation whose services they demanded.

The case demonstrates some of the difficulties rights legislation presents. The rights categorised will inevitably compete and conflict at some time. The fact that they are often vaguely articulated means that resolving the conflict requires interpretation which may be highly subjective and involve a costly judicial process.

The Charter of Rights and abortion

ACL regards as a fundamental flaw in the Charter that it does not protect the life of the unborn. In fact, it explicitly excludes any abortion law from the effect of the Charter in Section 48, and the Abortion Law Reform Act was not subject to a statement of compatibility as is all other legislation. This is despite the fact that the Preamble to the UN Declaration of the Rights of the Child says that the child “needs special safeguards and care, including appropriate legal protection, before as well as after birth”.

In addition, the Charter has been used to quash the freedom of conscience of doctors in regards to abortion. Doctors are permitted to refuse to perform abortions based on a conscientious objection but under Section 8 of the Abortion Law Reform Act 2008 would be forced to be complicit with abortion, violating their own conscience, by referring a patient to a doctor who would perform an abortion. Helen Szoke of the Victorian Equal Opportunity and Human Rights Commission said in The Australian that a “doctor’s right to freedom of conscience needs to be balanced with competing considerations”, and that sometimes “limits on human rights are necessary in a democratic society that respects the dignity of each individual”.

Thus, rather than protecting the freedom of conscience, such a fundamental right is breached by the Charter, presumably in favour of a right to obtain an abortion, a right which is not found in any of the international instruments, and in fact seems inconsistent with the Declaration of the Rights of the Child.

17 Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination) [2010] VCAT 1613, [39]
19 Section 8, Abortion Law Reform Act 2008 (Vic).
The Charter provides leverage for unrepresentative activists

Activists see in a charter of rights the potential to facilitate change using courts rather than convincing the electorate to support their causes at the ballot box. Courts in some countries and in some US states use rights instruments to permit same-sex marriage, even though this is against the will of the people. For example, Canada's Supreme Court redefined marriage in this way based on its interpretation of the Canadian Charter of Rights and Freedoms, even though there is no mention of either a right to marry or of sexuality in the Charter.

As Samuel Gregg said:

The paradox that confronts us is that contemporary rights language seems increasingly predicated towards facilitating the use of political and legal power to sanctify certain ideological tendencies... to undermine core institutions such as the nuclear family in the name of "diversity"...

Of great concern also is the trend "we have seen in more recent times, to attempt to restrict as fundamental a freedom as religious liberty to what occurs during church services". Those who support the Charter suggest that a charter "put[s] fundamental human rights above politics". However, as Gregg argued, it is more likely that human rights will be politicised and argued in courts away from the democratic process.

Rights not addressed by the Charter

As is inevitable when attempting to make a list of all fundamental human rights, the Charter has made some startling omissions. The right to private property ownership is neglected, other than to say that a person "must not be deprived of his or her property other than in accordance with law". Although providing a right to freedom of religion and conscience, the right of parents to educate their children in accordance with their own moral and religious views is ignored, despite being specifically mentioned in the ICCPR. The Charter also guarantees a right to be a member of a trade union but does not protect the right not to join a trade union.

The lack of mention of these rights in the Charter has not resulted in a lack of protection of them. It is thus unclear that any rights need the Charter to be well protected by the common law and other legislation. Moreover, it demonstrates that attempting to provide for protection of all human rights may result in a somewhat arbitrary and incomplete list.

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Practical problems the Charter has presented

The Charter can have detrimental practical effects.\textsuperscript{25}

In 2010, the Supreme Court of Victoria used the Charter to reach a decision which gave a 45-year-old female prisoner the right to receive government-subsidised IVF treatment while in prison.\textsuperscript{26} This was based on a prisoner's right to "be treated with humanity and with respect for their human dignity".\textsuperscript{27}

In 2009, Justice Ross said of Extended Supervision Orders (ESOs) to monitor sex offenders:

\textit{I am not persuaded that on its proper construction s 11 of the Act is 'compatible with human rights' within the meaning of s 32(1). The making of an ESO... has a profound impact on the human rights of person [sic] to whom the order is directed. I am not satisfied that the limitations on such a person's human rights that flow from the imposition of an ESO are reasonable or demonstrably justified in a free and democratic society based on human dignity, equality and freedom.}\textsuperscript{28}

In 2010, the Court of Appeal found that, under the Charter, the onus on persons found in possession of illegal drugs to prove they were not in possession\textsuperscript{29} was a breach of the ordinary right to be presumed innocent until proven guilty.\textsuperscript{30}

David Hicks, despite not being a Victorian, has also been supported on the basis of the Charter, with the Victorian Equal Opportunity and Human Rights Commission claiming that his rights were breached and that the Charter "is a law that protects Victorians from the human rights abuses that David Hicks has been subjected to".\textsuperscript{31}

Gangland figure Tony Mokbel attempted to use the Charter to avoid trial, claiming his right to a fair trial was being breached because of his notoriety. Legal professionals have expressed concern that this could become more regular under the Charter.\textsuperscript{32}

It is thus not surprising that the Charter has earned the nickname "the criminal's charter".

Summary

The Victorian Charter is unnecessary, ineffective, and vague. It has the potential to transfer a great deal of influence in policy and law-making decisions to unelected judges, whose traditional role in the Westminster system has been to interpret the law as made by the legislature. It has failed to


\textsuperscript{26} Castle v Secretary to the Department of Justice & Ors [2010] VSC 310.

\textsuperscript{27} Castle v Secretary to the Department of Justice & Ors [2010] VSC 340, [127].

\textsuperscript{28} The Secretary to the Department of Justice v AB [2009] VCC 1132, [18], emphasis in original.

\textsuperscript{29} Section 5, Drugs, Poisons and Controlled Substances Act 1981 (Vic)

\textsuperscript{30} R v Mocmilovic [2010] VSCA 50

\textsuperscript{31} Victorian Equal Opportunities and Human Rights Commission, 26 February 2007, 'Human Rights Conference highlights importance of Charter'

protect important rights, not only by omitting them from the text of the Charter itself, but even rights contained in the Charter, such as those of religious freedom.

ACL recommends that the Charter be repealed. In place of the Charter, a Human Rights Parliamentary Scrutiny Bill could be considered as a means of scrutinising legislation in the context of human rights by the Parliament.

If the Charter is to be retained, it needs to be improved. Importantly, Section 48 needs to be repealed in order to strengthen the rights of the unborn, which currently are explicitly excluded from the Charter. Rights to freedom of religion, conscience, and beliefs need to be strengthened also to prevent cases such as Cobaw where such rights were unnecessarily trumped by competing rights in the Charter. The right to exercise these freedoms is a fundamental aspect of a democratic society and churches, schools, and other faith-based groups must be afforded these rights.

Recommendations

For the reasons discussed above, ACL makes the following recommendations:

1. That the Charter of Rights and Responsibilities Act 2006 be repealed.
2. That the Charter be replaced with a Human Rights Parliamentary Scrutiny Bill.

In the event that the Charter is not repealed, ACL makes the following recommendations:

3. That Section 48 be repealed and the Charter strengthen the rights of the unborn child.
4. That adequate exceptions be put in place to ensure that the Charter does not interfere with the right to freedom of conscience, religion, and belief, especially in the context of the exercise of these rights by religious groups, including churches and faith-based schools.
5. That the right to freedom of conscience, religion, and belief be strengthened in the Charter.

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