Submission to the Four-year review of the Victorian Charter of Human Rights and Responsibilities

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To whom it may concern:

The Australian Family Association (AFA) submits the following considerations for inclusion in the Scrutiny of Acts and Regulations Committee’s four-year review of the Victorian Charter of Human Rights and Responsibilities (the Charter). We thank the Committee for the opportunity to participate in the review.

The Australian Family Association’s General Objectives

The AFA is a voluntary, non-party-political organisation formed to provide a forum and a vehicle for those in the community concerned with the strengthening and support of the family. The AFA’s current active financial membership numbers approximately 4,000 Australia wide, although the AFA draws on the support of a much larger network of families and individuals whose involvement does not involve financial membership.

This submission reflects both the specific expressed concerns of our members, as well as broader concerns with the Charter itself. The Australian Family Association continues to harbour serious reservations with regard to the inclusion and operation of a charter of rights in the Victorian legal system. For the reasons that follow, it is our respectful submission that the Charter should be repealed in its entirety.

Uncertainty and ambiguity of human rights

After four years of the Charter’s operation, the very concept of ‘human rights’, as well as the nature and content of certain identified human rights, remain fraught with uncertainty. Academic discourse in the area of human rights reveals as much. Similarly, the inevitably contested process of drafting any human rights statement, document or legal instrument demonstrates that, whatever human rights any such document might express, the final result represents only the compromised opinion of the negotiating or drafting parties.

Disagreements abound as to which purported rights ought to be included, and which should be left out of any given charter. That is to say, no one is really certain what constitutes a human right and what does not. The fact that Victoria’s list of articulated human rights might be added to (or subtracted from) according to prevailing trends or the political objectives of the government of the day indicates the arbitrary and fickle nature of any such document, and calls into question the need for and value of a charter of rights at all.

The relevance and usefulness of any charter is also undermined by the breadth of often-conflicting views as to what the contents of any particular human right might be. The Victorian Charter, for example, states that:

Families are the fundamental group unit of society and are entitled to be protected by society and the State.

Although most Victorians would undoubtedly support such a right in general, it remains entirely unclear what the right actually entails. For example, the right begs the question: what constitutes a “family”? To this, any number of ideologically, philosophically or even theologically driven answers might reasonably be given, and if Victoria at least, it is unlikely that any kind of consensus would exist on the question of ‘what makes a family’.

As a broad statement of goodwill, therefore, the family’s right to protection under the Charter may be instructive or educative, but beyond this, it serves no practical purpose. To the contrary, it is highly likely that competing interest groups (including, perhaps, the Australian Family Association) might lay claim to such a right, interpreted in accordance with their own values and ideological underpinnings, in ways that would be unacceptable to others who nevertheless support the broad
formulation. Because of their considerable persuasive power, human rights are notoriously prone to being used as tools to further particular political or ideological ends.

The ambiguity of the expressed human rights gives rise to three unsatisfactory outcomes.

Firstly, a human right which essentially means 'whatever one wants it to mean' is rendered null, void and utterly without value. Human rights themselves become a laughing stock. For example, many of the AFA's members have expressed outrage that the Charter is powerless to defend the rights of the child in the womb. To that significant portion of the community who sees in the unborn child a human person, the Victorian Charter - and in particular, the Charter's expressed "right to life" - makes a mockery of human rights.

Secondly, as suggested earlier, the malleability of human rights lends to their being bent and twisted and manipulated in order to further certain specific ideological interests, which interests are far from universally accepted.

Thirdly, and in a related manner, human rights are inevitably entrusted to judges for final determination as to their nature and contents. What results cannot confidently be expected to reflect a universal understanding of any given human right - primarily because no such universal understanding can be said to exist. Most often, judges will confer an interpretation of a given right in accordance with his or her considered judicial opinion. Alternatively, judges might enshrine in law a 'majority view' of what a particular human right might mean. But in each case, the judge's view is fallible, and the meaning of certain rights is liable to change over time.

Ultimately, these observations point to a general danger enlivened by the encroachment by human rights upon sovereign law, namely that the more deeply any purported universal human right becomes entrenched in the law of the land, the less universal any legislated right is likely to actually be.

The Charter is an ambiguous filter

The ambiguity with which human rights are inevitably laden is particularly concerning given that the Victorian Charter legislation requires not only that every new piece of Victorian legislation be drafted in accordance with the ill-defined rights included in the Charter, but also that all previous laws be interpreted and applied in accordance with the Charter, wherever that is possible.

This amounts to running Victoria's entire legal heritage - parliamentary and judicial - through a filter of unfathomable uncertainty, even perhaps in direct contradiction to long-established principles of interpretation. To do so would seem to vandalise and distort a legal system which is designed precisely to determine how the competing rights of individuals might be justly reconciled wherever such rights come into conflict, and has successfully done so for centuries.

The Charter is unnecessary in a well-functioning democratic state

Victorian law is the product of a process of ongoing refinement, both through parliament and through the courts, and reflects the ever-renewed efforts of law makers to ensure just outcomes for parties who find themselves in conflict.

In some respects, the notion of justice must also conform to practical realities. For example, in the case of *R v Moncilo*, the defendant faced a presumption of guilt in circumstances which, for a range of public policy reasons, had been determined by democratically elected legislators to be appropriate, particularly in the context of a broader legislative and executive fight against the illegal drug trade in Victoria.

To impose a presumption of guilt in a specific set of circumstances was clearly the result of considered legislative decision making, and yet it is nevertheless an extraordinary step for the parliament to take. However, if, in time, the legislature determined that such a policy was amenable
to producing unjust judicial outcomes, there is every reason to expect that the government of the day, in response to any inevitable public outcry, would respond accordingly. In doing so, the government would not be reliant upon any charter of human rights.

This nuanced approach to law making, and to the formidable task of determining just outcomes in difficult situations, comprises a substantial reason for the overwhelming success of the Australian social and legal system. Its success reflects an inherent capacity to ensure that wherever individual rights come into conflict, they meet a just resolution. Importantly, the Victorian legal system does so without articulating a precise set of human rights. In the context of such an effective judicial system, the Charter is superfluous.

The Charter undermines parliamentary sovereignty by subjecting Victorian law to international law

The court’s judgment in Momoilovic reveals the extent to which the Charter subjects Victorian law to legal principles which were decided by foreign bodies and over which Victorian citizens exercise no control. Given that section 32(2) of the Charter gives express power to the courts to interpret the Victorian Charter according to international conventions, and given that all Victorian law must be interpreted and applied in accordance with the Charter, it is inevitable that long-established Victorian legal principles must be overridden by principles arising in jurisdictions which are substantially different to those arising in Victoria. To subvert Victoria’s legal heritage in this way is to undermine the democratic nature of our legal system.

The Charter’s operation is in this respect undemocratic, and if the Charter is not repealed in its entirety, then we submit that at least section 32(2) should be repealed.

Huge cost, no benefit

The additional compliance process through which every new piece of Victorian legislation is required to pass, in order to ensure its compatibility with the Charter, adds a massive cost – in terms of time, money and additional resources – to the legislative process. However this process has been shown in some cases to be merely a matter of going through the motions, such that the lengthy compliance process provides no guarantee that a court would agree with the Scrutiny of Acts and Regulations Committee’s assessment of the legislation’s Charter-compatibility. The costs of compliance are without observable benefit.

Furthermore, any proposal to mandate public reporting by authorised bodies under the Charter would similarly impose huge cost burdens on the state, which would have to process and review such reports, and which would also inevitably be required to provide additional funding to those bodies required to prepare such reports. These costs deliver no demonstrable increase in the enjoyment of human rights, which are already well protected under Victorian law.

Provision for new remedies should be rejected; current remedies should be repealed

We note that some elements of the community have suggested that the Charter should be amended to allow litigants to bring legal actions purely based on alleged breaches of the Charter. We submit that allowing such actions would result in an inevitable surge in opportunistic litigants – predominantly against the state – and would therefore exhaust significant legal resources at great expense to the taxpayer. We reiterate that the legal system is already well equipped to deal with genuine allegations of injustice, and that remedies under the charter are unnecessary.

Rather than broaden the scope for litigation under the Charter, we instead suggest that, if the Committee is inclined not to repeal the Charter, then any judicial or other remedies which are already currently available through the Charter should in fact be repealed. As such, the Charter might remain as an instrument of both educative and aspirational import, but would not unduly intervene in the operation of the legislative and judicial arms of the Victorian legal system.
Respectfully yours,

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