Dear Honourable Members,

I thank you for this opportunity to make submissions on Victoria's Charter.

This is an Amended Submission. Please disregard my earlier one.

My name is Dr Damien J Cremeau.

I am a Barrister-at-Law. I am also Adjunct Professor of Law at Murdoch University. I teach law currently at Monash University in its Masters program. I am a former Senior Member, and Deputy President, of the Victorian Civil and Administrative Tribunal (VCAT). I have expertise in administrative and constitutional law. I am General Editor of the Australian Journal of Administrative Law.

I am available to attend upon the Committee, at short notice, if called upon to do so.

I make the following points if I may respectfully do so--

(1) Human rights I consider are a matter of national significance— if there is to be legislation upon the subject. Rights do not differ from State to State: by their very nature, they are human rights and not Victorian (or ACT rights ) or whatever. From this it follows that the "Charter of Human Rights and Responsibilities Act 2006" of Victoria (the "Charter") , and the corresponding ACT legislation, adopts a "go it alone" approach which is in advance of what should be dealt with as an Australia-wide matter—if it is to be dealt with legislatively at all.

The Charter is thus out of keeping with other States (except the Territory of the ACT).

(2) There is already Australian legislation, enacted federally, on the subject of human rights. See the "Australian Human Rights Commission Act 1986". If this Act is not capable of dealing with State issues—because of Constitutional restrictions—then that was the intention of the Founding Fathers.

(3) The Charter is expressed as an enactment dealing also with "responsibilities". There are precious few of those specified in the Charter. This seems to make its reference to responsibilities largely vacuous or meaningless or redundant.

(4) The Charter is very selective in the rights it mentions. Hardly any economic rights are mentioned eg the right to a fair wage. Economic rights of this nature can be crucial in today's world. Yet they are missing.

(5) Those rights the Charter does mention, are often so vaguely expressed that they cannot be readily understood. What does the right to life (s 9)mean? Does this bring into question eg doctors' activities
in public hospitals with respect to the terminally ill? And where does abortion fit into this scheme? Do the unborn have a right to life? My view is that they do—but the Charter nowhere makes this clear. Are the unborn children under s 17 of the Charter?

(6) Many of the rights guaranteed by the Charter were pre-existing common law rights in any event which until the Charter commenced had been observed and protected quite satisfactorily by the courts. A most important right in a democracy is that of freedom of political expression. But this is now an implied right under the federal Constitution. The High Court is approaching Chap III of the federal Constitution in a way which will lead to it being shortly a" due process "chapter of the Constitution in any event. And federal administrative laws (especially the" Administrative Decisions (Judicial Review) Act 1977 ") go a long way towards protecting citizens under the rule of law already.

(7) There is a lack of clarity about those bodies which the Charter applies to. Especially may this be said of VCAT. When exactly is a court or tribunal acting in an administrative capacity? This has never been properly delineated and has led to much uncertainty. Is it acting administratively in conducting administrative review—and, if not, why not?

(8) The remedies provided by the Charter for the protection of rights are inadequate and cumbersome and in the end ineffectual. A declaration of inconsistency does nothing. Certainly it does not strike down the inconsistent law and shows that the Charter really achieves nothing of substance. The Supreme Court is an expensive forum to go to if one wants to achieve this result.

(9) We have managed so far in Victoria to successfully run our State without a Charter and one, based thus on this experience, is not needed.

(10) The costs involved in having public authorities devote time and money to ensuring Charter compliance, and in educating staff about it, cannot be justified. Such time and money could be better used on other projects.

(11) To strengthen the Charter’s remedial provisions—whereby the courts could be able to strike down legislation—would be to transfer to unelected judges what has been enacted as the will of the community by elected parliamentarians. This is to the contrary of a democracy. Judges are not representative of the community in the way parliamentarians are.

(12) If we are to have selected rights specified in some manner in our laws in Victoria—something I do not think is needed—then I would submit that such rights simply be included in the "Interpretation of Legislation Act 1984" (to the effect that laws of the Victorian Parliament should be interpreted, subject to clear contrary intent, consistently with the rights specified and not otherwise). In other words, as a compromise between those who support the Charter and those who don’t, myself being in the latter category, I suggest a simple interpretive provision (such as the one in s 35 of such Act whereby Acts of Parliament be interpreted so as to promote their object). This ensures certain rights are given prominence while at the same time it ensures Parliament is not hampered in being able to legislate clearly to the contrary as occasion arises. It also ensures that the courts do not travel beyond their proper province.

Dr Damien Creanen

29 May 2011