Submission

for

Inquiry into the

Charter of Human Rights and Responsibilities

Conducted by

Scrutiny of Acts and Regulations Committee

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from

Salt Shakers

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Salt Shakers is a national organisation which assesses ethical issues, informs Christians and interacts with government on a range of issues.
Section A – Our Key Concerns

The legitimacy of a Chart of Human Rights and Responsibilities

Salt Shakers opposes the Charter of Human Rights and Responsibilities (the 'Charter'), and have always opposed the Charter. In essence we believe that the Charter does not provide the appropriate legal framework for our state and that it should be repealed.

We oppose the Charter for a number of reasons:

1. Our statute law in Victoria sufficiently covers human rights.
   In fact, the Charter undermines Victorian statute law and the Victorian legal system. There is a very real tension between the ability of a state to give rights and the ability of said state to take them away.

   The common law has been the basis of law in Victoria – over time legislation has affirmed the legal principles of the common law. The common law in essence came to us from the United Kingdom – and can be traced back to the documents the Magna Carta and the 1688 Bill of Rights – both of which used Biblical law as the foundation of the legal system.

   The common law and the legislative framework resulting from that has served us well – with its legislation based in the parliament and the enforcement of the laws based in the judicial system providing a system of checks and balances for our state.

   The relatively new use of international law and the laws and declarations from the United nations have imposed a new system of law on our state – laws that work through the Tribunal system (VCAT) and discrimination laws that do not use the same legal framework and laws of evidence as our criminal and civil law.

   The Victorian Charter of Human Rights and Responsibilities falls into this category – promoting the rights of some people, but inevitably diminishing the rights of others. In many cases where the Charter might be applied, there is a competing sets of rights – where the rights of one remove the rights of another.

   The right to housing has been regularly brought before the courts/tribunals because of the Charter (Director of Housing v Sudi [2010] VCAT 328; Heywood v Director of Housing [2010] R2009/36396; Director of Housing v TK [2010] VCAT Application 2010/11921).

   One such case, which was a significant misuse of the Charter, was Homeward Services v Mohamed (Residential Tenancies) [2009] VCAT 1131. This case raised the issue as to whether the right not to be homeless could be considered as stemming from the Charter. It was held by VCAT that section 13 (A person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with) of the Charter did not allow the eviction of a tenant by its landlord (a non-profit welfare agency). It is difficult to understand how someone has a right to continue to receive charity from another person or entity. While charity is an important concept, it, by no means, should form a right to receive. People and entities should be free to be charitable up until the point they choose not to.
Section 9 of the Charter provides that every person has a right to life. This seems to be quite a conflict with the right for an individual woman to legally choose to abort her child under Victoria’s criminal law. The savings provision in the Charter, saying it does not apply to abortion, in effect removes the right to life for those who are unborn. We know medically that life starts at conception, so this right to life is being undermined through Victoria’s Abortion Act.

In addition, during the debate and passage of the Abortion Act, the parliament refused to consider the law in relation to whether it met the conditions of the Charter because of this ‘savings provision’. The fact that the Abortion Act removes the right of conscience of doctors since it requires a doctor who doesn’t approve of abortion to refer a woman seeking one to another doctor who they know WILL perform an abortion, in effect is against the Charter condition or ‘right’ for the protection of conscience – but this has been ignored in this case.


It is questionable whether exemptions should play any part in discrimination law. After all, this merely causes the rights of one group being placed above the rights of another. But then, that’s what discrimination law does!

In YMCA – Ascot Vale Leisure Centre (Anti-Discrimination Exemption) [2009] VCAT 765 an allowance was given for ladies-only swimming sessions outside of the regular opening times for the pool. This case is a clear example of a Charter which promotes equality, yet seems more concerned about discriminating for minority groups.

2. The Charter causes frivolous law suits.
Some examples of this include Gunseer v Magistrates’ Court of Victoria & Anor [2008] VSC 57; Sabel v Medical Practitioners Board [2008] VSC 346; XFJ v Director of Public Transport (Occupational and Business Regulation) [2008]; Kay v Victorian Attorney-General & Anor (Victorian Court of Appeal, Unreported, 19 May 2009); Smeaton v Victorian WorkCover Authority [2009] VCAT 1195; Russell v Yarra Ranges Shire Council [2009] VSC 486; Castles v Secretary of the Department of Justice & Ors [2010] VSC 181.

One significant example is the case of Wells v The Queen (No 2) [2010] VSCA 294 where the defendant sought an interlocutory proceeding because he claimed that his rights under section 24 & 25 of the Charter were breached. As the court rightly pointed out, it is hard to establish an unfair trial when the trial in question has not occurred in
the first place.

3. The Charter places legislation at the mercy of the courts.
The Charter of Human Rights and Responsibilities takes power from Parliament and
gives it to the Courts. This severely undermines the role of Parliament and Parliament’s
ability to legislate laws that are beneficial for society as a whole and not just for
individuals in question. The Charter also creates a platform for activist judges to
interpret the Charter liberally, in effect fashioning and molding laws.

Decisions are being made because of legal argument claiming the rights of the
Charter. If a judge or court decides that a law is in conflict with the Charter, the matter
is currently referred back to the parliament. However, this places pressure on the
parliament to change the law to match the ‘new interpretation’ that results from the
Charter.

4. The Charter has been manipulated in criminal proceedings and by activist
groups.
Cases like Tomasevic v Travaglini & Anor [2007] VSC 337; DPP v TY (No 3) [2007] VSC 489;
Gray v DPP [2008] VSC 4; Re AWB Limited [2008] VSC 473; Re Dickson [2008] VSC 516;
Seachange Management Pty Ltd v Bevnoil Constructions & Developments Pty Ltd & Ors
(Domestic Building) [2008] VCAT 2629; RJE v Secretary to the Department of Justice [2008]
VSCA 131; Secretary to the Department of Justice v AB [2009] VCC 1132; Dale v DPP [2009]
VSCA 212; Wells v The Queen (No 2) [2010] VSCA 294; DPP v Ali & Anor (No 2) [2010] VSC
503 reveal a broad use of the Charter of Human Rights and Responsibilities to undermine
Victorian criminal law.

The Charter of Human Rights and Responsibilities touches on these rights in sections 22-27. If,
indeed, there are inconsistencies between the Charter and Victoria’s various criminal schemes it
seems prudent that these inconsistencies are rectified by Parliament rather than used as a tool
against authority.

5. The Charter of Human Rights and Responsibilities has become a platform for
activist groups

The Charter has been used by activist groups to advance their causes. Various ‘legal
help’ groups who are promoting these causes have provided legal help to these groups
to challenge the current law and particular situations.

In AB and Victorian Equal Opportunity & Human Rights Commission and Department
of Human Services and Separate Representative of J [2010] VCC AD-10-003 (6
August 2010) two homosexuals referred to the Charter in their case where they wanted
to adopt a child.

In Cobaw Community Health Services Limited v Christian Youth Camps Limited & Anor
[2010] VCAT 1613 (6 October 2010), Justice Hampel referred repeatedly to the Charter
in her decision. These were arguments put to her by the homosexual group Wayout
and their lawyers. She noted the ‘weighing up’ of the rights of both sides:

“Justice Hampel noted that when interpreting the religious exemptions under the EO Act, she
must have regard to their purpose, namely to protect religious freedoms, in a manner consistent with the Charter of Human Rights and Responsibilities Act 2006. In particular, she considered the rights to freedom of thought, conscience, religion and belief in s 14 of the Charter, and freedom of expression in s 15 of the Charter, in a manner which is compatible with the rights to equality and freedom from discrimination in section 8 of the Charter. She noted that this interpretation should not privilege one right over another, but recognise their co-existence.”

6. The Charter ignores the duties to which individuals have to society.
The cases mentioned above, in regards to the Charter’s interaction with criminal proceedings, shows a lack of responsibility for actions which harm society. This is a significant weakness for the Victorian Charter of Human Rights and Responsibilities.

Perhaps the most relevant case in this regard is R v Kent [2009] VSC 375, where the defendant indicated that his mental health issues should be considered in conjunction with his imprisonment conditions. This forced Justice Bongiorno to consider section 22(1) of the Charter and whether Mr. Kent’s inherent dignity as a human being would be undermined. As this was a consideration at sentencing proceedings (and to a crime which the defendant pleaded guilty) it seems improper that the presiding judge should have to consider the dignity of someone who will be imprisoned for confessing to planning out terrorism activities. This leaves the door wide open for future defendants to ignore their duty to keep society safe.
Section B – Terms of Reference

1. The addition of further rights

Section 44(2): Salt Shakers opposes the incorporation of any new rights into the Victorian Charter. Case law shows that the Charter has not been successful in keeping a distinction between Rights and Responsibilities hence there is no reason to give further power to individuals.

For example, if the right regarding ‘homelessness’ was incorporated into the Charter, what does that mean for the state? If someone claims they have a right to a home because of this Charter, would the state be responsible for providing a ‘home’? Should the state be responsible for this? What of the responsibility of the individual.

There is definitely a role for charity and compassion but that does not mean people have a right to demand housing. Including such rights in the Charter would be very problematic.

2. Further provisions for remedies
Since we oppose the Charter, we also oppose the current system of ‘remedies’ – so we definitely oppose any extension of these.

3. Considering the effects of the Charter
Much of what we included in our first section addresses the ‘effects’ of the Charter. We have seen people use the Charter in unforeseen ways – prisoners, activists, the homeless etc. The Charter is an unnecessary piece of legislation – we should rely on the traditional criminal and civil law and repeal this Charter.

4. Benefits and Costs of the Charter
We believe that there have been no benefits from having the Charter. The Charter has led to a lot of litigation and cost the state a lot of money – it has also cost individuals money in trying to defend cases based on human rights law.

5. Reform or improvement
Salt Shakers recommends that the Charter be repealed in whole. For the reasons listed in Section A the Charter is inadequate and unnecessary and undesirable. There are already too many ‘rights’ listed in the Charter. It is not the role of government to give rights – because if a government can give rights, they can also take them away.
As a Christian organization we believe that rights, if there are any, come from God. As citizens we have a range of responsibilities – our focus should not be on ‘rights’.