Submission

on the

Charter of Human Rights and Responsibilities Act 2006

to the

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1. Introduction


Subsection 44(1) of the Charter requires the Attorney General to cause a review to be made of the first 4 years of operation of the Charter and a copy of the report of the review to be laid before each House of Parliament on or before 1 October 2011.

On 19 April 2011 the Governor in Council required the Scrutiny of Acts and Regulations Committee to inquire into, consider and report to the Parliament on the Charter of Human Rights and Responsibilities Act 2006 (Vic) ("the Charter") by considering the following issues:

- The matters referred to in section 44(2) of the Charter:
  - whether additional rights should be included in the Charter, including economic, social, cultural, children’s, women’s and self-determination rights; and
  - whether further provisions should be made regarding public authorities’ compliance with the Charter, including regular auditing and further provision for remedies.

- The effects of the Charter on:
  - the development and drafting of statutory provisions;
  - the consideration of statutory provisions by Parliament;
  - the provision of services, and the performance of other functions by, public authorities;
  - litigation and the roles and functioning of courts and tribunals; and
  - the availability to Victorians of accessible, just and timely remedies for infringements of rights.

- The overall benefits and costs of the Charter.

- Options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria.

Public submissions have been invited by the Committee and these are due by 10 June 2011.

2. Additional rights

Paragraphs 44(2)(a) and (b) of the Charter require that the review of the Charter:

include consideration as to whether—

(a) additional human rights should be included as human rights under this Charter, including but not limited to, rights under—

(i) the International Covenant on Economic, Social and Cultural Rights; and

(ii) the Convention on the Rights of the Child; and
(iii) the Convention on the Elimination of All Forms of Discrimination against Women,[and]

(b) the right to self-determination should be included in this Charter.

2.1 Economic, social and cultural rights

Rights enumerated in the International Covenant on Economic, Social and Cultural Rights include:

- the right to work (Article 6);
- the right to the enjoyment of just and favourable conditions of work (Article 7);
- the right to form trade unions and join the trade union of his choice (Article 8);
- the right to social security, including social insurance (Article 9);
- the right of the family to protection and assistance; the right of mothers to special protection before and after birth; the right of children and young people to special measures of protection and assistance (Article 10);
- the right to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (Article 11);
- the right to the enjoyment of the highest attainable standard of physical and mental health (Article 12);
- the right to education (Article 13); and
- the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications (Article 15).

It is unclear what it would mean to incorporate these rights in the Charter.

If the Charter retained its current structure then incorporating these rights would extend the range of rights against which bills must be assessed for compatibility by the member of parliament introducing them (section 28) and by the Scrutiny of Acts and Regulations Committee (section 30).

It would also impose new obligations on public authorities not to act in a way that is incompatible with any of the enumerated human rights (section 38).

Further the courts would be required to interpret all laws "insofar as it is possible to do so consistently with their purpose" in a way that is compatible with the enumerated human rights.

In each of these cases the incorporation of economic, social and cultural rights in the Charter is likely to give rise to further uncertainty in the law and to conflicts over how to balance competing rights.

For example, how would a bill be assessed against the "right to the continuous improvement of living conditions"?

There are fundamental complexities and deeply held disagreements on the best approach to economic policy to facilitate a continuous improvement in living conditions. Robust debate on these matters is properly a matter for democratically elected parliaments. It is hard to see how it would help to impose on the Scrutiny of Acts and Regulations Committee the obligation to hold a mini-debate on overall economic theory every time it considered a bill that had economic implications.
Health and education are two of the principal services offered by the Victorian government. Governments are judged each election in large part on how they have delivered such services. It is difficult to see how it would help to impose a legal requirement through the Charter on public authorities to act in accordance with the "the right to the enjoyment of the highest attainable standard of physical and mental health" and "the right to education".

These provisions will do nothing to assist a government manage limited resources to the best of its ability in the interests of all Victorians.

Indeed it is foreseeable that actions by individuals or special interest groups to exploit the inclusion of such rights in the Charter could lead to courts interfering in the decision making process as to how best to allocate limited health and education budgets.

Of course every additional dollar a government spends on health or education comes either from reducing spending on other responsibilities – such as providing an efficient police service and justice system – or from increased taxation. Budget decisions are properly subject to intense scrutiny through estimates committees and other parliamentary and public debate. There is nothing to be gained – and significant risks – in giving the courts a role in such debates through enshrining economic and social rights in the Charter.

Recommendation 1:

Economic, social and cultural rights as enumerated in the International Covenant on Economic, Social and Cultural Rights should not be included in the Charter.

2.2 Children's rights

Australia's ratification of the Convention on the Rights of the Child was debated vigorously in 1990 with pro-family groups asserting that the Convention undermined parental rights. This view was dismissed by proponents of ratification.

However, the official view of the Committee on the Rights of the Child was made clear in its 1995 "Concluding Observations of the Committee on the Rights of the Child: Holy See". The Committee took the Holy See to task over its formal reservation to Article 5 and Articles 12 through 16 of the Convention in which the Holy See states that it will interpret these articles in accordance with parents' inalienable rights and prerogatives. The Committee stated that it was "concerned about [these] reservations ... in particular with respect to the full recognition of the child as a subject of rights ... In this respect, it wishes to recall its view that the rights and prerogatives of parents may not undermine the rights of the child as recognized by the Convention, especially the right of the child to express his or her own views and that his or her own views be given due weight." [Emphasis added]

2.2.1 Corporal punishment

In 2005 the Committee on the Rights of the Child in its "Concluding observations: Australia" among other findings objected to the laws in various Australian States and territories that permit parents to use corporal punishment for the purpose of "reasonable chastisement". The Committee formally called on Australia to "take appropriate measures to prohibit corporal punishment at home".

Many Australian families use reasonable physical discipline from time to time. There is a significant body of research confirming its utility in raising children well.

The merits or otherwise of banning the use of corporal punishment within the home is a legitimate subject for debate internal domestic debate within each State and territory. However, incorporation of the rights in the Convention on the Rights of the Child into the Charter of Human Rights and Responsibilities Act 2006 would effectively import into Victorian law the explication of these rights by the UN Committee on the Rights of the Child. This Committee interprets the right of the child to be
protected from "all forms of physical or mental violence" to exclude absolutely all forms of corporal punishment, and to require laws prohibiting any person, including parents, from using any physical force in disciplining children.4

Victorian law has no statutory provision for a defence of reasonable chastisement but the common law allows parents to administer corporal punishment to children in their charge provided the punishment is neither unreasonable nor excessive. However section 32 of the Charter, which includes an instruction to consider international law "relevant to a human right", would be likely to cause the law prohibiting common assaults (Section 23 of the Summary Offences Act 1960) to be read as excluding the common law defence of reasonable, non-excessive use of force by a parent disciplining a child.

This is an example of how the Charter could be interpreted by the courts to change the law in a substantial way without a parliamentary debate on the specific issue.

2.2.2 Child autonomy

Article 5 of the Convention on the Rights of the Child states that:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention. [Emphasis added]

This phrase effectively limits the obligations of States Parties to respect parental rights only when parents are considered by the State to be acting "in a manner consistent with the evolving capacities of the child". This would result in the assessment of the "capacity of a child" being taken from the parents, who have intimate knowledge of the child over an extended period, and being given to a State official who has little knowledge of the child in question.

Whether or not this provision was explicitly incorporated into the Charter, it would still operate as an overarching framework for understanding the rights of children in the light of international law as required by subsection 32 (2) of the Charter.

The autonomy model of children's rights is further expressed in Articles 12 through 16 of the Convention which require States Parties to recognise children's rights to:

- have their views expressed and taken into account in all matters concerning them (Article 12).

The weight to be given to these views is to be in accordance with the age and maturity of the child. While 12.2 deals with judicial and administrative proceedings, article 12.1 is unlimited in application. It could be held to require parents and educational authorities to give more weight to a child's views than they might otherwise do.

If a child did not get its way in some matter, Article 12 would also empower the State to represent the child "in any judicial and administrative proceedings affecting the child". Parents with limited financial resources, who could not afford to employ a highly paid lawyer, could find themselves pitted against an experienced government lawyer purporting to represent their child.

- freedom of expression, including seeking and receiving information through any media (Article 13).

The only restrictions on this right recognised in Article 13 are "for respect of the rights or reputations of others; or for the protection of national security or of public order, or of public health or morals." These restrictions, of course, apply to adults and no recognition is given to the special vulnerability of children or to the responsibility of parents in this area.
This provision could make it very difficult for parents to resist exposure of children to material which parents may find objectionable on religious, moral or other grounds. For example, parents who wish to protect their children from exposure to pornography or drug and suicide promotion on internet websites could find themselves prevented from doing so.

- freedom of thought, conscience and religion (Article 14).

Under this article parental supervisory rights must only be respected by the State when exercised in a manner consistent with the evolving capacities of the child. In other words, children have a right to freedom of thought, conscience and religion to be exercised independently of their parents’ decision with the full legal protection of the State whenever the child is judged to have the capacity to do so.

Parents might find that this article could create difficulties for them if they were trying to discourage their children from joining fringe religious sects, or encourage their children to adhere to traditional religious practices of the family.

- freedom of association and peaceful assembly (Article 15)

This freedom is only to be limited by the usual limits permitted to restrict these rights for adults (eg protection of public order). This Article could also be cited to prevent parents from effectively supervising their children’s relationships with others.

These rights may make it difficult for parents to resist associations by their children with persons whom parents find objectionable, especially as children are taught these rights in schools. For example, the new right of freedom of association may make it difficult for parents to prevent a young teenager from forming inappropriate, and possibly harmful, associations.

- freedom from arbitrary interference with privacy (Article 16).

Privacy rights are used to ground alleged rights to sexual activity, access to contraception and abortion. This Article could be held to endorse children’s rights to such things without parental knowledge or supervision whenever the child is judged to have the capacity to exercise these “rights” independently.

A difficulty for parents may arise from the inclusion of the word “arbitrary”, because it could permit children to resist intrusion by parents into anything that children consider to be private to them, including medical treatments, and whatever may occur in the child’s bedroom or other part of a home set aside for the use of a child.

In each of these Articles children are said to possess autonomous rights. Either through Article 5 or through explicit statements in these Articles, parental supervisory rights are to be exercised only in a manner consistent with the evolving capacity of the child.

This represents a decisive move away from age-based criteria for minority status to capacity-based criteria. The obvious difficulty with this is that once it is held to be an obligation under international law (as opposed to simply being expressed as a suggestion for how parents ought to fulfill their supervisory responsibilities) is that someone must make judgements as to:

- the current capacity of the child to exercise a particular right independent from parental supervision;

- the extent to which parental action infringes the child’s valid, autonomous exercise of a right; and

- any remedy necessary to enforce or uphold the child’s rights and to restrain the parents from infringing those rights.
Incorporating children's autonomy rights in the Charter would open up the possibility that public authorities — including schools and health services — would consider themselves obliged under Section 38 of the Charter to determine a child's "evolving capacity" and make decisions that effectively undermined parental rights. What reason do we have for thinking that public authorities are better placed than parents to make decisions in the best interest of the child?

Recommendation 2:

Children's rights, as enumerated in the Convention on the Rights of the Child, should not be included in the Charter.

2.3 Women's rights


It would be potentially confusing to duplicate these provisions in the Charter.

The Charter purports to protect and promote human rights as such. It would be inappropriate to use it as a vehicle to promote the interests of one sex only — women.

Recommendation 3:

Women's rights, as enumerated in the Convention on the Elimination of All Forms of Discrimination against Women, should not be included in the Charter.

2.4 Right to self-determination

Article 1 of the International Covenant on Civil and Political Rights (ICCPR) provides that:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

This right of self-determination is not a right inhering in individuals as such but a right attributed to "peoples". There is no definition of this term "peoples" in the ICCPR or in the documents produced by the Human Rights Committee which is charged with interpreting the ICCPR.

It is far from clear what implications including a right of "all peoples" to self-determination in the Charter could have on the law in Victoria.

Articles 3, 4 and 5 of the Declaration on the Rights of Indigenous Peoples, to which Australia is a signatory, expound on the right to self-determination for indigenous peoples.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5
Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Each of these provisions could be held by a court to be relevant in interpreting a right to self-determination included in the Charter.

This has possible implications for the application of the general law – including the criminal law – to Aboriginal people in Victoria. Article 5 could be read as propounding a right of indigenous people to choose whether or not to be subject to the legal regime of the jurisdiction in which they reside or to opt to be subject only to a distinctive indigenous legal regime.

This would be an undesirable outcome as it would undermine the equality of all people before the law.

Recommendation 4:

Given the uncertainties surrounding the meaning of the right to self-determination it would not be appropriate to include it in the Charter.

3. Auditing public authorities for Charter compliance

Paragraph 44 (2) (c) of the Charter requires that the review consider whether “regular auditing of public authorities to assess compliance with human rights should be made mandatory”.

Section 38 of the Charter makes it, subject to certain provisions, “unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.”

It would seem to be unnecessary to impose a system of regular auditing of public authorities to assess compliance with human rights. There is no evidence of widespread or endemic violation of human rights by public authorities in Victoria (with the exception of public authorities that are involved in abortion in violation of the right to life of the unborn child, a matter which is excluded from the Charter by Section 48).

The Victorian Human Rights and Equal Opportunity Commission has reported that public authorities are increasingly engaged in monitoring their compliance with their obligations under the Charter in the absence of any mandatory requirement.

Recommendation 5:

There is no need to make regular auditing of public authorities to assess compliance with human rights mandatory.

4. Further provision for remedies

Paragraph 44 (2) (d) of the Charter makes it a requirement that the review consider whether “further provision should be made in this Charter with respect to proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful because of this Charter.”

The Charter already provides in subsection 39 (1) that:

If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that
person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

This provision has been used with some plaintiffs successfully invoking unlawfulness under the Charter as the grounds for remedies.

For example, in *Castles v The Secretary to the Department of Justice & Ors* the plaintiff Ms Castles, a prisoner, obtained an order in favour of her being given permits to receive IVF treatment at an appropriate clinic. The Supreme Court found that the interpretation of the right of “all persons deprived of liberty [to] be treated with humanity and with respect for the inherent dignity of the human person” in subsection 22 (1) of the Charter confirmed the interpretation of paragraph 47 (1) (f) of the Correction Act 1986 which provides that prisoners have “the right to have access to reasonable medical care and treatment necessary for the preservation of health”.

This is a good example of how the Charter is largely redundant as more detailed provisions are already included in specific purpose legislation. In this case the *Corrections Act 1986* not surprisingly contains more detailed provisions regarding the rights of prisoners than the Charter does.

(It is of course a separate matter as to whether access to IVF is rightly understood as included in the right to have access to “reasonable medical care and treatment necessary for the preservation of health”. IVF treatment does not improve a woman’s health and in some circumstances may endanger it.)

In *Director of Housing v Warfa Sudi* heard before the Victorian Civil and Administrative Tribunal, the then President, Justice Bell, found that the Director of Housing had acted unlawfully under subsection 38 (1) of the Charter in that he had made an application for possession of the house in which a Somali refugee and his young son were living, without offering any justification for the breach of the right under section 13 (a) of the Charter not to have one’s home “unlawfully or arbitrarily interfered with”. The remedy obtained by Mr Sudi was that the application of the Director of Housing for possession (effectively an eviction order) was dismissed as invalid because it was unlawful under subsection 38 (1) of the Charter.

It is unhelpful to have actions undertaken in compliance with the provisions of the *Residential Tenancies Act 1997* judged unlawful on the basis of the Charter, with the result that the action is declared invalid. Balancing the rights of landlords – including the Director of Housing as the landlord of public housing – and tenants is a complex, delicate matter. Including all relevant aspects of the law on this matter in the principal Act would be more helpful than having the Victorian Civil and Administrative Tribunal overlay the necessarily general Charter provisions on the explicit provisions of the *Residential Tenancies Act 1997*.

Introduction of any further remedies for breaches of Section 38 by public authorities would only lead to further lack of clarity in the law. Public authorities can only act pursuant to specific legislation bestowing powers on them. Transparency is better served if the criteria for exercising these powers, including the scope and nature of any discretion bestowed, are clearly set out in the specific legislation.

Requiring public authorities to try to guess what courts might eventually make of the interaction between the general rights specified in the Charter and their duties and corresponding powers under specific legislation is unhelpful to good governance.

Rather than expanding remedies, serious consideration should be given to repealing Section 38 and 39 of the Charter. Public authorities by their nature are required to act lawfully. The laws with which they are required to comply should be as clear as possible. Requiring public authorities, in the broad terms of section 38, not “to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right” is unhelpful, particularly when the human rights are enumerated in necessarily broad terms in the Charter.
Recommendation 6:

No further remedies for acts or decisions of public authorities made unlawful by the Charter should be introduced. Instead, serious consideration should be given to repealing sections 38 and 39, which impose unreasonable obligations under the Charter on public authorities.

5. Effect of the Charter on the development, drafting and consideration of statutory provisions

Section 28 of the Charter requires the proposer of a bill to provide a Statement of Compatibility which “must state whether, in the member’s opinion, the Bill is compatible with human rights and, if so, how it is compatible; and if, in the member’s opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility”.

Since this section came into effect on 1 January 2007 all bills introduced into the Parliament have been accompanied by the required statement.

5.1 Statements of incompatibility

Only on two occasions has the proposer of a bill expressed the view that part of the bill is incompatible with human rights.

Both occasions involved bills that were amending the Control of Weapons Act 1990 by introducing or varying provisions allowing police to conduct random searches in various limited circumstances. The Minister for Police and Emergency Services, Mr Cameron, expressed view that the provisions were incompatible with the right not to have one’s privacy arbitrarily interfered with as set out in section 13 (a) of the Charter.

Mr Cameron apparently did not believe that this limitation on the right to privacy could be “demonstrably justified” as provided for by section 7 (2) of the Charter or he would have said so, as he did in relation to other provisions of the bills.

He may have felt it impossible to make this claim, at least in relation to 2010 bill, because of the finding by the European Court of Human Rights in Gillan v. the United Kingdom, application no. 4158/05 (12 January 2010) that a United Kingdom legislative scheme for random searches within designated areas was incompatible with the right to private life in article 8 of the European Convention of Human Rights.

Mr Cameron refers to this decision as “reinforcing” his view that the provisions for random searches in the two bills were incompatible with human rights. Nonetheless he states that:

“This government nevertheless wishes to proceed with the amendments. Whilst the random search powers introduced in late 2009, as used in planned designated areas, have been effective in the detection of offenders and in deterring others from offending, the community’s concern about the level of violence involving the use of knives and other weapons in public places has not abated. It is necessary to ensure that police are empowered to do everything that they need to do to prevent and deter weapons-related offending. Whilst the amendments in this bill will not alleviate the incompatibility of the existing provisions, they are necessary to ensure the operational effectiveness of these critical police powers.”

If the provisions “are necessary” for operational effectiveness and therefore ultimately for the security of the community, why are these provisions not “demonstrably justified” as permissible limitations on human rights under section 7(2) of the Charter?
It seems that it is because under human rights acts, including under the Charter, it is finally the courts rather than Parliament that determines the scope of “demonstrably justified” limitations on human rights. In the face of a decision of a foreign court – the European Court of Human Rights – on the acceptable justifications for random search schemes, a Minister in the Victorian government has felt compelled to label a proposed random search scheme, deemed by the government to be justified by the need for operational effectiveness for police in securing the safety of the community, as “incompatible with human rights”.

This marks a low point in the application of the Charter – an inappropriate subordination of the executive and legislative arms of government to the judiciary – in this case to a foreign court.

The previous government is to be commended for proceeding with the amendments to the Control of Weapons Act 1990 which it believed to be in the best interest of the people of Victoria despite this humiliating admission that the provisions were “incompatible” with its own Charter.

However, the government is to be faulted on having introduced the Charter which has led to this embarrassing and unnecessary situation.

Proposers of bills should be prepared to defend their provisions against all criticisms, including criticisms based on alleged incompatibility with human rights. The merits of bills can be debated publicly and in the Parliament. However, the requirement to assess the provisions of bills against the enumerated rights in the Charter in the light of international human rights jurisprudence (as required by subsection 32(2) of the Charter) is unhelpful.

5.2 Abortion Law Reform Bill 2008

In her second reading speech introducing the Abortion Law Reform Bill 2008 the Minister for Women’s Affairs, Ms Maxine Morand, said:

“In accordance with section 48 of the Charter of Human Rights and Responsibilities, a statement of compatibility for the Abortion Law Reform Bill 2008 is not required. The effect of section 48 is that none of the provisions of the charter affect the bill. This includes the requirement under section 28 of the charter to prepare and table a compatibility statement and the obligation under section 32 of the charter to interpret statutory provisions compatibly with human rights under the charter.”

Notwithstanding this assertion by the Minister, the Scrutiny of Acts and Regulations Committee, noting that section 48 referred to “any law applicable to abortion and child destruction”, did draw the attention of the Parliament to possible violations of the right to life as well as the right to freedom of conscience and belief by the provisions of the bill. The Committee did not express a view on whether unborn children were persons whose rights are protected by the Charter.

This bill explicitly violated the right to life of unborn children right up to birth, by making abortion lawful on demand up until 24 weeks and with very few restrictions from 24 weeks to full gestation. The bill also explicitly attacked the right to freedom of conscience and belief, by providing for doctors, nurses and pharmacists to be coerced into performing, cooperating with or referring for abortions in certain circumstances.

There is no doubt that this bill was the most significant human rights issue in Victoria since the Charter was enacted in 2006. The complete exclusion of “any law applicable to abortion or child destruction” from being affected by the Charter makes the Charter a sick joke in the eyes of the many Victorians who value human life from its origin in conception to its natural end.
5.3 Infertility Treatment Amendment Bill 2007

The Infertility Treatment Amendment Bill 2007 included provisions allowing licences to be issued for the creation of human embryos by cloning for the explicit purpose of using them in research in which they would be destroyed. The Charter does not include any provision excluding laws governing human embryo research and human cloning from being affected.

There is no saving provision excluding laws applicable to human embryo research and human cloning from being affected by the Charter.

The Infertility Treatment Amendment Bill 2007 included provisions that allowed licences to be issued to create human embryos by cloning for the explicit purpose of using them in research in which they would be destroyed. There is no saving provision excluding laws applicable to human embryo research and human cloning from being affected by the Charter.

The Minister for Health, Ms Bronwyn Pike, made the extraordinary claim in the statement of compatibility accompanying the bill that “the bill has no human rights impacts.” She did not elaborate on this blanket claim.

Once again the Scrutiny of Acts and Regulations Committee disagreed. As well as noting, without resolving, the issue of whether human embryos were persons whose rights were protected by the Charter, the Committee considered that the bill touched on the right of women invited to donate eggs for cloning research not to “be subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent” as expressed in section 10 (c) of the Charter.

For those many Victorians who value human life from its origin, the introduction of a law permitting the creation of human embryos by cloning with the intention that they would be destroyed in the course of research, the Charter again failed to prevent a manifest abuse of human rights.

5.4 Trivialising human rights

The Institute of Public Affairs has identified several examples of statements of compatibility that trivialise human rights issues.

The list is indicative of the waste of resources and parliamentary time created by the Charter’s requirement for statements of compatibility:

- whether a prohibition on the possession of implements to engage in identity theft infringes the right to freedom of expression (Crimes Amendment (Identity Crime) Bill 2009)
- whether requiring persons who serve on town planning committees to disclose their interests on a register of interests infringes their right to privacy and reputation (Planning Legislation Amendment Bill 2009)
- whether granting or extending a lease over Crown land to a person to run a kiosk or other facility infringes the right to freedom of movement by preventing other citizens moving freely over that piece of Crown land (Crown Land Amendment (Leases and Licences) Bill 2009)
- whether banning graffiti is a justifiable limitation of the freedom of expression of graffiti ‘artists’ (Graffiti Prevention Bill 2007)
- whether the ability of a fire safety inspector to evacuate licensed venues that are a serious fire hazard is a justifiable limitation on freedom of movement (amendments to the Liquor Control Reform Act 1998 made by the Justice Legislation Further Amendment Bill 2010)
• whether police powers to seize ice pipes for sale in retail shops is a justified limitation of property rights of ice pipe retailers (amendments to the Drugs, Poisons and Controlled Substances Act 1981 made by the Justice Legislation Further Amendment Bill 2010. The Statement of Compatibility reassures readers that “If an ice pipe is seized, it must be returned within three months”.)

These examples show how the requirement to prepare a statement of compatibility with the Charter for every bill introduced to the Victorian Parliament has resulted in squandering of resources analysing trivial issues, wasting parliamentary time and trivialising human rights. Such statements also have the potential to undermine the legitimate responsibility of the Parliament to legislate for the good order and government of the people of Victoria.

**Recommendation 7:**

> Since the requirement in the Charter for statements of compatibility wastes valuable resources and parliamentary time, trivialises human rights and potentially undermines legitimate parliamentary responsibilities, the provisions in Section 28 and 30 of the Charter should be repealed.

### 6. Effects of the Charter on provisions of services by public authorities

The Victorian Equal Opportunity & Human Rights Commission’s 2010 report on the operation of the Charter in its chapter on “client-focused services and decision making” advances, with several illustrations, the claim that the Charter is having a significant effect on the provision of services by public authorities.

Some examples offered include:

• Consumer Affairs Victoria producing information for people with disabilities, Indigenous consumers and consumers from culturally and linguistically diverse backgrounds in accessible formats;

• The Department of Health making a commitment to “involving people in informed decision making about their treatment”;

• Corrections Victoria working with the Koori community on programs for released prisoners to reduce the risk of reoffending;

• New facilities for accommodation for the homeless; and

• Boorandarra City Council making provision for blind people to know, in the absence of gutters, where the “footpath ends and the road begins”.

The obvious question with these examples is whether or not the Charter really contributes in any significant way to public authorities simply doing their mandated job in a sensible manner. It is noteworthy that the moral obligation to care for the blind was enunciated thousands of years ago in our Judaeo-Christian heritage: “You shall not curse the deaf or put a stumbling block before the blind, but you shall fear your God: I am the LORD” (Leviticus 19:4).

On the other hand, some examples offered by the Commission raise concerns about possible negative effects of the Charter.

The decision by Mereland City Council to ban from using Council facilities all sporting clubs that are unable to show that “they are actively including women, juniors, people with a disability and people
from culturally diverse backgrounds in their clubs" seems an unnecessarily draconian policy based on a misapplication of the "right to equality".

The Victorian Law Foundation's decision to "consult with children about proposed reforms to the Children's Court and to ensure that their concerns are reflected in the reforms" is also of dubious value.

**Recommendation 8:**

*Given the lack of substantial evidence that the Charter is directly responsible for any significant improvements in the provision of services by public authorities in Victoria, no such claim should be accepted as a reason for retaining or further entrenching the Charter.*

7. Effects of the Charter on litigation and the role of courts and tribunals: the interpretive provision (Section 32 (1))

A principal criticism of bills or charters of rights including the Charter is that they transfer important functions from elected parliaments to unelected courts particularly by bestowing on courts a power to interpret all other statutes and subordinate legislation in the light of the enumerated rights in a bill or charter as understood by the court.

In the *Charter of Human Rights and Responsibilities Act 2006* the relevant section setting out this interpretive power reads as follows:

32. Interpretation

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

The meaning of this provision has been hotly contested – in parliament when the bill was debated, by commentators in public discourse and, not least, by tribunals and courts – with widely differing interpretations being offered.

The key point at issue has been to what extent this provision allows a court to "read into" a statutory provision a meaning other than that intended by the parliament which enacted it in order to make it compatible with the human rights enumerated in the Charter as understood by the court.

It is helpful to look at how the interpretation clauses in other human rights acts have been understood by the courts. Examples of such bills or charters of rights include the United Kingdom's Human Rights Act 1998; New Zealand's Bill of Rights Act 1990; and the Australian Capital Territory's Human Rights Act 2004.

7.1 House of Lords and the UK Human Rights Act 1998

Those favouring this interpretation have seen the provision as virtually indistinguishable from the parallel provision in the United Kingdom's Human Rights Act 1998 which reads:

3 Interpretation of legislation

1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

This UK provision was famously interpreted by the House of Lords in *Ghaidan v Godin-Mendoza*. Lord Nicholls of Birkenhead observed that:
the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is ‘possible’, a court can modify the meaning, and hence the effect, of primary and secondary legislation.

This case dealt with the meaning of a provision of the Rent Act 1977 which provided that on the death of a protected tenant of a dwelling-house his or her surviving spouse, if then living in the house, becomes a statutory tenant by succession. The statute explicitly provided at paragraph 2(2) of Schedule 1 that “a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant”.

Mr Juan Godin-Mendoza lived in a flat with the legal tenant Mr Hugh Wallwyn-James. The two men were in a homosexual relationship up until Mr Wallwyn-James’ death. Mr Godin-Mendoza asked the court to rule that he was entitled to succeed as a tenant as the “spouse” of the deceased tenant.

Lord Nicholls noted that:

*On an ordinary reading of this language paragraph 2(2) draws a distinction between the position of a heterosexual couple living together in a house as husband and wife and a homosexual couple living together in a house. The survivor of a heterosexual couple may become a statutory tenant by succession, the survivor of a homosexual couple cannot.*

He concluded:

*Paragraph 2 of Schedule 1 to the Rent Act 1977 is unambiguous. But the social policy underlying the 1988 extension of security of tenure under paragraph 2 to the survivor of couples living together as husband and wife is equally applicable to the survivor of homosexual couples living together in a close and stable relationship. In this circumstance I see no reason to doubt that application of section 3 to paragraph 2 has the effect that paragraph 2 should be read and given effect to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant. Reading paragraph 2 in this way would have the result that cohabiting heterosexual couples and cohabiting heterosexual couples would be treated alike for the purposes of succession as a statutory tenant. This would eliminate the discriminatory effect of paragraph 2 and would do so consistently with the social policy underlying paragraph 2. The precise form of words read in for this purpose is of no significance. It is their substantive effect which matters.*

Lord Nicholls’s view prevailed in this 4-1 decision of the House of Lords.

Neither “mere facts” such as the inherent meaning of words, nor “unambiguous” provisions in a statute, nor the “ordinary reading of ... language” are to stand in the way of court’s power to make the law mean what they think it ought to mean. In fact language itself is to be abandoned: “The precise form of words read in for this purpose is of no significance.”

### 7.2 Changing the meaning of words – the ACT experience

Empowering courts, whenever possible, to interpret statutes in such a way as to make them compatible with the bill of rights can lead to some very creative judicial reasoning.

For example, the ACT Human Rights Act 2004 originally provided in Section 30 (1) that: “In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.”
‘Becomes’ reinterpreted to mean ‘allows’

In the 2005 case of SI by his next friend CC v KS by his next friend IN Chief Justice Higgins exercised this power to interpret Section 51A (3) (b) of the Domestic Violence and Protection Orders Act 2001 in a way contrary to its plain and unambiguous meaning. The provision states that an “interim order becomes a final order against the respondent if the respondent does not return the endorsement copy to the Magistrates Court at least 7 days before the return date for the application for the final order.” (Emphasis added.)

Higgins CJ thought that this provision violated the rights to liberty and freedom of movement guaranteed by the Human Rights Act 2004 and therefore declared that it should properly be interpreted to “empower but not mandate the making of a final order in the absence of a conforming objection”.

‘Before’ reinterpreted to mean ‘after’

In 2008 the ACT’s Legislative Assembly amended Section 30 of the Human Rights Act 2004 to read “So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.” (Emphasis added.) This amendment came into effect on 18 March 2008.

However, this did not stop Chief Justice Higgins deciding on 31 March 2008 in R v DA that the right to a fair trial guaranteed by Section 21 the Human Rights Act 2004 required him to read down a provision in Section 68B of the Supreme Court Act 1933 which allows an accused person to elect trial by a judge alone “if the election is made before the court first allocates a date for the person’s trial”. (Emphasis added.) According to the chief justice this provision, despite its plain meaning, did not prevent him allowing the accused to elect trial by a judge alone after the court had allocated a date for the trial.

“I don’t know what you mean by ‘glory’,” Alice said.

Humpty Dumpty smiled contemptuously. “Of course you don’t — till I tell you. I meant ‘there’s a nice knock-down argument for you’!”

“But ‘glory’ doesn’t mean ‘a nice knock-down argument’,” Alice objected.

“When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean — neither more nor less.”

“The question is,” said Alice, “whether you CAN make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master — that’s all.”

Like poor Alice, none of us mere mortals could possibly know what the words “becomes a final order” or “before the court first allocates a trial date” until we are told by the Chief Justice. Chief Justice Higgins tells us that “becomes a final order” means “does not become a final order unless a judge thinks it should” and “before the court first allocates a trial date” means “before the court first allocates a trial date or later if the judge thinks this is necessary for the accused to get a fair trial”.

In interpreting the verb “becomes” to mean “does not become unless” Chief Justice Higgins is right up there with Humpty Dumpty himself, who observed of verbs:

“They’ve a temper, some of them — particularly verbs, they’re the proudest — adjectives you can do anything with, but not verbs — however, I can manage the whole of them!”

Under this system parliamentarians would have no idea — and no basis on which even to guess — what meaning may be attributed to the words of the statutes they enact. Nor would they have any effective means of amending a statute when it is interpreted by a judge to mean something contrary to the plain
meaning of its wording. What possible form of words could stop a Chief Justice Higgins from making a statute mean just what he chooses it to mean – neither more nor less?

From a citizen’s perspective, one of the most important attributes of law is certainty. A law-abiding citizen needs to know what the law means, with a reasonable degree of certainty, so that he or she can live in a manner that complies with the law. Lack of reasonable certainty replaces freedom with fear.

### 7.3 Victoria’s Charter of Human Rights and Responsibilities

Section 32 (1) of Victoria’s Charter of Human Rights and Responsibilities Act 2006 states: “So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.”

This section commenced on 1 January 2008.

Professor James Allan has commented on the likelihood that the words “consistently with their purpose” will act as an effective restraint to judicial creativity in interpreting statutes:

> Those four words will be our bulwark against the tide of interpretation on steroids type House of Lords’ results, results that are not interpretation so much as redrafting. Those four words will ensure that parliament in Australia remains supreme (within the confines of the Constitution). To paraphrase Churchill, ‘never has so much been owed by so many to .... four words’; at least if we are to take this latest incarnation of the pro-bill of rights camp’s assurances seriously.19

> Here is the truth of the matter. Any judge inclined to fancy himself or herself a latter day philosopher king – an arbiter for the rest of us of what is and is not in keeping with the amorphous notion of fundamental human rights – will not in the least be prevented from doing so by these four extra words. Those who balk at what the House of Lords has done would balk without these four extra words. And those who would not balk, who think they have some sort of pipeline to God when it comes to all these incredibly contentious and debatable line-drawing exercises connected to rights-based disputes that always and everywhere lead to disagreement and dissent amongst smart, reasonable, well-informed and even nice people, well those sort of judges are simply not going to be deterred by these four words.20

Judge Harbison, Vice President of the Victorian Civil and Administrative Tribunal opined in her judgement in the case of Royal Victorian Bowls Association Inc (Anti-Discrimination Exemption) [2008] VCAT 2415 (26 November 2008) that:

> In deciding this application, I must consider the Charter because s32 clearly tells me that in interpreting all statutory provisions (and I take that to mean whether they are ambiguous or clearly expressed), I must make sure that I do so in a way that is compatible with human rights.21

The learned judge proceeded to find that Section 32 of the Charter did in fact change the interpretation of Section 83 of the Equal Opportunity Act, significantly narrowing the grounds on which an exemption from anti-discrimination provisions of the Act could be granted.

Chief Justice Warren of the Supreme Court in the case of *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (7 September 2009) interpreted a provision in that Act which in certain circumstances abrogated the privilege against self-incrimination as extending derivative use immunity to the person, despite the fact that the statute itself clearly provided only a much more limited form of immunity. The extended immunity had to be “read in” by the judge.
The judge essentially used the Charter interpretive provision to second guess the parliament on the balance to be achieved between the privilege against self-incrimination and the difficulty and importance for the well-being of the community of prosecuting cases of organised crime.


At 74 the court said:

*With great respect to Bell J, we do not agree that the insertion into s 32(1) of the words ‘consistently with their purpose’ was intended to ‘put into s 32(1) the approach to s 3(1) adopted by the House of Lords in Ghaidan’. In our view, the insertion of those words of limitation stamped s 32(1) with a quite different character from that of s 3(1) HRA, which was said in Ghaidan to require the court where necessary to ‘depart from the intention of the Parliament which enacted the legislation’. In our opinion the inclusion of the purpose requirement made it unambiguously clear that nothing in s 32(1) justified, let alone required, an interpretation of a statutory provision which overrode the intention of the enacting Parliament.*

The court rejected submissions that it could use a broad understanding of section 32 (1) to read down a provision in the *Drugs, Poisons and Controlled Substances Act 1981*, which reversed the onus of proof on a person accused of possession of drugs to establish that drugs found in the person’s residence were not in the person’s possession, to require only an evidential burden of proof (providing some evidence to raise a doubt) rather than a legal burden of proof (providing evidence that was persuasive on a balance of probabilities).

The result of applying a narrower understanding of the interpretive provision of the Charter was that the court found that there was no meaning of the relevant provision in the *Drugs, Poisons and Controlled Substances Act 1981* which was compatible with the Charter right to be presumed innocent.

The court further considered that the limitation on the right to be presumed innocent was not “demonstrably justified” under section 7(2) of the Charter. The court then set a high bar for any government seeking to claim such “demonstrable justification” for a provision incompatible with Charter rights:

*The government party seeking to make good a justification case under s 7(2) will ordinarily be expected to demonstrate, by evidence, how the public interest is served by the rights-infringing provision. The nature and extent of the infringement of rights sought to be justified will usually determine how much evidence needs to be led, and of what kind(s).*

The implication is that to avoid a court issuing a declaration of inconsistent interpretation, as the court did in this case, a government must persuade the court of the validity of its reasons for limiting the Charter right. This seems to improperly involve the court in the exercise of making public policy by weighing the respective arguments for a policy decision.

Ms Momeclovic has appealed the case to the High Court which heard the matter in February 2011. A judgement is still awaited.

It is not possible to predict how the High Court will rule on the meaning of section 32 (1) of the Charter – the interpretive provision - and its connection with section 7(2) which permits demonstrably justified limits on Charter rights.

However, regardless of the ruling – whether a broader or narrower understanding of the interpretive provision is favoured – there will continue to be a lack of clarity as to the meaning of all Victorian
statutes which conceivably touch on human rights. Such a lack of clarity is contrary to the desirability of law to be transparent and its meaning reasonably ascertainable.

The rule of law includes the important principle that laws are published and available for consultation so that the citizen can know at any time what laws he must obey and what penalties he may face for violating the law.

Charter-based interpretation of laws by the courts undermines the rule of law and substitutes for it rule by judges. No one can know what the law means until a judge tells him. No one then can act in a way that complies with the law and avoid violating it.

This is a form of tyranny. A person may find himself having violated the law because a judge has just interpreted a statute contrary to its plain meaning but in a way considered necessary by the judge to give the statute have a charter-compatible meaning.

 Recommendation 9:

The Charter has resulted in transferring considerable power from the elected Parliament to unelected judges by empowering the courts to creatively interpret legislation in order to achieve compatibility with the charter or to declare statutory provisions to be incompatible with the charter. These provisions have increased uncertainty about the meaning of the law as well as undermined democratic processes. For these reasons section 32 of the Charter should be repealed.

8. Effects of the Charter on litigation and the role of courts and tribunals: importing international law

Section 32 (2) of Victoria’s Charter of Human Rights and Responsibilities Act 2006 provides that:

International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

United Nations treaty monitoring bodies have expressed the view that, among other things, governments should protect human rights by:

- refusing to foster the observance of Mother’s Day;
- prohibiting parents from withdrawing their children from a sex education class;
- ensuring that at least 30 percent of children under age three are in full time day care;
- denying doctors or hospitals the right to conscientiously object to participation in abortion;
- denying economic support to mothers who choose to stay at home;
- allowing children to access medical or legal counselling without parental consent;
- allowing teenagers to access to abortion without parental knowledge; and
- denying religious bodies any exemptions from anti-discrimination laws.23

These views all touch on matters that are socially contentious and which should remain the business of elected, accountable parliaments and the executive governments answerable to those parliaments.

As pointed out in section 5.1 above, a decision of the European Court of Human Rights declared that random search provisions violate the right to a private life in European human rights law. This
decision apparently led the Victorian Minister for Police and Emergency Services to declare that such provisions in government bills were incompatible with the Charter right to privacy.

In *Director of Public Transport v XF* J of the Supreme Court of Victoria opined that:

> interpretation of the Charter requires consideration of general human rights standards and jurisprudence, not simply the application of domestic cases concerning different statutory regimes. International human rights law and comparative jurisprudence supports a different, more flexible, approach to disability discrimination than that adopted by the majority in Purvis [a recent judgement of the High Court of Australia].

While this case was decided on other grounds, it is a matter of some concern that a judge of the Supreme Court of Victoria would consider that the Charter operates so as to direct Victorian courts to prefer the approach of international courts to statutory interpretation over that of the High Court of Australia. This is particularly concerning since section 73 of the *Commonwealth of Australia Constitution Act* provides that “the judgement of the High Court ... shall be final and conclusive.”

**Recommendation 10:**

*Section 32 (2) of the Charter should be repealed.*

### 9. Effects of the Charter on litigation and the role of courts and tribunals: the right to freedom of belief

Section 14 of the Charter provides for the right to freedom of thought, conscience, religion and belief as follows:

1. Every person has the right to freedom of thought, conscience, religion and belief, including—
   1. the freedom to have or to adopt a religion or belief of his or her choice; and
   2. 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.

2. A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

The interpretation of this right, and the consideration of its relationship with “the right to equal and effective protection against discrimination” provided for by section 8 (3) of the Charter, was considered by Hempel J of the Victorian Civil and Administrative Tribunal in *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination).*

The case involved the refusal by Christian Youth Camps Ltd (CYC), a company conducted by members of the Christian Brethren, to accept an application for a booking for the use of a campsite run by the company from a group called WayOut, which works with groups of young people from rural Victoria “to provide an environment that is welcoming to same sex attracted young people”.

Hempel J invoked the Charter in interpreting the relevant provisions of the *Equal Opportunity Act 1995:*

> The correct approach, in my view, when considering the interpretation of the provisions of the EO Act relevant to the complaint, that is those relating to the definition of discrimination in ss 7 and 8, of the provision of services and accommodation in ss 42 and 49, and whether Cobaw had standing to bring a representative complaint under s 104(1B), is to interpret those
provisions in a way that gives effect, as far as possible consistently with the purposes of the EO Act, to the realisation of the right of equality and freedom from discrimination in s 8(2) and (3) of the Charter.

In considering the interpretation of the provisions of the EO Act relevant to the exceptions relied on by the respondents, that is s 12 and ss 75(2) and 77, that I must interpret those provisions in a way that gives effect, as far as possible consistently with the purposes of the EO Act, to the realisation of the rights of freedom of religion and expression in ss 14 and 15 of the Charter, and of the right of equality and freedom from discrimination in s 8 of the Charter.

The case highlights the potential conflict between Charter rights.

Hempel J set out her approach to dealing with this conflict as follows:

A construction that advances the purposes or objects of the EO Act would favour a narrow, not broad, large or liberal interpretation of the exceptions. The inclusion of the exceptions in the EO Act evidences Parliament's intention to strike a balance between the right to be free from discrimination, and the right to freedom of religious belief, and the point at which the balance is struck. In construing the exceptions, the right to freedom from discrimination must not be curtailed unless "clearly manifested by unmistakeable and unambiguous language".

These principles referred to in the previous paragraph must be considered in light of s 32 of the Charter. The complainant did not take issue with the Commission's submission that, when construing ss 75(2) and 77 the right to equality and freedom from discrimination under s 8 of the Charter invoked by the complainant was required to co-exist with the rights to freedom of thought, conscience, religion and belief and freedom of expression in ss 14 and 15 of the Charter invoked by the respondents. The complainant and the Commission both submitted that just as the s 8 rights to equality and freedom from discrimination were not absolute and may be limited in accordance with s 7(2) of the Charter, so too were the rights to freedom of religion and expression not absolute. They too were subject to limitation pursuant to s 7(2).

The respondents submitted that s 32 of the Charter required ss 75(2) and 77 of the EO Act to be interpreted in a manner consistent with the rights to freedom of religion under s 14 and expression under s 15, but without regard to the right to equality and freedom from discrimination in s 8. The effect of the respondents' submissions was that the freedom of religion and expression rights trumped the equality and freedom from discrimination rights relied on by the complainant. For the reasons I expressed when addressing the respondents' submissions about what Charter rights were engaged in this proceeding, that is not a tenable submission having regard to s 7(2) of the Charter which requires both rights to co-exist.

I accept the Commission's submission that when considering the application of the Charter rights to the exceptions, both sets of rights invoked by the parties may be limited for the purpose of protecting the rights of another person. I also accept the Commission's submission that it is necessary to examine the content of the respective rights to determine the relevance of those rights in the task of interpreting the exceptions. This must be done, not in the abstract, but by reference to the words of the provisions setting out the exceptions.

I must therefore interpret sections 75(2) and 77, having regard to the purpose of those exceptions, namely to protect religious freedoms, and in a manner consistent with 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 but also, so far as it is possible, in a manner which is compatible with the rights to equality and freedom from discrimination in s 8 of the Charter. I must do so in a way which does not privilege one right over another, but recognises their co-existence.57

In the light of this approach Hempel J went on to make the following extraordinary findings:
• notwithstanding very explicit religious purposes in its trust deed CYC was not a religious body for the purposes of the exception in section 75 (2) of the Equal Opportunity Act 1995;

• that the only “doctrine” of the Christian Brethren was the plenary inspiration of Scripture so that any beliefs they had about homosexual behaviour based on the interpretation of Scripture were not doctrine and therefore could not establish a need to discriminate to comply with their doctrine;

• that notwithstanding the strongly expressed views of all the Christian Brethren who gave evidence that “they and other Christian Brethren would be offended, horrified or greatly or very upset, if WayOut conducted its proposed forum at the adventure resort”, this was not grounds for concluding that the refusal to take the booking was necessary to avoid injury to the religious sensitivities of people of the religion (section 72 (b) (ii)).

“Injury in this context means more than mere offence. Injury means causing harm. ... The harm must be real, and significant. In our secular and pluralistic society, freedom of religious belief and expression carries with it acceptance of the right of others to hold different beliefs, and for those who hold different beliefs to be able to live in accordance with them. This is the essence of the difference between the freedom to hold one’s own beliefs, and the right to impose those beliefs on others.”

• “The conduct of the respondents in refusing the booking was clearly based on their objection to homosexuality. They are entitled to their personal and religious beliefs. They are not entitled to impose their beliefs on others in a manner that denies them the enjoyment of their right to equality and freedom from discrimination in respect of a fundamental aspect of their being. Having done so, and in a manner that understandably caused hurt and offence, compensation is appropriate. I order the respondents pay compensation in the amount of $3,000.”

In this case the Charter despite section 14 manifestly failed to protect the freedom of religion and belief. Instead it was used by the judge to support the narrowest possible reading of the religious exceptions in the Equal Opportunity Act 1995.

Recommendation 11:

The Charter has failed to protect the right to freedom of religion. It gives no useful guidance as to how to resolve matters where rights conflict. It is susceptible to being interpreted by judges to suit their own predetermined views. The Charter should be repealed and substantive protection of human rights such as freedom of religion should be ensured by appropriate specific legislation such as more comprehensive exceptions to the Equal Opportunity Act 1995 (or better still repealing aspects of the Act that unnecessarily intrude on freedom of association as well as freedom of belief).

10. Accessible, just and timely remedies for infringements of rights

By its nature the Charter is not a useful instrument for securing “accessible, just and timely remedies for infringements of rights”.

As discussed above the Charter fails to give clarity to the meaning of the law. By simply enumerating rights it gives no clear guidance as to how to resolve conflicts between these rights or to determine the appropriate limits to the enumerated rights.

Remedies can be sought before courts or tribunals. In these cases repealing the Charter would help improve accessibility, justice and timeliness by removing a complicating factor that only makes the
law more obtuse and that can lead to delays in the resolution of proceedings as Charter issues are raised.

Remedies can also be sought by making a complaint to the Ombudsman Victoria.

Recommendation 12:

The Charter has done nothing to deliver accessible, just and timely remedies for infringements of rights and should be repealed.

11. Overall benefits and costs of the Charter

- The Charter has created a new lack of clarity in the meaning of the law.
- It has undermined the ability of citizens to know with reasonable certainty what Victorian laws mean.
- It has failed to protect the most vulnerable of human beings – human embryos and the unborn child – from laws which authorise their exploitation and destruction.
- It has failed to protect freedom of religion.
- It has been used to undermine laws which seek to improve community safety and to improve the effectiveness of the criminal justice system.
- It has resulted in parliamentary time and resources being wasted on trivial statements of compatibility.

The Charter has failed to deliver on its promise of a fairer Victoria. It serves no useful purpose. It should be repealed.

Recommendation 13:

The Charter should be repealed.

12. Options for reform: protecting and upholding rights in Victoria

Human rights are best protected in Victoria by the current system of a Westminster-style democracy:

- a parliament which makes laws but which is accountable to the people at each election;
- an executive government accountable to the parliament; and
- a judicial system, including the common law and the rights and freedoms it protects.

This system recognises historical experience that the greatest threat to human rights has arisen from tyrannical governments which have concentrated power in a dictator or small oligarchy.

Human rights are protected in Victoria, not by a single “rights” document like the Charter which needs to be interpreted by the judicial elite, but by deliberation and debate within and between the different arms of our constitutional system of government.

Victoria’s constitutional system includes several additional elements which serve to protect our human rights:

• a bicameral parliament with upper and lower houses elected by different methods;
• a written constitution and
• a neutral head of state in the Governor who ensures due constitutional process.

In the Western world in the past, a system of checks and balances has usually been an important part of the protection of our human rights. Free nations establish a constitutional division of powers between the legislature, the executive and the judiciary. As the late Sir Harry Gibbs, one of the greatest Chief Justices of the High Court of Australia, pointed out, the most effective way to curb political power is to divide it. He said that a “constitution which brings about a division of power in actual practice, is a more secure protection for basic political freedom than a bill of rights, which means those who have power to interpret it say what it means.”

We concur with the sentiment expressed by former News South Wales Labor Premier, Hon Bob Carr:

I and others will take issue with any attempt by a group of zealots to arrogate to themselves the power to define, codify and nail down their definition at this time of what they think ought to be our rights. Talk about elitism.

Rights count. So much so they need the give and take of the common law, rowdy parliaments and the ebb and flow of public opinion.

It’s the commonsensical ethos of a people – temper democratic, bias offensively Australian – not a declaration of abstractions that will keep us free.

Human rights are best protected in Victoria by our current Westminster system with the distinct roles for parliament, the executive government and the judiciary. Removing the Charter by repeal would help make this clearer.

**Recommendation 14:**

*The protection of human rights in Victoria should rely on the process of deliberation and debate within and between three arms of government each with its distinct role – parliament, the executive government and the judiciary. The Charter has muddied the waters, serves no useful purpose and should be repealed.*

### 13. Endnotes

1. UN Committee on the Rights of the Child, *Concluding observations of the Committee on the Rights of the Child: Holy See*, paras 7 and 13; [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6f6b879be758d0e8ec12570d9103340ba$FILE/G0544374.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6f6b879be758d0e8ec12570d9103340ba$FILE/G0544374.pdf)

2. CRC/C/15/Add.268, paras 35-36, p 7; [http://www.unhchr.ch/tbs/doc.nsf/898586b1dce7b4043c1256a450044f331/6f6b879be758d0e8ec12570d9103340ba$FILE/G0544374.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dce7b4043c1256a450044f331/6f6b879be758d0e8ec12570d9103340ba$FILE/G0544374.pdf)

3. Larzelere, R. E., & Kuhn, B. R. (2005), “Comparing child outcomes of physical punishment and alternative disciplinary tactics: A meta-analysis”, *Clinical Child and Family Psychology Review*, 8 (1), 1-37; [http://www.springerlink.com/content/k0x444x2255187aq/](http://www.springerlink.com/content/k0x444x2255187aq/); and

4. Committee on the Rights of the Child, General Comment No. 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia); [http://www.unhchr.ch/tbs/doc.nsf/898586b1dec7b4043c1256a450044f331/6545e032eb57bf5c125716c002e834d/$FILE/G0740771.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dec7b4043c1256a450044f331/6545e032eb57bf5c125716c002e834d/$FILE/G0740771.pdf)

May 2011, p. 38;  


16. Carroll, Lewis, "Through the Looking Glass", Chapter VI;  

17. Ibid.

18. “Siren songs and myths in the bill of rights debate”, Senate Occasional Lecture, 4 April 2008;  


20. Ibid., p 11.


22. R v Momiclovic [2010] VSCA 50 (17 March 2010);  


24. Director of Public Transport v XFI [2010] VSC 319 (29 July 2010) at 69  


29. “Lawyers are already drunk with power”, The Australian, 24 April 2008;  