Mr Edward O'Donohue,
MLC Chairperson Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

By email: charter.review@parliament.vic.gov.au

14 June 2011

Dear Chairperson and members of the Scrutiny of Acts and Regulations Committee

Review of the Charter of Human Rights and Responsibilities 2006 (Vic)

I make this submission as a current LLM student at the University of Melbourne, having studied and researched various aspects of human rights law, including the Charter of Human Rights and Responsibilities 2006 ('the Charter'). Further to the Terms of Reference for the Committee's Review of the Charter, this submission is made in relation to:

<table>
<thead>
<tr>
<th>The effects of the Charter on:</th>
</tr>
</thead>
<tbody>
<tr>
<td>- the development and drafting of statutory provisions; and</td>
</tr>
<tr>
<td>- the consideration of statutory provisions by Parliament</td>
</tr>
</tbody>
</table>

While the Charter contains several mechanisms aimed at improving the development of statutory provisions and parliamentary debate, the executive has often utilised its dominant position in Parliament and under the Charter to ignore the these mechanisms and act contrary to the spirit of the Charter.

This submission seeks to highlight both structural weaknesses in the Charter, which are overly deferential to the executive, and the examples of the executive's failure to comply with the Charter. However, firstly, this submission will identify the aims of the Charter against which these deficiencies should be assessed.

THE AIM OF THE CHARTER

The Charter aims to:

- prevent human rights abuses;
- use dialogue to improve policy formulation and decision making; and
provide human rights protection while ultimately preserving parliamentary sovereignty.

The Charter recognises that there needs to be a check on executive power to ensure that human rights considerations are not unreasonably sidelined in the pursuit of political or popular objectives. It was thought that the Charter represented “a decisive departure in Victoria from the long held notion that the best protection for human rights is the good sense of our parliamentary representatives”. However, unfortunately this has not been achieved and the decision to protect human rights of vulnerable individuals and minorities remains at the discretion of the executive.

While it is legitimate for politicians to be informed by the majoritarian views of their constituency, the Charter sought to ensure dialogue in the policy making process was achieved by incorporating a number of institutional views. Despite this intention, the executive circumvented the involvement of Parliament and the judiciary, passing bills before SARC had opportunity to report to Parliament and pre-emptively declaring bills incompatible with human rights, thereby preventing any human rights compatible judicial interpretation.

This is disappointing noting the Charter was in fact designed to preserve parliamentary sovereignty, considering judicial review as complementary to executive power and allowing human rights to be limited, provided the limitations served a legitimate aim and were proportionate.

In my view, the Charter, both structurally and in its use by the executive, errs too far on the side of upholding parliamentary sovereignty to effectively prevent human rights abuses and to improve policy formulation.

STRUCTURAL WEAKNESESS IN THE CHARTER

The broad articulation and non-absolute nature of rights contained in the Charter allows the executive, in dialogue with the Parliament and the judiciary, to shape discussion surrounding the scope of, and corollary duties connected to, human rights. This is a legitimate activity of

---

the executive, provided it is conducted in good faith. However, several additional mechanisms guard parliamentary sovereignty too closely:

- inclusion of specific limitations in addition to the general limitations provision;²
- provisions surrounding the compatibility of bills, including the fact that:
  - a failure to table a statement of compatibility does not affect the validity of the bill;³ and
  - a bill may be introduced which is incompatible with the Charter (without referring to the override provision)⁴.
- narrow scope of judicial review, demonstrated by:
  - the limited interpretation power, which only permits interpretation “so far is it consistent with its purpose”, preferring the purpose of the legislation being interpreted over the purpose of the Charter;⁵
  - where such a human rights compatible interpretation is not possible, the only other option available to the judiciary is to issue a declaration of inconsistent interpretation, which as the practical implementation of the Charter as discussed below, would be unlikely to exert any pressure on the executive to adopt a human rights compatible position;⁶
- the additional override provision contained in section 31; and

MISUSE OF THE CHARTER BY A DOMINANT EXECUTIVE

These structural weaknesses have been used to the advantage of the executive to ignore human rights and continue to be motivated by political or popular objectives with due regard for human rights issues. This is most evident in the following examples in which the executive has:

- failed to identify the rights impact of a bill
- shown disregard for the rights of unpopular groups; and
- tabled statements of INCOMPATIBILITY.

² For example, the right to privacy in section 13 of the Charter is weakened by internal (unlawful and arbitrary) and general (section 7(2)) limitations provisions, allowing greater scope for limitations of this right.
³ See section 29 of the Charter.
⁴ See section 28(3)(b) of the Charter.
⁵ Section 32 of the Charter.
⁶ Section 36 of the Charter.
No rights impacts identified

Both the Infertility Amendment Bill 2007 and the Abortion Law Reform Bill 2008, which deal with politically divisive issues, failed to identify human rights impacts. SARC fulfilled its role by reviewing the Bills and the Second Reading Speeches and highlighting issues of concern in its report to Parliament and corresponding with Ministers. However, the Ministerial correspondence was inadequate. In relation to the Infertility Amendment Bill 2007 the Minister’s response did not genuinely address SARC’s questions, rather the Minister noted Victoria was implementing a national scheme and failed to address the rights issues raised by SARC or respond to SARC’s comments regarding the adequacy of compatibility statement.7 In relation to the Abortion Law Reform Bill, the executive sought to rely on the savings provision in section 48 of the Bill to avoid tabling a statement of compatibility.

Disregard for rights of unpopular groups

Sex offenders and criminals are, understandably, unpopular in the community and therefore, politically. However, as noted in the Preamble to the Charter, human rights must be understood as “belong[ing] to all people without discrimination”. The Charter acknowledges that rights are not absolute and is in fact designed to accommodate competing values through the section 7(2) reasonable limitations test.

However, in the Justice Road Legislation Amendment Bill 2007 and the Serious Sex Offenders Monitoring Amendment Bill 2009, the executive ignored the substantive requirements of the section 7(2) test, merely discussing competing rights and values at a high level of abstraction, by balancing the general rights of criminals and serious sex offenders against the rights of the community to protection.

For example, in the Serious Sex Offenders Monitoring Amendment Bill 2009 the only referral to the requirements of the section 7(2) test was that it “requires a balance between the rights of offenders as well as the rights of the community, particularly potential victims including children.”8 By discussing competing rights at such a high level of abstraction, using

---

such emotive language and appealing to public sentiment, the rights of offenders to privacy, liberty and freedom of movement can never trump the rights of children and the community to protection, it is a simplified and unfair comparison.

The executive went so far in the Justice and Road Legislation Amendment Bill 2007 to claim that allowing Victoria Police to provide photographs of convicted persons to media organisations enhanced the right to life as the proposed amendments will “promote confidence in the criminal justice system”. The executive’s broad interpretation of this right to include a right to ‘quality of life’ is, surely, straining its meaning to political advantage.

Statements of Incompatibility

Since the enactment of the Charter the executive has tabled two Bills which it admits are at least partially incompatible with the Charter (the Summary Offences and Control of Weapons Acts Amendment Bill and the Control of Weapons Amendment Bill 2010). This admission is perhaps the most detrimental to rights protection as it prevents further discussion on the limitations and in effect circumvents the role of the judiciary.

In each case the Minister conceded the powers conferred were incompatible with the right against unlawful or arbitrary interference with privacy contained in section 13(a) of the Victorian Charter. However, no analysis of this position was undertaken.

Both Bills cited community concern as the justification for measures, rather than providing evidence of any increase in weapons related violence. Such statements and the marketing campaign surrounding this legislation sparked anger from community groups:

“The Bill reflects a law and order campaign which overlooks other ways of dealing with violence in our community. Such a campaign is political and as such is concerned about ‘being seen to be doing something’ rather than ‘doing something effective’. We acknowledge that some people are scared, which has in part been influenced by the skilful marketing of a law and order crack down. In reality, debate about public space is fuelled by fear and anger rather than logic.”

---


10 Victorian Aboriginal Legal Service Co-operative Ltd, Submission to the Scrutiny of Acts and Regulations Committee in response to the Summary Offences and Control of Weapons Acts Amendment Bill 2009, 20
Furthermore, by failing to engage in detailed and reasoned analysis of the limitations imposed, the executive limited the parameters of the debate to whether or not the protection of the public from weapons-related violence was worthwhile.

The failure of the executive to make these arguments and the pronouncement of its clear intention that the measures be considered incompatible with the Charter stifles debate in Parliament and prevents the judiciary from interpreting the provisions in accordance with human rights, pursuant to section 32. This deters litigation as the only judicial remedy available is a declaration of inconsistent interpretation. While such a declaration requires a Ministerial response, the Minister could simply repeat the rationale expressed in the statement of compatibility and not be subjected to further scrutiny.

The executive's admission that these measures cannot be reasonably be justified in a "free and democratic society based on human dignity, equality and freedom" set "a dangerous precedent." The machinery of the Charter is designed to ensure transparency in government and scrutiny of executive action. The executive eluded these objectives by failing to outline substantive policy justifications to satisfy the reasonable limitations test.

Finally, acknowledging the powers are incompatible, also acknowledges the exercise of these powers by police will be incompatible with human rights and, as such, lessens scrutiny over the exercise of these powers.

CONCLUSION

The enactment of the Charter was described as an 'historic day for Victoria'. The enactment of a 'powerful symbolic and educative tool' which would help Victoria "become a more tolerant society, one which respects diversity and the basic dignity of all." However,

---


12 The obligations of a public authority to act compatibly with human rights, in section 28(1) of the Victorian Charter, do not apply if "as a result of a statutory provision... the public authority could not reasonably have acted differently or made a different decision" (section 28(2) of the Charter).


14 Ibid.
unfortunately, it is the executive that has ignored these objectives and preferred political point scoring to the effective protection of human rights.

The executive’s dominance in the dialogue model, given the numerous concessions made to preserving parliamentary sovereignty in the drafting of the Charter, has allowed it to contravene the intentions of the Charter, without being held to account by either SARC, the media or the public.

As such, I believe the Charter should be strengthened and there should be a continued focus on generating cultural change throughout all levels of government to ensure the Charter meets its objectives and provides an effective model of rights protection.

Structurally, the Charter should be strengthened by:

1. requiring SARC’s report to be tabled in Parliament prior to any vote on the legislation; and
2. amending section 29 of the Charter to allow legislation to be challenged on the basis that the executive has not genuinely engaged in a section 7(2) limitations analysis.

Practically, the operation of the Charter must be improved by:

1. compulsory education for parliamentarians to ensure they understand that the reasonable limitations test can be used to justify limitations on rights and do not hold misconceptions regarding the effect of the Charter; and
2. greater engagement with the media to highlight and scrutinise the executive’s actions in relation to the protection of human rights.