Ad Hoc Interfaith Committee

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And then the Friday 17th June 2011

Mr Edward O’Donohue, MLC
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002
Email: charter.review@parliament.vic.gov.au

Dear Mr O’Donohue,

Re: Charter of Rights and Responsibilities

We welcome the opportunity to make a submission.

The Charter of Rights and Responsibilities Act 2006 has three areas that it affects: the development and passage of legislation, the operation of public authorities and the application and interpretation of the law by the courts and tribunals. We would prefer that the first of these effects were maintained along similar lines to the Commonwealth Human Rights (Parliamentary Scrutiny) Bill 2010 which has the first function only. We would also prefer that such a Bill engaged all of the international human rights instruments to which Australia is a signatory, as does the proposed Commonwealth Bill. The latter would provide a much more comprehensive protection of human rights than the Victorian Charter.

We acknowledge that there have been some positives in relation to the role of the Charter such as its effect on those affected by housing decisions and its role in relation to public authorities and the protection of people who are vulnerable such as those needing housing and those who have disabilities or mental illnesses. There is a need to ensure that their rights are protected. In supporting repeal and replacement of the Charter we urge that those rights that have been protected in that respect are protected, perhaps by way of giving a role to the ombudsman to overview public authorities and ensure that they protect the rights of their clients.

These recommendations are our response to the fourth issue, “Options for reform…”, but there are problems with the content of the rights within the Victorian Charter:

- There is an idiosyncratic selection of rights that do not adequately reflect the international instruments;
- Those rights that are included such as the right to life and the right to religious freedom are poorly expressed;
• They are subject to interpretation clauses that allow limitations to be imposed in ways that do not reflect international law with respect to human rights.

The Arguments in support of our contention that the *Charter of Rights and Responsibilities Act 2006* (hereafter, the charter) should be replaced by a Human Rights Parliamentary Scrutiny Bill are fivefold:

1) The Charter is often ignored by both the Government in proposing new legislation and the Parliament in considering such legislation

2) Whilst claiming to be a charter of rights, the Charter is in fact highly selective in the rights that have been included

3) The Charter does not meet Australia's international obligations in respect of the right to life

4) The Charter does not meet Australia's international obligations in respect of the protection for freedom of conscience, thought and religion

5) The Charter invites application and interpretation by the Courts in a way that is selective and potentially unbalanced

The following appendices explain our concerns. We would welcome an opportunity to discuss these matters further with the Committee.

Yours sincerely,

Rob Ward

On behalf of the following signatories:

Rev David Palmer, Convener, Church & Nation Committee, Presbyterian Church of Victoria

Pastor Peter Stevens, Victoria State Officer, Family Voice Australia

Imam Raid Galil OAM, Heidelberg Mosque

Rev Dr Max Champion, National Chair of The Assembly of Confessing Congregations within the Uniting Church in Australia

Rabbi Dr Shimon Cowen, Director, Institute for Judaism and Civilization.

Dr Rosalie Hudson, Uniting Church in Australia

Marlene Pietsch, Lutheran Church of Australia, Victorian District

Dr Adam Cooper, John Paul II Institute for Marriage and Family

Assoc Prof Nicholas Tonti-Filippini, John Paul II Institute for Marriage and Family
Very Rev Dr Michael Protopopov OAM, Vicar General of the Russian Orthodox Church in Australia
Robert Ward, Vic/SA State Director, Australian Christian Lobby
Maurice Benington, Executive Pastor, Christian City Church Whitehorse
His Eminence Metropolitan Archbishop Paul Saliba, Antiochian Orthodox Christian Archdiocese of Australia, New Zealand and the Philippines
Rev Mark Durie, St Mary’s Anglican Church, Caulfield North
Rev Ross Carter, Uniting Church in Australia
Rev. Fr. Geoff Harvey, Orthodox Church in Australia
Rev Greg Pietsch, President Victorian District (including Tasmania) Lutheran Church of Australia
Mike Grechko, Senior Minster, Berwick Church of Christ
Pastor K L Vogel, General Secretary, Australian Union Conference, Seventh-day Adventist Church,
Michelle Dempsey, State Executive Officer, Victoria Christian Education National
Rev Andrew Bray, Moderator, Presbyterian Church of Victoria
Ps Paul Craig, Senior Minister, Diamond Valley Baptist Church
Ps Mark Conner, Senior Minister, CityLife Church Knox
Stephen McCracken, Associate David McCracken Ministries
Jeanette Woods, Executive Officer Vic/Tas Christian Schools Australia
Ps Lin Rauber, Frankston Forest Baptist Church
Pastor Wayne Swift, Executive Director, Apostolic Church Australia
Ryan Smith, Pastor, Kyneton Baptist Church
Dr Brendan Roach, President, Harvest Bible College
Ps. Peter Owen, Parkside Christian Fellowship, Warrandyte
Ps Dan Parker, Kingston City Church, Heatherton
Jill Healey, Executive Principal, Flinders Christian Community College
Rev Rob Issachsen, Transforming Melbourne
Appendix 1: The Charter is often ignored by both the Government in proposing new legislation and the Parliament in considering such legislation

This assertion can be demonstrated by considering four specific bills that have come before the Parliament since the Charter received royal assent. Our argument is that by demonstrating both the ease and frequency with which the Charter has been ignored, the case for retaining the Charter in the statute book is greatly weakened.

Abortion Law Reform Act 2008

Despite the existence of a freedom of conscience clause in the Charter (s14), Section 8 of the Abortion Law Reform Act 2008 requires a registered health practitioner with a conscientious objection to abortion to refer to another registered health practitioner who does not have a conscientious objection to abortion.

This is not a genuine freedom of conscience clause given that a conscientious objection to abortion must of necessity prevent a health practitioner referring since it implies approval of the conduct and it involves cooperation in the act.

Even worse, Section 7 of the Abortion Law Reform Act 2008 allows no freedom of conscience to a registered pharmacist or registered nurse.

The Government justified its failure to meet the requirements of the Charter on the basis of section 48 of the Charter:

Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.

However, such an exclusion (an exclusion we consider abhorrent), cannot be used to justify removing a freedom included in section 14 of the Charter.

When the Act was considered by Parliament, the Scrutiny of Acts and Regulations Committee (SARC) raised a number of concerns about the Abortion Law Reform Act 2008. In an Alert Digest to the Parliament it raised the following questions for Parliament’s consideration:

1. whether the provisions of the bill constitute an undue trespass to rights or freedoms within the meaning of the Act.

2. Whether or not foetuses have human rights under the Charter; and

3. If so, whether or not clauses 4 to 7 and 11, by legalising many abortions, reasonably limit the rights of foetuses to protection according to the test set out in Charter s. 7(2).

4. Whether or not clause 8(1)(a), by requiring practitioners to refer patients to doctors who hold no conscientious objection to abortion, limits those practitioners’ freedom to believe that abortion is murder?
5. If so, whether or not clause 8(1)(a) is a reasonable limit on freedom of belief according to the test set out in Charter s. 7(2) and, in particular, whether or not there are any less restrictive means available to ensure that women receive appropriate health care?¹

There is no indication in Hansard that the Parliament ever addressed these questions or the matter of the bill’s incompatibility with the right to freedom of thought, conscience and belief and the rights of human beings before birth.

Assisted Reproductive Technology Act 2008

Let it be said that we find Assisted Reproductive Technology Act 2008 to be as morally repugnant as the Abortion Law Reform Act 2008 in that it made assisted reproductive technology and all the many parental possibilities that it created accessible to everyone barring those failing a police check for offences against children. In doing so, it permitted up to five persons becoming involved in the production of a child with the commissioning parent(s) being a single person, male or female or a same sex couple in addition to an opposite sex couple.

Fathers were removed from the legislation altogether.

The consequence of these new arrangements is that any right a child might have to his or her identity and to know, to access or to be cared for by his or her birth mother and biological mother and father has been removed.

When the Assisted Reproductive Technology Act 2008 was introduced into Parliament, the SARC raised a number of questions for Parliament’s consideration²:

1. Whether or not clauses 11(1) and 14, by imposing procedures on people who use assisted reproductive technology that do not apply to people who conceive naturally, limits their Charter right to equal enjoyment of the rights to privacy and family without discrimination on the basis of impairment, marital status or sexual orientation?

2. If so, whether or not clauses 11(1) and 14, by seeking to protect children conceived using assisted reproductive technology, are reasonable limits according to the test set out in Charter s. 7(2)?

3. Whether or not embryos have human rights under the Charter; and

4. If so, whether or not clause 34(2)(b), by requiring the destruction of stored embryos in some circumstances to prevent their indefinite storage, is compatible with any rights that stored embryos have to life.

Further, the Committee raised and issue of whether clause 45 of the bill concerning the publication of certain information infringed the Charter right to freedom of expression.


In the event, the bill passed without discussion of the matters raised by the Committee. The failure of the Parliament to seek compatibility with the Charter raises further doubts as to the usefulness of the Charter.

**Medical Treatment (Physician Assisted Dying) Bill 2008**

When the private member’s Medical Treatment (Physician Assisted Dying) Bill 2008 was introduced, SARC observed:

The Committee therefore considers that clauses 5, 6, 12, 14 and 15 engage the Charter right of people with terminal or incurable illnesses not to be arbitrarily deprived of life.

The Committee further observed that “clause 9 may require a person who has a conscientious objection to suicide to play a role in a process that leads to a suicide. The Committee also observes that clauses 10 and 11 may require a person who has a conscientious objection to suicide to refrain from conduct that they believe is necessary to denounce or prevent a suicide. The Committee therefore considers that clauses 9, 10 and 11 may limit the Charter right of people to be coerced or restrained in a way that limits their freedom to adopt their beliefs in practice.”

The Committee then went on to refer to Parliament for its consideration the questions of whether or not:

- clauses 5, 7, 8 and 17, by exempting some acts of assisting suicide from criminal, civil and disciplinary liability, breach the state’s duty under Charter s. 9 to protect people with terminal or incurable illnesses from suicide
- clauses 5, 6, 12, 14 and 15 permit the assistance of a suicide that is the result of mental illness, external pressure or poor decision-making and, if so, whether or not the bill’s provisions are a reasonable limit on the Charter rights of people with terminal or incurable illnesses to life and to not be arbitrarily deprived of life according to the test set out in Charter s. 7(2)
- clause 9, by requiring doctors to inform patients that other doctors may be willing to assist them to commit suicide and by requiring health care providers to forward a copy of a patient’s relevant medical records to a new health care provider who might assist that patient to commit suicide, limit the Charter freedom of those doctors and employees of health care providers not to be coerced to act in a way that is contrary to their beliefs about suicide
- clause 10, by barring professional organizations and associations from engaging in prejudicial pressure or penalties for things done lawfully under the bill, limits the Charter freedom of members of those entities not to be restrained in a way that is contrary to their beliefs about suicide

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- clause 11, by barring people from trying to resuscitate people who have taken a drug to end their life in accordance with the bill, limits the Charter freedom of people not to be restrained in a way that is contrary to their beliefs about suicide

and, if so, whether or not any limitation is reasonable under the test set out in Charter s. 7(2).

The bill was defeated but without any evidence in Hansard of any consideration given to the Committee’s report with its questions.

**Summary Offences and Control of Weapons Acts Amendment Act 2009**

At the time the Summary Offences and Control of Weapons Acts Amendment Bill 2009 was introduced, Mr Cameron, the Police Minister acknowledged that the bill was “partially incompatible with the charter”\(^4\).

Liberty Victoria reported the Minister admitting the bill was ‘incompatible with the Charter to the extent that it limits rights ... in providing powers for police to randomly search persons (including children) and vehicles in public places within designated areas, even if the police have not formed a reasonable suspicion that the person or vehicle is carrying a weapon’. Liberty Victoria concluded, “it became obvious how ready our elected representatives are to ignore the Charter altogether”\(^5\).

Clearly regardless of the merits or otherwise of the Act, the Government decided to ignore the Charter.

Certainly there is no evidence from any the above four cited bills that the Charter had any discernable impact on the formulation of these bills or their passage through the Parliament.

If a major reason for the Charter is to require conformity in new legislation to its provisions then the demonstration above that the Charter has been set aside by the Government and Parliament leads to the question, “why have a Charter that is ignored?”.

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\(^5\) [http://www.libertyvictoria.org/node/132](http://www.libertyvictoria.org/node/132)
Appendix 2: Whilst claiming to be a charter of rights, the Charter is in fact highly selective in the rights that have been included

The Charter has been highly selective in the rights it has included, raising the issue of the Charter promoting some human rights to the neglect of others.

It is noted that many rights in the International Covenant on Economic, Social and Cultural Rights have not been included. Thus the Charter does not protect work (Article 6), just and favourable conditions of work (article 7), maternity leave, children not to work (Article 10) and education including private education (Article 13). Nor does it incorporate the right to an adequate standard of living, 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).

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 high to balance competing rights.

For example, how is a bill to 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.

Again, 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”.

There is a very broad range of rights listed in the Convention on the Rights of the Child that are not covered in the Charter including, but not limited to protection of best interests, responsibilities, right and duties of both parents, identity, family relations, not to be separated from parents unless in best interests, contact and personal relations with separated parent, family reunion, parental direction, access to media that promotes social, spiritual and moral wellbeing and protection from injurious material and protection from harm and abuse.

Whilst inclusion of rights from the Convention on the Rights of the Child is debateable, our concern is that incorporating children’s rights in the Charter would open up the possibility that public authorities 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. Unfortunately some parents are inadequate and the State is forced to intervene, but the general proposition that public authorities are better placed than parents to make decisions in the best interest of the child is one that we reject.

It is also worth pointing out the Charter does not offer protection to a number of freedoms listed in the International Covenant on Civil and Political Rights. Attention is drawn in Appendix 4 to the
failure of the Charter to include respect for the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions (Article 18.4). Other examples include the right to self determination (Article 1), the right to not be imprisoned for failing to fulfil a contract (Article 11), the rights of the child for protection, birth registration, name and nationality (Article 24) and the right of men and women of marriageable age to marry and to found a family (Article 23.2). Note that Article 23.2 defines marriage as between a man and a woman.
Appendix 3: The Charter does not meet Australia’s international obligations in respect of the right to life

Section 48 of the Charter prevented discussion about the complexity of the issue of applying the Charter in relation to abortion.

There are several issues to be addressed in relation to compatibility of the rights in the Charter and the matter of abortion. Most obviously is the right to life and whether the child before birth has rights and the way in which the child's rights are to be protected in relation to his or her mother and the unique relationship that exists between her and the child she carries. The Convention on the Rights of the Child recognises the need for protection of the child before birth. Other issues that need to be addressed in this context are the right to freedom of religion and the right to freedom of conscience.

The Charter applies to persons and persons are defined as human beings. It may be argued that before birth the child is not a person for the purposes of existing law but it is difficult to argue that the child before birth is not a human being. As a matter of biology he or she obviously is.

One of the complaints that can be made about the Abortion Law Reform Bill 2008 is that no attempt was made to seek any kind of compatibility with the right to life of the child before birth. Some attempt could have been made to give weight to the rights of the child before birth without necessarily precluding access to abortion. Respect for the right to life of the child before birth could have been addressed by being open to the possibility of discussion and passing some or all of the many amendments that were proposed. In fact they were defeated along the same lines as the voting for the bill itself. In other words those who proposed the bill refused to allow any form of amendment.

During the debate on the Bill efforts were made to introduce amendments of this kind including:

- Protection for children born alive after an abortion\(^6\)
- Ban on Partial Birth Abortion\(^7\)
- Legal protection (under the Crimes Act) for an unborn child seriously injured during an assault on the mother\(^8\)
- Protection for victims of child sex abuse seeking abortion.
- Information on health risks of abortion\(^9\)
- Independent professional counselling\(^10\)

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\(^6\) Victorian Hansard 11 September 2008 p. 3620 - 3629  
\(^7\) Victorian Hansard 11 September 2008 p. 3498-3506  
\(^8\) Victorian Hansard 11 September 2008 p. 3474-3480  
\(^9\) Ibid. p. 3629-3631  
\(^10\) Ibid. P. 3616
• Protection for women with disabilities who have impaired decisions-making

• A foetus that is born alive has all the rights of a child

• Approval requirements for abortion clinics

• Offering women ‘decision-making’ counselling

• Notifying the custodial parent of a child seeking an abortion

• Keeping an adverse events register

• Requirement to provide foetal tissue samples to police if abuse suspected

• Recording of data on abortion

• Pain relief for foetus

These amendments were not aimed at prohibiting abortion that they did indicate a more balanced approach to the gravity of a decision to end the life of a child before birth. By and large they would have made the Charter more compatible with respect for the rights of the child before birth. Other possibilities might have included a waiting period and protection against women being coerced to have abortions.

It does seem strange that an issue of such gravity does not provide protection for the woman to allow her time and space including the counselling support to help her make a decision in accordance with her own values. Decision-making counselling is important to the way in which the counselling is able to support the woman and creates an environment in which she is not being pressured in either direction. The counsellor can explore with her the pressures that are upon her and ways in which she might seek to prevent those pressures from having her make a decision that is not consistent with her own values and which she may later regret. This is not to deny the capacity of women to make decisions. It is simply a recognition from the evidence that many women say that they would have made a different decision if they had been supported particularly if they had been supported by the father of the child.

A man who says to his pregnant partner, “It’s your choice”, might think that he is being politically correct but the reality is that in expressing no view about the life of their child and offering no support to continue the pregnancy with all the implications that that would have for each of them, he is in fact withholding support from her and passively pressuring her to get rid of the problem. It is for reasons like that that women should be given the opportunity to access decision-making counselling voluntarily because involuntary counselling is not bonafide counselling. They can choose

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11 Ibid.
12 Ibid.
13 Ibid. p. 3622
14 Ibid. p. 3536-3550
15 Ibid. p. 3480-3485
16 Ibid. p. 3620
17 Ibid. p. 3619
18 Ibid. p. 3623
19 Ibid p. 3625
otherwise under such a requirement. The point simply is that those who offer abortion would be required to offer them an opportunity, though the actual provision of decision-making counselling should not be by the abortion provider since the abortion provider has an obvious conflict of interests.

The right to life also raises issues in relation to the termination of the life of a child who has reached the stage of maturity at which he or she could be born alive. This applies to a relatively small proportion of abortions that occur after approximately 20 to 24 weeks. There can be no question of a conflict between the woman's rights at that stage and the rights of the viable child. The difference in procedure is between delivery involving an intervention to cause the death of the child before birth and the same procedure without that additional intervention. In other words what is involved is whether or not the procedure involves fatal intervention. There is no medical reason in the interests of a viable child why the procedure should include that fatal intervention. If it was needed for the woman the child could simply be born alive. The purpose of fatal intervention is not the well-being of the mother but her wish not to have her child born alive. That is not a health issue for her. It may be a psychological or social issue in which she would prefer the child not to survive either being brought up by herself or being brought up by someone else.

Whatever happens with the Charter whether it is repealed or amended section 48 must not survive. In the absence of section this issue needs to be revisited to ensure that there is compatibility between the abortion legislation and the rights to life and freedom of conscience. That may require some amendments to the abortion legislation. In relation to the right to life in general there are some issues about the way in which the right is stated in the Charter. It is quite differently stated from the way in which it is stated in the International Covenant on Civil and Political Rights. In the ICCPR the right to life is both inherent and inalienable. In the international principles of interpretation that makes the right to life non-derogable. "Inherent" means that it belongs to the individual as a simple matter of that individual's existence. "Inalienable" means that it cannot be taken away, given away or sold.

Unfortunately in the Charter the right to life is neither inherent nor inalienable and it has no more status than any other right and so is subject to the Charter section 7(2) which allows reasonable limitations to be imposed upon it and the law courts and tribunals can also apply their own interpretation of the Charter in determining the meaning of existing law.

This is one of the many ways in which the Charter does not reflect the international human rights instruments or international law. There is a need to amend the Charter (if it is to be reatained in some form) to ensure that the right to life is non-derogable. This has a bearing not only on the issue of abortion, but as the scrutiny of acts and regulations committee has noted, it has a bearing also on the assisted reproductive technology legislation. Their questions in relation to the latter issue were also ignored in the Parliamentary debate.

The meaning and interpretation of the right to life and its non-derogable status is also relevant to any future discussion of the issue of euthanasia both voluntary and non voluntary. The usual way in which euthanasia legislation is formulated, the law recognises a range or category of individuals who suffer from terminal and chronic illness and classifies them in such a way that their right to life becomes contingent upon their continued desire to live. In other words euthanasia legislation for the purposes of the right to life discriminates between people who are terminally and/or chronically
ill and the rest of the population. Such a discrimination would require health professionals to offer the possibility of termination of life to people in those categories who met the description in the legislation. In other words there would be a significant change to medical practice which seeks to help people live with chronic illness and to live as fully as they can with terminal illness. The health professions would cease to be giving that unequivocal support and instead they would be offering an alternative which would profoundly alter the nature of that support.

That difference in the relationship between the patient and the health professional would not be limited to that relationship but would extend to the relationship between the patient and his or her family who would also be made aware of the possibility of the patient making a decision to end his or her own life. They would be aware that the patient could decide to put him or herself out of their misery and burden. Many patients who are chronically or terminally ill are already conscious that they are a burden to others. Euthanasia legislation makes that burden optional and that cannot be without pressure on the patient to end his or her life, if respect for his or her life had become contingent in the law upon his or her attitude only.

If the right to life in the Charter were expressed with the strength that it has in the international human rights instruments and, according to laws of interpretation of those instruments, being non-derogable, then this would require a more sophisticated and nuanced discussion of this issue than the contemporary discussion which tends to focus on the supremacy of autonomy over all other rights.

The Ad Hoc Interfaith Committee strongly supports inclusion of the right to life as it is expressed in the international human rights instruments and with the principles of interpretation that have been established in international law.

There is a further issue in relation to the Convention on the Rights of the Child. Articles 3, 9, 18, 20, 21, 37 and 40 of the Convention all require that the "best interests of the child" principle be applied to each and every "proposed or existing law or policy or administrative action or court decision directly or indirectly affecting the well-being of children". This has important significance for medical treatment decisions in relation to children because the right to life gives meaning to best interests that ensures that their continued life is considered positively. It does not mean that the right to life is taken as exclusive it simply means that it is part of the mix of those aspects that are considered in determining what is in the child’s best interests. That would not of course make legislation that allowed for the withdrawal or the withholding of burdensome life prolonging treatment incompatible with the right to life. What it would do is prevent the right to life from not being considered in the formation of law or public policy by the Parliament. What it would exclude would be a view that said because the child suffered from a major disability that therefore his or her right to life should not be considered, that the life is not worth living. Inclusion of an equal and inalienable right to life prevents some lives from being judged to be not worth living. It insists that no-one is to be denied life prolonging treatment on the grounds of disability.
Appendix 4: The *Charter* does not meet Australia’s international obligations in respect of the protection for freedom of conscience, thought and religion

The Victorian *Charter* is very seriously deficient in the protection afforded freedom of thought, conscience and religion.

Before critiquing the *Charter*’s failure to adequately protect freedom of thought, conscience, and religion, it is first necessary to comment on the anti discrimination movement and then review the United Nations framework, to which Australia is a states party, for freedom of thought, conscience, and religion.

**The anti discrimination movement**

In Victoria over the past decade we have witnessed the ever encroaching reach of anti discrimination measures under the previous Government through its legislation reinforced by the exclusive focus of the Victorian Equal Opportunity and Human Rights Commission on anti discrimination to the virtual exclusion of human rights.

Those who believe that anti-discrimination laws should be ever expanded to cover more and more issues and to apply in more and more situations, tend to find it difficult to see any other point of view. There is an unspoken belief that non-discrimination is the right that trumps all others. There can be a fundamentalism about this as powerful and rigid as the most dogmatic of religious fundamentalisms. That fundamentalism inheres in two aspects. The first is a belief that all limitations on who is eligible to apply for particular jobs should be abolished or severely restricted, even if 99% of all the other jobs in the community were open to that person and the limitations are themselves based upon competing human rights claims.

The second fundamentalist aspect of the anti-discrimination movement is an unwavering belief that the only human rights are individual ones and not group rights. This can make adherents blind to the competing claims of groups which would justify a right of positive discrimination in order to enhance the cohesion and identity of the group.

All the major world religions in Australia, including the Christian religion, are minorities. Only a modest percentage of Australians attend Churches, mosques, synagogues or other houses of faith on a regular basis. No religious organization has much influence over public policy, certainly not during the life of the previous Government. No religious faith has much influence on what is enacted in legislation\(^{20}\). No religious moral code represents a national shared consensus about how we should live, and there are few if any moral values specific to people of religious faith that are enshrined in law. The position was otherwise in previous generations.

**The United Nations framework for freedom of thought, conscience, and religion**

The starting point for considering religious freedom is the United Nations framework.

Article 1 of the 1948 *Universal Declaration of Human Rights* declares,

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\(^{20}\) Though we do gratefully acknowledge the present Government’s changes to the religious exception clauses in the Equal Opportunity Act 2010.
"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

We gladly affirm that these truths concerning human beings are consistent with cultural diversity if for no other reason than to explain the considerable degree of harmony evident within Christian, Muslim and other religious communities in Australia despite the extraordinary racial and cultural diversity existing within these communities.

It is important to recognise that according to Article 1 of the Declaration the state is not the source of human rights. Rather, the inviolable dignity of the human person is derived from and directed to that which transcends the authority of the state.

Regarding freedom and religion, the Declaration affirms (Article 18):

"Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance"

Because religion most directly addresses the foundation of human dignity, religious freedom is the source and safeguard of all rights and freedoms.

For most people, religion is a communal and public commitment, underscoring the fact that the person is not simply an isolated, autonomous individual but a person in solidarity with others. This solidarity is underscored also in other communities – locality, school, business, and cultural and sporting activities, and most particularly in the family (Article 16). In such communities people keep faith with the allegiances that give meaning to their lives.

Respect for human rights requires the protection of the communities and associations by which a culture of human dignity flourishes. We know from historical experience, as for instance, with the totalitarian regimes of recent memory, that when these communities are weakened or destroyed, individuals become abstract instruments of collective power, their human dignity is not respected and the way is opened to tyrannical regimes which eventually implode. The state is the servant and guardian, not the master of the communities of allegiance in which free persons express their identity and solidarity with others.

Whilst almost all of the Declaration’s thirty articles begin with the word "Everyone", this "everyone" is not only an isolated, solitary bearer of rights but more importantly the person in community. In addition to the family and religion, the Declaration recognises communities of work (Article 23), of cultural life (Article 27), and of political participation (Article 21). In the last instance, it is asserted that "the will of the people shall be the basis of the authority of government." In the sphere of education, it is said that "Parents have a prior right to choose the kind of education that shall be given to their children" (Article 26).

This theme of the communally situated "everyone," in which freedom is understood not as freedom from community but as freedom for community, is an often neglected integrating feature of the Universal Declaration. Article 29 succinctly summarizes this theme,
“Everyone has duties to the community in which alone the free and full development of his personality is possible.”

It is clear not only from Article 29 but the Declaration taken as a whole, that we have obligations to one another arising from our participation in a common humanity and common moral order. If the dialogue about our common future is to be secured and advanced, we must be able to give a reasonable account of such obligations. An unfortunate feature of Charters of Rights as currently enacted, is that they are more about rights than obligations.

Freedom of thought, conscience and religion is dealt with more fully in the 1966 International Covenant on Civil and Political Rights (ICCPR).

The relevant articles in ICCPR are Articles 18, 20, 25 and 27

**Article 18**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

**Article 20**

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

**Article 25**

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

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21 The distinctions referred to in Article 2 are, “such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

**Article 27**

_in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language._

**Article 18** corresponds to Article 18 of the Declaration.

**Article 18.1 & 18.2** maintain that people have a right to both freely believe and practice their religion, whether individually or communally, irrespective of how offensive or unreasonable one faith may seem to another, as well as having the right to change their religion. In manifesting one's religion by teaching that religion's claims to truth, it is inevitable and necessary to critique other religions' claims to truth. This needs to be understood as serving the propagation of a religion without necessarily being seen as an attack on persons of another religion.

Furthermore, in relation to proselytising religions such as Christianity, Islam, Buddhism and Hinduism, it is impossible to draw a line between proselytism and teaching.

**Article 18.3** adds a limitation on religious freedom, but it is a very strict one. It requires that any such restriction be _necessary_. In other words, in seeking to apply a restriction on freedom of religion it needs to be clearly demonstrated, by real evidence and not assertion, that without the proposed restriction damage would be caused to "public safety, order, health, or morals" or there would be a violation of "the fundamental rights and freedoms of others".

The 1984 Siracusa Principles^{22} define the conditions and grounds for permissible limitations and derogations enunciated in the ICCPR in order to achieve its aims. These are:

1. _No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself._

2. _The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned._

3. _All limitation clauses shall be interpreted strictly and in favor of the rights at issue._

4. _All limitations shall be interpreted in the light and context of the particular right concerned._

5. _All limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant._

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6. No limitation referred to in the Covenant shall be applied for any purpose other than that for which it has been prescribed.

7. No limitation shall be applied in an arbitrary manner.

8. Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.

9. No limitation on a right recognized by the Covenant shall discriminate contrary to Article 2, paragraph 1.

10. Whenever a limitation is required in the terms of the Covenant to be “necessary,” this term implies that the limitation:

(a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,

(b) responds to a pressing public or social need,

(c) pursues a legitimate aim, and

(d) is proportionate to that aim.

Any assessment as to the necessity of a limitation shall be made on objective considerations.

11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.

12. The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state.

Article 18.4 specifically protects the rights of parents “to ensure the religious and moral education of their children in conformity with their own convictions”.

Article 20 does not endorse the concept of vilification as in the Racial and Religious Tolerance Act 2001 (RRTA2001), being restricted to incitement to serious offences properly dealt with in the criminal courts.

Article 25 makes clear that every citizen shall have the right and the opportunity, without any distinction, inter alia, of religion, to take part in the conduct of public affairs. In other words religious belief and its expression is no barrier to participation in the public domain.

Article 27 reinforces Article 18 in the protection of the communal expression of religious faith.


Turning now to Victoria’s Charter of Human Rights and Responsibilities Act 2006:

Section 14: Freedom of thought, conscience, religion and belief of the Victorian Charter mirrors the positive guarantee of freedom of thought, conscience and religion found in ICCPR Article 18.1 and 18.1, though the inclusion of belief, presumably to cover non theistic beliefs such as atheism, does detract from the focus of ICCPR Article 18 on freedom of religion.
The Charter fails to include any provision to respect the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. In other words ICCPR Article 18.4 is a glaring omission from the Victorian Charter. This is a significant and major omission particularly in the light of the previous Government’s attempt to intrude upon the right of religious organisations to select staff who will uphold the religious and moral values of the organisation.

The second major problem immediately arises when Section 7 of the Charter: Human Rights – what they are and when they may be limited of the Victorian Act is taken into account. The limitation provisions in Section 7 bear little resemblance to ICCPR Article 18(3) in their practical and legal effect. Section 7(2) of the Charter provides:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and
(b) the importance of the purpose of the limitation; and
(c) the nature and extent of the limitation; and
(d) the relationship between the limitation and its purpose; and
(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The first point to be noted is that, contra ICCPR Article 18(3), there is no boundary to the grounds on which freedom of religion may be restricted in the Charter.

In the second place, the Charter introduces the concept of reasonable limitations. ICCPR Article 18.3 makes no reference to reasonable limitations. As noted earlier, the subsequently enunciated Siracusa Principles define the conditions and grounds for permissible limitations and derogations enunciated in ICCPR in order to achieve an effective implementation of the rule of law.

Comparing Section 7(2) of the Victorian Charter with the Siracusa Principles clearly demonstrates Section 7(2) does not comply with Principle 1, Principle 3 (there is no mention of strict interpretation of limitations or the favouring of the right concerned in the Charter) or Principle 10 (the concept of ‘necessary’ is not present in the Charter at all and there is no requirement that the limitation answer a pressing public or social need, pursue a legitimate aim, etc).

In contrast, therefore to the rigour imposed by ICCPR Article 18 interpreted according to the Siracusa principles, the Charter enables the state to restrict rights in a far greater range of circumstances, thus effectively restricting rights that are supposedly guaranteed under the Charter.

More will be written in Appendix 5 about the way in which the interpretation and application of the Charter’s limitation provisions leaves much to judicial discretion, contra ICCPR Article 18.3 interpreted by the Siracusa principles.
Appendix 5: The Charter invites application and interpretation by the Courts in a way that is selective and potentially unbalanced

At the conclusion of Appendix 3 on the failure of the Charter to meet Australia’s international obligations in respect of the protection for freedom of conscience, thought and religion, it was noted that much is left to judicial discretion in the interpretation and application of the limitation provisions contra ICCPR Article 18.3.

The fundamental right to freedom of religion should not be susceptible to change by judicial interpretation. Judges, with respect, are unelected and through Australia’s common law system inevitably have enormous potential to influence the content of fundamental rights in this field as litigation ensues.

An example of wide judicial discretion conferred in the determination of fundamental rights is found in Section 32(1) of the Victorian Charter, which stipulates that

(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.

Among the statutory provisions that are to be interpreted this way obviously is the Charter itself and that includes its constituent guarantees. Section 32(2) does not require the international standard, ICCPR, Article 18 to be the yardstick for interpretation.

(2) 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.

The result is that international law and the extent to which it may be considered in interpreting a human right is left to the discretion of the judge and indeed may not be considered at all.

In fact no clear guidelines are offered as to those matters to be taken into account when determining a human right. It is simply inappropriate for judges effectively to award fundamental freedoms to the individual or take them away according to such an ill-defined principle of what “is compatible with human rights”. This is especially true of freedom of religion which is the subject of Australia’s pre-existing international commitments. The Victorian Government in effect gives its judiciary the power to trump ICCPR Article 18.

The broadly defined method of interpretation in the Victorian Charter impacts not simply the guaranteed rights in the Charter but, by virtue of Section 32, everything else in the Victorian statute book. The Charter enables the Supreme Court to make a declaration of incompatibility with a State law, if an issue arises in a court proceeding about whether a law is consistent with a human right (Sections 33 of the Charter)\footnote{Provision is also made for the scrutiny of proposed State laws, all intended to conform State laws to the judicial interpretation of human rights under section 32. The potential reach of that judicial interpretation is unfathomable.}. A declaration of incompatibility under the Victorian Charter, of itself, may not immediately affect the rights or obligations of a party to the litigation which gives rise to the declaration. But the body of law developed by judges through their interpretation of human rights will be the law applicable throughout the jurisdiction.
Disputes which call for judicial interpretation will not only be those asserting the straightforward denial of a human right but inevitably will arise incidentally whenever it suits a party to invoke a human rights issue in pursuit of their claim (whether or not it is a human rights claim). Human rights thus enter the arena of private litigation to be used as a sword as well as a shield as demonstrated with the Victorian RRTA2001.

If the state is to remain the guarantor of human rights, as indeed it should, then human rights claims should be directed against the state – and not private parties. As soon as human rights can be asserted by private parties, whether individuals or religious groups, they will be. The concern here is that a culture of rights assertion will be generated on religious grounds when instead tolerance should be the touchstone.

It is submitted that this level of judicial discretion and basic uncertainty in the interpretation of fundamental human rights is unacceptable, and as such forms a significant part of our call to repeal the Charter.

The third problem with Section 7(2) of the Victorian Charter. Section 7(2) is that it is a catchall limitation clause for any and every human right. By placing all rights within the same limitation clause permits a particular rights to be limited by other rights. This is precisely what occurred in the Cobaw case.

As noted in Appendix 4, Section 14(1) & (2) of the Charter provided for the right to freedom, conscience, religion and belief.

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 Judge Felicity Hampel of the Victorian Civil and Administrative Tribunal in Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination)\(^\text{24}\).

The case involved the refusal by Christian Youth Camps Ltd, [CVC] 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.”\(^\text{25}\)

CVC argued the freedom of religion right in the Charter permitted them to act as they did in denying Cobaw use of their facilities while Cobaw and VEOHRC argued that the freedom of religion right was not absolute but must co-exist with the anti-discrimination right in the Charter\(^\text{26}\).

Judge Hampel invoked the Charter in interpreting the relevant provisions of the Equal Opportunity Act 1995:

\[\text{The correct approach, in my view, when considering the interpretation of the provisions of the EO Act relevant to the complaint, that is those relating to the definition of discrimination in ss 7 and 8, of the provision of services and accommodation in ss 42 and 49, and whether Cobaw had}\]


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, in this case setting s 8 against ss 14 and 15. The fact that the limitation clause s 7(2) places all rights within the same limitation clause, contra ICCPR would permit a particular right, that to freedom of religion, to be limited by other rights, in this case freedom from discrimination.

Judge Hampel 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 complaint 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 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.\(^{27}\)

In the light of this approach Judge Hampel went on to make certain extraordinary findings, now to be tested in the Court of Appeal:

- 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 found 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” (para 333) 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) (a)). “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.” (para 328)

- “The conduct of the respondents in refusing the booking was clearly based on their objection to homosexuality. (para 361) 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 $5,000.” (para 358)

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 and to allow freedom from discrimination to trump freedom of religion.

In reaching her decision to uphold the complainant, Cobaw, Judge Hampel agreed that agreed that Freedom of Religion was not a stand-alone right (para 325). No right is absolute (para 39). The submission of CYC was “an attempt to privilege one right (freedom of religion and the right to express it) at the expense of another (equality before the law and freedom from discrimination)...” (para 39). Freedom of Religion must coexist with and not trump the rights to equality and freedom from discrimination in the Charter (para 325). Rights must be balanced. The scheme of the Charter, consistent with that, allows for the limitation of rights where one person’s enjoyment of a Charter right impinges on or impairs another’s enjoyment of a Charter right (para 37).

Clearly, Judge Hampel’s finding exposes the problem in the Charter of conflicting rights. Disallowing freedom of religion to trump (her words) equality and freedom of discrimination, she permitted equality and freedom of discrimination to trump freedom of religion.

We note in passing that Judge Hampel has made the same error as Judge Higgins in the religious vilification 2004 case involving the Islamic Council of Victoria and two Christian pastors28, in that she chose to enter theological debate and define Christian Brethren doctrine, in order to buttress her findings, in a way that the Christian Brethren would not recognise29.

Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination) is the subject of an thorough assessment in the June 2011 edition of Quadrant: Homosexuality trumps Christianity by the Rev Dr Peter Barclay30.

The more general case that the Charter invites application and interpretation by the Courts in a way that is selective and potentially unbalanced has been well argued by Ben Jellis in an article, Look but Don’t Leap: Lessons from the Victorian Statutory Bill of Rights31.

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29 This particular case clearly demonstrated the dangers for the judiciary in taking sides in disputes involving religious beliefs. Judge Higgins made a number of theological assertions in his VCAT finding against the two pastors. These were criticised in an appeal to the Court of Appeal which set aside Judge Higgins determination and remedies, sending the case back to VCAT. See http://www.austlii.edu.au/au/cases/vic/VSCA/2006/244.html.