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

29 June 2011

Dear Mr O’Donohue


This is a submission to the Scrutiny of Acts and Regulations Committee regarding its review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

The terms of reference we are focusing on are:

- The overall benefits and costs of the Charter; and
- Options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria.

The submission is brief because we have in other forums written on these topics. It is inefficient and undesirable to repeat our comments in this submission. Rather we attach previous publications that we have written on the topic. In short, our key submissions are:

1. Human rights are desirable.

2. Human rights are desirable because they enhance human prosperity — if they retard prosperity, they should not be promoted.

3. Human rights should be promulgated and conferred on individuals in a manner which is provable and empirically sound.

4. Legislation often fails to achieve its aims and can sometimes have counter-intuitive outcomes.

5. Legislative documents which catalogue open-ended interests which are labelled rights are poorly designed mechanisms for actually conferring rights.

6. The crucial step in conferring rights is not identifying them; it is defining their limits and ranking them against other often conflicting priorities in the form of the common good or other conflicting rights. Even the right to life is not absolute — it can be violated in situations of self-defence and necessity.
7. The process of demarcating the scope and application of rights requires a rigorous analysis of the relevant cause and effect systems operating in the community against a backdrop of desirable moral outcomes.

8. Judges are not trained to undertake this process and do not have the resources and information necessary to accomplish the task.

9. The process of conferring and protecting rights is innately a role for Parliament.

10. The best assessment of the effectiveness of the Charter is derived from empirically studying its impact.

11. The Charter has proven to be an ‘invisible’ document as far as directing legal and social outcomes is concerned. The sum total of human rights advancement produced by the Charter is the expansion of a ‘use immunity’ in the decision of Re an application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381.

12. The failure of the Charter is supported by the fact that the Productivity Commission found in 2010 that Victoria has the slowest legal system in Australia, despite the fact that Victoria is the only state with a Charter that expressly states that every person has the ‘right to be brought to trial without unreasonable delay’.

13. Victoria also has the most secret court system in the country (contrary to the requirements of s 24 of the Charter) - there are more suppression orders in Victoria than the rest of the country combined.

14. Charter supporters contend that the Charter has resulted in public authorities incorporating rights into their decision-making process. There is no evidence to support this. Aspirational phrases of the type found in the Charter cannot drive outcomes. More likely, they are used by people to mask their pre-determined decisions in a moral language – thereby discouraging inquiry and challenge.

15. Rights charters (in the form of the current Victorian Charter) are also undesirable because they engender a natural sense of rights triumphalism, negating the imperative to ascertain the rights that are lacking and how they can be conferred.

16. Rights charters are also undesirable because the evidence shows that they lead to a human rights industry, which places the industry above human rights. This is demonstrated by the large number of ‘template’ submissions that have been sent to this Committee, lobbying for the continuation of the Charter in its current (or similar) form. These submissions have been actively encouraged by organisations with a vested interest in the continuation of the Charter.

17. The only rights that should be in the Victorian Charter are those that are set out in concrete terms, following evidence based reasons in support of the proposals. Thus, for example, the Charter should state that all ‘people charged with a criminal offence are entitled to be tried within one year of being charged. If that does not occur as a result of no fault of the accused, the matter shall be permanently stayed’.
18. Rights expressed in this manner will achieve intended, real and productive outcomes. The Charter should be re-drafted in this suggested format.

Three documents are attached:

(i) Opinion piece in *The Australian* by M Bagaric on 3 Dec 2010, ‘The Rights Crusade is Simply Worthless’;
(ii) Opinion piece in *The Australian* by M Bagaric P Faris and 20 May 2011, ‘Charter’s Basic Flaw: They never beyond the aspirational’;

Yours sincerely

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The rights crusade is simply worthless

- Mirko Bagaric
- From: The Australian
- December 03, 2010 12:00AM

LAW is the only discipline where fundamental change can still occur without an empirically validated reason.

Normally the best we can do with law is measure its impact after it has been implemented.

On this criterion, the Charter of Human Rights and Responsibilities in Victoria must rank as the sorriest and most miserable piece of social and legal engineering ever passed by an Australian legislature.

Since the commencement of the charter three years ago, Victoria has been the only state in Australia with a human rights charter. But it has counted for nothing.

One thing that is certain is that Victorians do not enjoy more human rights than other Australians. In fact, to the extent that it is possible to measure human rights observance, Victoria fares worse than any other state.

In his second reading speech, outgoing attorney-general Rob Hulls proclaimed: "This is an historic day for Victoria."Today the government fulfils its commitment to provide better protection for human rights for all people in Victoria through the enactment of a charter of rights and responsibilities."

The charter was enacted in Victoria to the unbridled and, more importantly, unquestioning adoration of the legal profession and human rights advocates.

Like most Brumby government reforms, the charter was all spin, no substance.

It has proven to be an irrelevant and unworkable document. In the criminal law domain -- where the rights were meant to operate most acutely -- there is only one reported judgment where the charter has operated to expand the operation of a human right.

In Re an application under the Major Crime (Investigative Powers) Act 2004 (2009), a use immunity was read into a provision that curtailed the privilege against self-incrimination.

That's it -- the sum total of human rights advancement produced by the charter.

In other cases the courts have either ignored the charter or glibly stated a relevant right is defeated by the common good. In short, the charter has done less for human prosperity than the Dog Act.

In the meantime, the Productivity Commission found earlier this year that Victoria has the slowest legal system in Australia.
Delays of up to two years between charge and trial are not uncommon -- by which time witnesses are, at best, approximating what happened, as opposed to recalling what actually happened.

The breathtaking aspect of this is that Victoria is the only state with a charter that expressly states that every person has the "right to be brought to trial without unreasonable delay".

Victoria also has the most secret court system in the country. There are more suppression orders in Victoria than the rest of the country combined. So much for Hulls's grandiose second-reading speech claim.

In that speech, he said: "This (charter) further strengthens our democratic institutions and the protections that currently exist for those human rights."

Obviously Hulls thinks that the constitutionally entrenched right to an open justice system declared by the High Court recently in Totani (the motorcycle gang decision) is an indulgence we don't need in Victoria.

And it's not only Victorian courts that are shrouded in secrecy.

Victoria has laws, currently under appeal to the High Court, preventing parents from being informed if their neighbour is a pedophile.

The right to self-defence and to protect our children are also obviously mere indulgences we Victorians don't need.

In a stunning rebuke to the charter, the Victorian Court of Appeal has told appellants that they should not make charter arguments in interlocutory appeals.

Yes, that's right: the court has said that, because of the complexity of the document, it does not want to hear arguments that are based on it -- despite the fact that these arguments could result in an acquittal.

Law 101 states that, in a democracy, parliament makes the law and courts interpret and apply it.

Even in North Korea the courts don't effectively repeal entire acts of parliament by telling litigants they can't agitate principles of law that support their case.

Like the Court of Appeal, I find the charter inconvenient, but there is no justification for culling the rule of law.

Don't believe me that a court would tell litigants to not use the law?

Read the judgments in Wells v The Queen (No 2) (2010). The retreat from injustice in Victoria could hardly be more profound.

Delayed cases, closed courts and now the rule of law is being violated because the courts think a piece of legislation is a bit complex and hearings take time.
Yet it is no surprise that the charter would evoke such an extreme, unthinking response.

The charter is like no other legal instrument.

It does not set out rules.

It enshrines open-ended aspirational ideals without limits, leaving it for the courts to do the impossible task of balancing individual interests against the common good. There is no objective reference point for this.

The only way to genuinely enhance human rights is by legislating concrete, enforceable rights. Anything other is tokenistic spin.

A legislative change stating that all Victorians are entitled to a trial within one year of being charged would have advanced human rights in Victoria immeasurably more than the 20 so-called rights in the charter.

It is concrete, seemingly banal, laws of this nature that constitute human rights in action.

Anything other is a teenage crusade.

Like most crusades, it will end badly.

Mirko Bagaric is a professor of law at Deakin University.
Charters' basic flaw: they never move beyond the aspirational

- Mirko Bagaric and Peter Faris
- From: The Australian
- May 20, 2011 12:00AM

NOBODY doubts that some interests that are loosely labelled human rights are desirable -- the more the better.

Yet rights charters should be rejected because (counter-intuitively) they are ineffective at conferring rights to humans. And when charters do confer rights, it is nothing more than a fortunate happenstance.

Rights are important. So important that their content and application cannot be left to the whims of the innately unpredictable interpretive techniques of former lawyers.

Human rights are desirable ideals for one singular reason: because they enhance prosperity. There is one main reason that rights charters should be rejected: there is no empirical proof that they lead to a more prosperous community.

On balance, rights charters are an unwelcome distraction from the methodology and complex intellectual, social and political process that needs to be undertaken to implement measures to ensure baseline levels of flourishing for all people.

The unremitting failing of advocates of rights charters stems not from a compassion deficit. It is far more serious.

It is an incorrigible refusal to analyse the cause and effect systems of the world and empirically ground their proposals on the basis of proven and likely outcomes.

They barrack instead of analyse. They argue for wholesale change on the basis of exceptional and aberrant cases.

The stock-in-trade argument in favour of rights charters is to point to examples of egregious rights violations. Hence, charter advocates roll out their template of the imprisonment of stateless Palestinian Ahmed al-Kateb and Indian doctor Mohamed Haneef as well as the existence of mandatory refugee detention.

This is the same sort of perverse argument that is rolled out by opponents of immunisation of children every time a child has a one in a million adverse reaction to a vaccination.

Moreover, the same form of argument can be used against rights charters.

Victoria is the only state with a rights charter. The cruelty inflicted on Mr Kateb and Dr Haneef is mild compared to the barbarity of locking up Renate Mokbel for two years in a maximum-security prison for failing to pay a civil debt to the government -- a $1 million surety for brother-in-law Tony Mokbel's bail.
She had no prior convictions, her children had to be placed in the care of her terminally ill mother and she received the maximum penalty -- she was not eligible for parole because she had not committed a crime.

Anybody that doubts that the brutality inflicted on Mrs Mokbel can't occur under a rights charter needs to read the sin that is section 6 of the Crown Proceedings Act 1958 (Vic).

And while they are at it, they might care to reflect on the ongoing sin that some prisoners in Victoria are locked up indefinitely in isolation for more than 16 hours a day. And when they do get out of their cells they can communicate with only one other prisoner in a concrete exercise yard that is smaller than a human rights advocate’s spare office.

The right of prisoners to be treated with humanity, which is enshrined in section 22 of the Victorian Charter, presumably wasn't designed to jump prison walls.

And if rights fanatics care to do some actual wider research, they might reflect on the further sin that the guarantee contained in section 25 of the Victorian Charter -- to be tried without unreasonable delay -- has in fact worked to guarantee that accused persons in Victoria have the longest waiting time in the country between charge and trial.

None of these examples prove that charters are ineffective, but they highlight the emptiness of the main argument in support of charters.

What goes a long way to proving that charters don't work is that, since the inception of the Victorian Charter, there has not been one judgment that has demonstrably resulted in the rights of Victorians being enlarged. And Australians in search of more rights have yet to migrate to Victoria on mass.

Rights advocates acknowledge this and have resorted to desperate claims in order to talk up the supposed success of the Victorian Charter. We are told that the charter has resulted in public authorities incorporating rights into their decision-making process and that it is an educative tool for children. This is nonsense. There is nothing to apply and nothing to learn.

This gets to the heart of why charters cannot confer rights. The charter has no prescriptions or mandates, just aspirational phrases. These cannot be used by an individual to drive home any claim -- this can always be defeated by plucking out a conflicting right or the common good.

The logically meaningless and morally empty nature of rights charters only does one thing: it allows people in positions of power to mask their decisions in a moral language -- it can never change their decisions.

The Victorian charter is an appalling example of the nonsense that often fills rights documents. It is an embarrassing cut-and-paste job of a nearly 50-year-old international document (the International Covenant on Civil and Political Rights) that is logically meaningless (because it contains no tips about the respective importance of rights) and includes empty rhetoric such as the freedom of thought -- how was this at risk?

Documents like the charter mask complex issues regarding the nature and content of interests that are actually human rights and which rights take priority in a world of finite resources.
Their legal adoption engenders a natural sense of rights triumphalism, negating the imperative to ascertain the rights that are lacking and how they can be conferred.

It leads to a human rights industry, which places the industry above human rights.

And hence we see the appalling attempt to corrupt democracy by government-funded Victorian human rights groups urging people to submit cut-and-paste submissions to a government review of the rights charter.

Instead of lobbying people to lobby the government to maintain a document that maintains their human right to continue in a government-funded job, rights charter worshippers might want to consider ways to improve the human of rights of Australians that have prosperity deficits.

And there is no shortage of work on this front. It is a travesty that in Australia in 2011 hundreds of thousands of unemployed people are forced to endure life on $240 week (about $100 a week less than the pension); more than 100,000 Australians are homeless and nearly one third of Australia’s 2.4 million carers suffer depression, often because of inadequate government assistance.

Then again this is all a bit too harsh. There is no international document from which charter worshippers can cut and paste a solution, and it would surely be curtailing their inalienable and absolute right to freedom of thought to expect them to develop measures that actually enhance the prosperity of others.

Professor Mirko Bagaric and Peter Faris QC are the authors of *Australian Human Rights Law* (CCH, 2011).
CHAPTER 28: HAVE HUMAN RIGHTS FAILED HUMANS?
THE DISCORD BETWEEN HUMAN PROSPERITY AND
HUMAN RIGHTS

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§28-010  Human rights as the orthodox moral currency

A central theme in this book has been that although Australia does not have a charter
of rights, contrary to the conventional view, the Australian legal system does in fact
protect a large number of rights. This is an example of a society through its legal
system and moral code providing concrete protection to important human interests,
without invoking a human rights framework or guiding determinate.

The broader issue that emerges regarding human rights is whether rights discourse
and methodology is in fact the ideal mechanism for advancing human flourishing. In
this last chapter we raise for discussion an alternative ideology for promoting
prosperity.

As we have seen, the human rights crusade has trumped all other moral dialogue and
is the standard way to express moral claims and many legal entitlements. Yet
existence remains harsh for half of the world’s population, which struggle on less than
US$2.50 per day — their experience of human rights is mainly at the conversational
and aspirational level. This is not because of a lack of resources. There is enough grain
alone to make every person on the planet fat. There is a disturbing paradox behind the
mantra that is the human rights industry: human rights have not fostered a
demonstrable improvement to human prosperity.

The concept of human rights is alluring. As individuals we are attracted to rights,
especially of the so-called “human” variety. Human rights promise to provide us with
a moral shield and confer entitlements upon us. As a community we therefore
collectively embrace human rights. The rights wave seems unstoppable. Socially,
morally and politically, it is the manner in which we now most commonly assert
claims against others and the state.

Intellectually, it is almost heresy to deny or criticise rights or rights-speak. Countless
institutions, centres and departments have spawned against the backdrop of paying
homage to human rights. Whole journals are devoted to rights. Hundreds of books
have been written which dogmatically preach rights. There are more than a hundred
instruments at the international law level sprouting human rights. As we have seen,
most countries at the domestic level have a charter or bill of rights which give legal
status to human rights.

Yet the currency that is human rights is probably overvalued. A human rights ethic is
inward looking — focusing on "me". But humans are not atoms. We live in
communities. Human rights encourage individualism, when reality compels
community. The focus on the individual is self-defeating. It is a reason that we are
inhibited as a world community from implementing measures that would lift global
and individual prosperity to a level that is commensurate with world resources.

In this chapter, we argue that the concept of human rights as the concept is
conventionally used, in the form of open-ended aspirational claims, is not necessarily
desirable. To advance human prosperity we should be thinking and projecting not in
terms of rights but in terms of flourishing, and shaping the dialogue in the form of
concrete demands. We should recalibrate the universal moral psyche and our social
and economic imperatives to improving the living conditions of all humans.

The arguments that we offer in support of this hypothesis are three-fold. First, there is
no empirical evidence to show a link between human rights and an increase in human
flourishing. Studies of human living standards reveal billions of people presently
living in appalling conditions.

Secondly, countries which wholeheartedly embrace human rights continue to
wholeheartedly embrace massive discrepancies in national living standards. Finally,
human rights embracing nations are generally the strictest nations when it comes to
refusing to share their opulent rights enhancing shores with the hungry and destitute.

In this chapter, we do not purport to conclusively rebut the theory that human rights
promote human flourishing. There are many social, economic, political and moral
factors which contribute to overall human prosperity. It is not tenable to keep these
conditions static and isolate the impact of a human rights moral ethic on human
flourishing. Our aim is less modest: to encourage readers to stop sheepishly
championing human rights and inquire as to whether there is a more prosperity
enhancing ethic that as a worldwide community we should be embracing and
promoting.

§28-020  Human rights — the standard moral currency

As noted in Ch 2, human rights discourse is the most widespread and popular moral
currency. It permeates the value and belief system of most contemporary societies.
HAVE HUMAN RIGHTS FAILED HUMANS?

This is a relatively new phenomenon. Human rights as moral trumps emerged from the ashes of the atrocities of WWII. “Never again” was the theme to emerge from this carnage. Human rights were the most obvious moral choice to give grounding to this commitment.

The rights culture has taken hold despite shaky intellectual underpinnings for rights. For centuries philosophers have failed to find credible answers to the most basic issues regarding the foundation and provenance of human rights, such as what are rights and which right prevails when rights clash.1

There are no settled limits regarding the content of rights. This is evident from the Universal Declaration of Human Rights (UDHR) which includes some important rights such as the right to life, liberty and property. Less obvious, but still desirable are the rights to freedom of movement and expression. But, wholly contentious are the rights to privacy and rest and leisure, as proclaimed in Art 12 and 25 of the UDHR.

¶28-030 Human rights for all, so then why are so many living in abject destitution

If most of the world, and especially the disproportional resource-rich first-world, wholeheartedly embraces human rights then one would expect that most humans, to the extent that it is humanly possible, would find themselves living in conditions where they have access to at least the necessities of life. Yet, the reality is the contrary. Recent data shows that three billion people, almost half of the world’s population, live on less than US$2.50 per day and more than 80 per cent of humanity lives on less than US$10 per day.2

UNICEF estimates that 25,000 children die per day of poverty — the equivalent of one child dying every 3.5 seconds. The main killers are hunger and readily preventable illness.3 The gap between the rich and the poor remains at striking levels. In 2005, the wealthiest 20 per cent of people used 76.6 per cent of total private resources, while the poorest 20 per cent used 1.5 per cent.4

It is important to note, that while these figures are jarring there have been some improvements over the past few years in the living standards of the third-world generally. The World Bank reports that the portion of the developing world’s population living in extreme economic poverty, which is defined as less than US$1.25 per day has dropped to 26 per cent in 2005, from 52 per cent in 1981.5 However, the rate of poverty reduction is slowing due to the 2008–2009 Global Financial Crisis.6

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1 See further M Bagaric, How to Live: Bring Happiness and Dealing with Moral Dilemmas (2006).
2 S Chen and M Ravallion, The developing world is poorer than we thought, but no less successful in the fight against poverty, World Bank, August 2008.
The main response by the first world to address third world destitution is to commit 0.7 per cent of their gross national income to the United Nations Official Development Assistance. This was pledged nearly 40 years ago in a resolution of the General Assembly. To date only five countries have met or surpassed this target: Luxembourg, Denmark, Norway, Sweden and the Netherlands. Australia commits about 0.25 per cent of its GDP, the United States 0.22 per cent and the United Kingdom 0.48 per cent.

Human rights proponents could argue that poverty rates are improving, albeit slowly, and that this shows that human rights dialogue is proving to be an effective catalyst for enhancing prosperity. It is impossible to totally rebut this argument — this would require two parallel worlds, one with and without a commitment to the human rights ideology and a comparison of global prosperity in both worlds.

The best that can be done is to remove the speculation from the inquiry and ask whether the current levels of global destitution, against the backdrop of the human rights ideology in which we live, are acceptable. The answer is definitive: no. This raises concerns about the efficacy of human rights as a means for improving human prosperity.

28-040 Lack of actual commitment to human rights even in human rights embracing countries

The betrayal of human rights at the pragmatic level is evident not only at the global level but also at the domestic level. This undermines the possible counter that the reason for continued third-world destitution results from the inability of the first-world nations to adequately alter living conditions beyond their borders; as opposed to a flaw with a human rights ethic.

The wealth disparity even in many of the world’s richest countries remains at alarming levels. In the United States the percentage distribution of total income received by the poorest fifth of the population fell from 3.8 to 3.4 per cent during the period 1990 to 2006; while for the top five per cent during the same period it increased from 18.5 to 22.3 per cent. Ironically, or perhaps compellingly, this is arguably the country where rights are spoken of most loudly, most often, and most passionately.

A recent report by the US Agriculture Department has indicated that the number of US families struggling to feed themselves is growing. The annual Household Food Security report showed that in 2008, 14.6 per cent of US families encountered problems providing adequate food. This is an increase of 11 per cent from 2007. This is the highest level since the survey commenced in 1995.

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8 There is a commitment to grow this to 0.3 per cent.
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The gap between the rich and poor is growing in most wealthy nations. In a 20-year study of its 30 member countries (all of which have a charter or bill of human rights, except for Australia) published in 2008, the OECD noted that wealth inequality had increased in 27 nations. The inequalities were starkest in Mexico and Turkey, followed by the United States. The study noted that in the US the richest 10 per cent earn an average of $93,000, while the poorest 10 per cent earn an average of $5,800.

128-050 Human rights for all, so then why do we reject desperate foreigners?

The starkest repudiation of an actual commitment to human rights comes in the form of the growing fortresses that are first-world national borders. This point was starkly and saliently made in the film *The Day After Tomorrow* where, as a result of climatic changes, the Northern American land mass was rendered uninhabitable by ice and snow. The population of the US was ordered south and millions of Americans sought refuge across the Mexican border. In a fascinating role reversal, the US Vice President broadcast his thanks to the Mexican and other third-world nations for their open-door generosity. The protectionism facilitated by the affluence previously enjoyed by the first world contrasted strikingly with the open gate of the third world receiving the US refugees. The fortress became a prison, from which the third world now offered an escape, and did so gladly. A universal and irreducible principle of human rights discourse is the prohibition against discrimination in any form — personal, social or economic. Individuals should be permitted to immigrate to the country and region of their choosing unless there is a relevant moral reason for restricting their entry and stay. It is the logical extension of the concept of the global commons.

Certainly, the best way to fix third world poverty is by massively increasing migration to the West. Left to their own devices many people would gravitate to life sustaining resources, leading to a rough equilibrium between the world’s resources and its population.

That is not to suggest that Africa would empty overnight into the western world. Some of its citizens are too destitute to hobble to a more plentiful border. Some will not want to come, in any event. But huge numbers will follow the yellow brick road to prosperity in the West.

There is one fundamental obstacle to Western nations relaxing border controls: racism. Discrimination on the basis of race is the lynchpin of the whole of Western migration policy.

Nationhood and the practice of excluding others from our shores is so embedded in the Western psyche that many readers will find it jarring to contemplate that this practice is morally objectionable. Yet, there is no reason in principle that migration controls could not be radically reduced worldwide, to something akin to that

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currently in place for citizens of European Union countries travelling throughout the EU.

For most of human history there have been few migration limits. Now we are moving to an age of "anti-migration", with advanced (Western) economies tightening immigration intakes during the latter part of the 21st century.¹³

Restrictive immigration policies are racist unless there is a morally relevant basis for tightly limiting the number of people we permit to join our privileged society.

A relevant reason cannot be a person’s birthplace. This is merely a happy or unhappy accident. So much is generally accepted in the philosophical rejection of the notion of the right to rule by birth. Much of what is important to a person’s flourishing should not turn on so little — morality requires that to the maximum extent possible luck is taken out of the benefits and burdens equation.

National security is commonly used to justify a tight migration policy. While nations have a legitimate right to security, this only justifies a policy of strict security checks. This is tacitly accepted by Western governments, all of whom accept massively more tourists than permanent arrivals.

Western nations are relaxed about tourists because they derive a net positive economic advantage from them. This gain, however, is not a moral justification for consigning much of the world to a life of destitution, merely a Western expedient.

It has also been claimed that too many foreigners would diminish our material prosperity. Research is equivocal about this. Some models suggest the opposite — that immigrants have a net positive effect on the economy.¹⁴

In any event, a slight diminution in the living standard of Western countries is a small price to pay to reduce global destitution. To determine whether a more relaxed approach to migration is justifiable, one cannot look at the situation only from the perspective of the locals. There is no ethical basis for ranking the interests of one person higher than another.

Arguments that open migration would lead to cultural dilution are unsound. What for one person represents cultural dilution, for another amounts to cultural enrichment. There is no objective point of reference from which these positions can be set off. They are by definition culturally relevant. Morality, on the other hand, consists of universal principles, which apply to all people equally. In any event, these arguments smack of the cultural hegemony experienced in the modern era that human rights abuses were most grotesquely abused — the era against which the rights dialogue professes to rebel most strongly.

This vision represents a vastly different world. Bagaric has argued that people ought to be able to travel and settle in any country of their choice so long as they do not present a security threat and the nation has the resources to sustain them.¹⁵

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¹⁴ Ibid.
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Is this likely to happen in the foreseeable future? No. Patriotism and materialism are such powerful forces that no amount of moral persuasion is likely to quickly reverse existing Western migration policies. The Western world must at least start seriously debating the notion of the free movement of peoples, otherwise forever be forced to accept the racism within their borders. For present purposes it is important to note that human rights discourse is applied in a manner more akin to a local etiquette as opposed to a universal principle in relation to acknowledging the interests of humans not from Western shores.

§28-060 Possible explanation for rights failure

There are two main reasons for the impotence of human rights so far as human prosperity is concerned.

The most important relates to the core fabric — the DNA — of human rights. They are introverted and introspective. Human rights innately encourage us to focus on how we as individuals are faring. Human rights do not prompt, invite or suggest any sense of responsibility or obligation to others.

There is nothing inherent in the human rights ethic to suggest that individuals who are utterly self-regarding in their actions are not morally complete. The only caveat to this is that it is unacceptable to violate the rights of others, but there is nothing requiring or urging us to advance the human rights of others. This induces an individualist and selfish mindset. The focus is on the "me", not on the "you". This occurs at the individual level and also at the group and national level. It is not surprising that prosperous nations care little for the lot of individuals living in poorer countries.

Secondly, there is no concrete manner in which to prioritise rights. As we saw in Ch 2 and 3 the need to rank and prioritise rights stems from the fact that no rights are absolute. As we have seen, rights often conflict with other rights. They can also conflict with the wider community good. When either of these scenarios occurs, difficult balancing processes need to be undertaken. These are made more difficult by the fact that there is no coherent guidance regarding the relative ranking of rights and the weight that should be given to broader community interests.

For example, while the right to property is desirable, it is not clear that this right (in the form of keeping profits from their drugs) extends to justifying multinational pharmaceutical companies continuing to deny life-saving medicines to millions of people who cannot afford the price of medication. It is also unclear, for example, to what extent the freedom of association and movement can be invoked to disrupt city streets in order to agitate for political or social change. The lack of a rights hierarchy permits profoundly obscene rights distortions and priorities to occur. For example, the Western world's increasing fascination with the right to privacy must seem incomprehensible to the third-world citizens struggling for the necessities of life — and indeed for the 14.6 per cent of US families struggling to put adequate food on the table.
The jurisprudence governing the circumstances in which rights should be limited is akin to randomness and in such a vacuum there can only be one winner — the person that yells the loudest and has the most.

§28-070 Potential shortcomings with our critique of human rights

The above critique of rights based discourse is obviously not conclusive. As noted at the outset the number of variables that contribute to human flourishing is almost infinite and hence it is not feasible to identify with certainty the actual roadblocks that currently apply to wide-ranging human flourishing. However, it is clear that the widespread endorsement of human rights has not resulted in anything approaching a world where most people enjoy human rights as anything other than the convenational level. This should at least prompt a degree of suspicion regarding the efficacy of human rights.

Secondly, it could be argued that human rights are not meant to enhance human flourishing. If not, then there is no better reason to ignore them — principles might sound important, but only a focus on consequences can put food into empty stomachs. If it was established that human rights cause net suffering (for example, because rights such as free speech prompt violence and rebellion), then they would have few proponents — although every society has its fanatics and masochists.

§28-080 A preferable approach — develop an ethic aimed at enhancing prosperity

In the end, what matters most to people is their flourishing. The prevailing moral ethic should promote this aim. Happiness, as the expression of flourishing, is all that matters.

Humans have a need for the necessities of life: food, shelter and clothing. Beyond that, it could be argued that the things that are important for prosperity (ie which make people happy) are too divergent for meaningful generalisations to be made. Hence, understandably moral and legal reformers and commentators have largely bypassed empirical data in framing moral standards and legal prescriptions.

Relatively new research suggests, however, that each of us is similar in terms of the things that are conducive or intrinsic to well-being. Despite superficial differences in terms of the lifestyles that we choose to lead and the manner in which we express and project ourselves, at the base we are all built relatively the same.

Social, psycho-social and neuro-psychological scientists have been making considerable headway into the issue of human well-being. With a large degree of accuracy they have identified the things that make us happy. These are not just vague guesses based on a few new common sense observations about the sort of things that
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make us tick. Using brain imaging censors they are able to ascertain the patterns of behaviour that are conducive to happiness.  

Dr Richard Davidson from the University of Wisconsin has identified an index for the brain's set point for moods. The images show that when we are distressed (anxious or depressed), the most active parts of the brain are the amygdala and the right prefrontal cortex. When we are in positive moods those brain areas are quiet and there is increased activity in the left prefrontal cortex.

A person's normal mood range can be ascertained by noting the baseline level of activity in right and left prefrontal areas. The further the ratio tilts to the left the happier we are.

It emerges that the Buddhists monks who for centuries have been preaching the art of happiness have actually mastered the art. When their brains were imaged, their baseline points were most to the left.

Wide ranging studies of thousands of people across many countries confirm the matters that promote well-being. One important finding relates to the connection between happiness and money. It emerges that once we are above the poverty line money makes only a small contribution to our level of happiness and once we reach about the average level of income it makes virtually no difference to our level of contentment.

In fact people who focus on the accumulation of wealth are actually more likely to be unhappy. Materialistic values are counter-productive as over time they heighten insecurity, which is one of the primary causes of unhappiness.

In a nutshell, the things that seem to be conducive to happiness are fit and healthy bodies, self-esteem, optimism, a sense of control, close relationships, challenging work and active leisure, punctuated by adequate rest and a faith that entails communal support, purpose and acceptance.

The interests which are central to the attainment of these goals include high quality medical care; access to education; liberty; protection of the family; freedom of religion; the right to welfare (so that all people can afford adequate food and clothing) and publicly funded education — at least to the end of secondary level.

Interests that are popularly termed rights, but seem to have little bearing on well-being include the right to privacy and reputation. The current state of evidence does not suggest that these interests in fact are important to well-being.

The commonalities of the human species provide a strong basis for confidence that it is possible to make accurate predictions regarding the protections and benefits that

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16 The discussion below is set out in greater detail in M Bogoric, How to Live: Being Happy and Dealing with Moral Dilemmas (2006), Ch 2.

17 Research of this nature has resulted in a number of institutions creating human indexes of well-being, which delineate the matters that are supposedly cardinal to human flourishing. The Legatum Prosperity Index, which measures prosperity across the globe assesses that in developed countries the most important components of well-being are: economy, opportunity, governance, education, health, safety and security, personal freedom and social capital. Australia ranks consistently high in this ranking — from first to fourth in recent years of the 110 ranked countries. In the most recent survey (2010) Australia is fourth, below Norway, Denmark and Finland. www.prosperity.com/rankings.aspx.

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best promote human flourishing. Future research should be directed to ascertaining with more particularity and certainty which interests are most central to human flourishing.

But in light of the current evidence, there is a sure basis for rejecting the slavish endorsement of abstract norms and moving towards the pursuit of concrete standards. Governments and individuals should be judged principally by the extent to which they advance these ideals — locally and abroad. Moral thinking needs to be directed to our obligation to ensure that each person, no matter where situated, has the opportunity to enjoy these ideals.

28-090 Conclusion

A regrettable aspect of social and moral discourse is that it lacks the same rigour as scientific analysis. Moral imperatives continue to be trumpeted, as opposed to proven. The louder and more appealing the trumpet the more likely that consensus will be reached.

Often consensus is reached despite any intellectual analysis or empirical inquiry. Such is the case with the current embrace of human rights. This is despite the lack of testing or evidence that human rights are positive ideals.

Before we go down the path of reflexively championing human rights discourse, we should inquire into the evidence linking human rights to human flourishing. There is no such evidence. In fact the weight of evidence is to the contrary.

Instead of promoting human rights, we should map out the interests that are important for human prosperity. The universal and irreducible goal should be to confer these interests to each individual. The degree to which we as individuals and collectively as countries assist in securing these goals for all of humanity should be the ultimate standard upon which we are evaluated.

There is no evidence that legislating abstract human rights protections promotes prosperity. There is thus, no basis for a country like Australia now enacting a human rights charter. Instead, we should be making concrete social, political and legal provisions for conferring upon all people, the essentials for human flourishing: a safety net level of minimum income through the welfare system, high standard free education, high quality health care and housing for all people. Resources are finite, and they should be deployed where they do the most good.

Further, decisions that fundamentally shape our lives, such as the permissibility of euthanasia, abortion and child smacking, should be made by "we the people" (through our politicians), not "them the courts" (through our judges).

The best protector of important human interests is not signing up to abstract ideals, but a robust democracy with a free press. As history has shown us, absent these conditions rights documents are worth less than the paper they are written on. This is why Australians enjoy a greater array of civil liberties than perhaps any other people in the world.

A bill of rights has the capacity to undermine our democratic structure. A bill of rights is like no other legal document. It is moral, not prescriptive in nature. It has

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the capacity to radically re-shape the matters that a society covers and protects. As we have seen, a bill of rights merely sets out which rights supposedly exist but fails to provide any details regarding the context in which rights apply and which rights prevail when rights clash with other rights and the common good.

Merely declaring, for example, that people have a right to liberty and free speech says nothing about the propriety of practices such as tobacco or alcohol advertising or the pre-trial detention of people suspected of committing serious criminal offences. All of the important social engineering is undertaken in the fleshing out process.

A bill of rights changes the judicial role from one which interprets the law to the creator of our moral and social fabric — a role that according to our system of government is preserved for "we the people", through our parliament.

Judges do not possess higher levels of moral wisdom. Their ethical choices, like those of most people, are more about emotion than logic. On moral issues judges usually follow their intuitions and predilections and use the vagaries of the law to dress up their conclusion in the language of the law to mask their personal political and religious sentiments.

Of course, there are many politicians that have a wayward moral compass. However, their decisions are made in the full public glare and the community is given an opportunity to lobby them. We are willing to wear these decisions because we all had an opportunity to contribute to the public debate on these issues.

In the end, a bill of rights is arguably internally contradictory. It betrays the community of the only right that it can exercise on morally decisive issues — the right for their voice to be heard in the matters that define us as a community. Courts are closed to all but the richest people in the community and judges are immune to community sentiment.

Yet, it is important for rights to loom large in public and political discourse. However, the debate needs to move on from the tokenism of implementing a bill of rights to the meaningful issue of "what concrete interests should our government confer upon us?" This is where the real advances in human flourishing and prosperity will occur. The impotence of rights charters to promote human flourishing is underlined by the fact that residents of Victoria and the ACT do not enjoy greater prosperity than other Australians.

It is of course difficult to measure accurately the extent of rights observance within a community. However, the Victorian experience offers some insight.18 The Charter has been in operation for three years. The quality of life, standard of living and operation and application of most legal standards is relatively similar throughout Australia. This is largely because of the federal nature of politics.

However, there are some matters that remain principally within the domain of state governments. One is the operation of the court system. On that measure Victorians fare poorly.

18 The ACT is not a good reference point given its small population and small number of judicial decisions.

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Victoria has the slowest court system in the country — despite being the only jurisdiction in the country (apart from the ACT) where the citizens supposedly enjoy the right to a speedy trial. Victoria also has the most secretive court system in the country. There are more suppression orders in Victoria than the rest of the country combined. Thus, Victoria also has the most secretive and closed system of courts in the country.

In addition to this, despite three years of operation there is not a single instance of a court on record in Victoria applying the rights charter in a manner that has resulted in a the law operating in a rights expanding manner.

Rather than taking Charter rights seriously, the Victorian courts have paid lip service to the document.

Overwhelmingly the jurisprudence of the Charter is as follows:
1. the courts acknowledge the existence of a right in the Charter
2. the courts note that no right is absolute and rights can be limited where they conflict with other interests
3. the other interest prevails
4. the Charter has no impact.

The only exception to this is the case of R v Memeleisic [2010] VSCA 50, where the court made a declaration of incompatibility. Even this failed to have any impact, given that the legislature refused to change the reverse onus provision.

Instead of a rights charter, the Victorian legislature would have been far more effective in expanding rights by stating in concrete terms the scope and application of rights. For example, the right to be tried without unreasonable delay has, predictably, proved to be vacuous. The intent behind this concept would be given meaning by a law that all Victorians charged with a criminal offence must be tried within 12 months (unless the accused causes the delay) and if that does not occur the accused is granted a permanent stay.

Until rights based laws are drafted in such a concrete manner rights will continue to develop in Australia in an incremental, almost accidental, manner.