SUBMISSION FOR four-year-review-of-the-
Victorian-charter).  
m. barr 28 June 2011

Summary

- The Charter is representative of the specific underlying issues underlying towards-a-just-and-fair-victoria
- Full application of Victorian human Rights Charter has not been achieved because it is a basic budget bare bones system without proper institutional and systemic embedding.
- Very little application to justice system generally and specifically to criminal justice system.
- Exceptional Events of last five years which have not even been able to reach public scrutiny, in practice reveal the Charter is being totally ignored at all levels but especially lawyers and junior barristers. It is due to the exceptional events described below which are directly relevant to scrutiny of Acts committee that this submission should be carefully considered.
- This difficulty in conceptualising human rights may be due to a lowering of standards in legal philosophy and jurisprudence which is a fundamental component of the human rights culture but which is being ignored by academic jurists.
- Hence the implementation requires a serious cultural or socio legal change at an institutional level
- Hence proper implementation of Charter requires a professional proficient institutional approach including appointment of legal and human rights ombudsman or guardian whether full time or part time.
- An independent inspector or trustee is now required because of the fact that the area of bypassing of rights of charter is expanding and are now becoming highly professionalised as well as politicised.
- The need for such a trustee or inspector is extremely strongly supported by the recent dramatic incidents involving resignations of the top officers in Victorian justice system directly indicative of a need for an institutional as well as a cultural approach.
• Using a fiducial/equitable/trust model one can extrapolate the above unprecedented incidents to the wider system and argue that special and more advanced institutional arrangements are required to guarantee and protect the legal and human rights of the community where a special trust and reliance obligation and relationship is present or applicable.

• Given its focus is on cultural change, the Charter's continued implementation needs strong leadership and commitment;

• Thus the submission of the Victorian Bar council must be commended on its reasonable and constructive approach.

• Parliament should be held realists and realise that the whole common law legal system is being conducted in an extremely polarising adversarial manner much more severe than in politics and that a charter is merely a token figleaf to attempt to protect some of the required checks and balances.

• In contrast the low application of the Charter of Human rights to social and institutional change is epitomised by the extraordinary low level of rational legal debate eg the sloganeering polemical exhortations of James Allen which is an eighth wonder of the world in its negativity and indulging in denial of human rights existence and its failure to use basic principles of legal philosophy and jurisprudence which is a fundamental component of the human rights culture.

• In contrast the Melbourne Herald Sun of June 24 admirably presented the simplistic outlines of the populist and only possible hard practical arguments against a Charter namely expense inconvenience and waste. (the managerialist model) In particular it is the involvement of Peter Faris QC in the debate which highlights the importance of this issue in the criminal justice system.

• A careful analysis of the Charter using applied and practical legal theory and logic reveals that fundamental principles of legal science have not been applied so that there are major deficiencies in coherence consistency and analysis which need to be rectified.

• Hence in summary in the last two years there has been a paradigm shift both in a legal as well as at a political level and a fresh approach is now required

• Due to gross lack of time to prepare for above due to illness I wonder if the Scrutiny of Acts Committee would consider giving me extra time to prepare a full analysis of the above or to perhaps allow me to present a summary at your formal hearings which will be consistent with your terms of reference.

• I apologise for the slightly disorganised nature of this submission which I have compiled on 28 June but I have attempted to insert appropriate summaries.

PRELIMINARY

I wish to congratulate to scrutiny of acts committee decision to conduct formal hearings as part of its Review of Victorian charter.

It is a pity that the review is being conducted fairly rapidly and I wonder if the committee will allow special extensions to elaborate on this extremely important issue
especially in the light of the exceptional events in Victoria and Australia over the last few years. I have unfortunately been very sick in the last month and not been able to prepare a proper submission for this extremely important area. In fact I have yet to read the full terms of reference which I will attempt to remedy soon.

MAIN CONCLUSION

Essentially I am using a fiduciary/ equitable model to enable me to claim that in certain areas where there is overwhelming executive power eg justice system there is need for a special framework to determine the responsibilities of the executive government including AG, police, DPP, INDEPENDENT SENIOR COUNSEL effectively acting in lieu of DPP, THE courts system as a whole, media reports of such, which requires such formal institutional protection and bulwarks as a professional inspector or ombudsman, ie former senior experienced judge or very senior experienced legal academic simply because the legal issues in 21 century are now complex and in fact setting new precedents.

An independent inspector or trustee is now required because of the fact that the area of bypassing of rights of charter is expanding and are now becoming highly professionalised as well as politicised and there is strong circumstantial evidence that there are now panels of senior counsel involved in major denial of human rights cases.

MAIN ARGUMENT AGAINST HUMAN RIGHTS CHARTERS – VALUE FOR MONEY

The front page article herald sun June 24 with banner headlines claimed that the charter caused “Red tape Madness" “—"your money wasted on pointless bureaucratic checks". It is this economic efficiency argument used in neoliberal productivity policy which is extensively analysed in this submission because it is clear that insufficient money was allocated to institutional support for the charter which has reduced its effectiveness.

The EFFICIENCY COMPLAINT is the standard argument used in last sixty years since WW2 by all bureaucracies undergoing cultural change ie the inconvenience to the system. If it is so cumbersome then the Herald sun should obtain independent investigations to show that proactive statements are not value for work.

DID PREVIOUS GOVERNMENT PUT IN ENOUGH APPROPRIATE RESOURCES TO EMBED CHARTER IN LEGAL CULTURE.

In fact the system brought in by previous government was in fact on the very cheap with minimal cultural integration into legal system (see discussion of actual case below) .(see submission by Victorian Bar) ie most cases of infringement of human rights are overlooked by solicitors and magistrates and only the tip of the iceberg reaches the higher courts. FURTHERMORE there has not been a systematic attempt to scrutinise all past acts passed prior to 2006 and especially prior to 2000 for breach
of Charter. There has been minimal feedback which should have been monitored continuously.

FURTHERMORE THE CHARTER IS NOT clearly compatible with Interpretation of acts act and may not be fully coherent with new procedural legislation for certain lower courts.

WHAT EXACTLY IS THE MAIN PURPOSE OF THE CHARTER.

The VLA believed the primary benefit of the Charter was to ensure better specific decision making by public authorities. With all due respect the Charter is also meant to place a general and specific restraint on exercise of unfettered power especially prosecution.

The main comment in Herald sun by Peter Paris QC, a criminal law expert and prosecutor about a lawyers picnic provides the crucial link to the main issue of the charter ie its application to statutory laws which override human rights and are inconsistent with charter. ie the Charter is meant to place restraint on powers of criminal law prosecutors. Essentially as shown by the case below, the resources and money now available to or expended by investigations and prosecutions by the executive and regulators now comparatively dwarfs the expenditure of the administrative public service in this area.

As shown by the main case discussed below the executive has available directly and indirectly unlimited resources for policy based prosecutions far in excess of the money used by administrative public service ie it is a moot point about exactly who is indulging in a lawyer's picnic and wasting the taxpayers money.

INCREASING POWERS AND CONTROLS BEING GIVEN TO QUASI POLICE

It is now obvious that a charter is becoming increasingly important due to increasing powers and controls being given to quasi police such as protective transport officers or protective service officers who will guard train stations at night. What is really needed are plain clothes police who will both travel on trains rather than simply guards at railway stations. The increasing use of quasi police powers need proper monitoring and should be the responsibility of a special inspector or ombudsman.

COMMENT ON SUBMISSION BY Victoria Legal aid.

VLA wants all extra funds on human rights directed to it, not any separate fund set up the government. Unfortunately VLA is also a public authority and has not subjected itself to independent analysis to determine if its rigid rules are consistent with Charter, it has an indirect conflict of interest or implied vested authority. Funds for charter litigation should be monitored by independent supervisor.

COMMENTS on ROLE OF JAMES ALLEN, the legal philosopher

The main legal analyst who is exceptionally misleading against the charter is a legal philosopher Prof. Allen who instead of using standard legal jurisprudence and legal
science resorts to esoteric general Greek and medieval philosophy beloved by theoretical academic philosophers who are preoccupied by ancient rhetoric and premodern logic and don't understand the role of dichotomous or complementary logic.

James Allens comments on the exact meaning of an abstract right are taken from Greek arguments over semantics which are beloved by theoretical analytical philosophers eg Wittgenstein who love to point out ambiguities in non concrete non rigid non fixed rules. This is general irrelevant simplistic abstruse sophistry or academic argumentation and it appears Prof. Allen has no practical expertise because Charters are used in individual cases in a practical applied sense not in vague abstract context.

Furthermore Prof. Allen doesn't realise that it is the practical or procedural rights that need greater protection eg Kracke rather than the more substantial ones which obtain all the publicity eg Momcilovic

Prof. James Allens hair splitting arguments are hence reminiscent of inappropriate scholastic type arguments used by medieval philosophers, but fellow legal academics have been too polite to point out that his argumentative sophistry is of very low legal standard.

One of the most important points which Allen doesn't understand is that many important legal concepts eg values are based on the dichotomous or oppositional conceptualisation or characterisation and are thus complementary or part of a coupled pair of terms eg general rights versus narrow rules, rights versus responsibilities, democracy versus tyranny etc. This type of inductive logic is unusual and is thus not easily handled even by solicitors which would explain their difficulty in grasping these concepts which are critical to applying human and civil rights.

Hence Allens misuse of philosophy is extremely misleading and dangerous and I am concerned that the reason that he has not been adequately analysed is that there has been a lowering of standards in legal philosophy and jurisprudence which is a fundamental component of the human rights culture.

MAIN SALIENT CASE involving clear breach OF THE TERMS AND SPIRIT OF THE CHARTER OF HUMAN RIGHTS in last few years.

There have been a number of high profile prosecution cases in Victoria in last few years achieving immense publicity eg Theophanou where there has been a clear breach of civil and human rights but the really gross cases are not publicised because there are no obvious high profile silks involved. However it appears that high powered silks are highly adept at bypassing the Charter and use proxies to avoid direct involvement in such cases. ie they can be characterised as independent senior counsel effectively acting in lieu of DPP.

I have been intensely targeted by the rule, executive, justice and legal systems for last 25 years for the reason that I have been suffering an extra long series of illnesses
of immense political sensitivity. The first of the "prosecutions" occurred 25 years ago with Mr. Rapke and this is discussed in next section. However in the past 25 years the level of harassment has steadily increased but has escalated dramatically in last two years when I became the target of an unprecedented intense campaign of harassment, raids and arrests by police, quasi police, undercover police, and senior counsel acting for police designed to obstruct and embarrass my treatment of my illnesses.

This campaign involved a bizarre set of criminal prosecutions in Magistrates court but the case became so difficult and obtuse for such a large number of solicitors and barristers that it has become obvious that the prosecution case was formulated by a panel of senior counsel of the experience and standard of Peter Faris QC but not necessarily involving him.

LIST OF over TWENTY ISSUES and characteristics INVOLVING HUMAN RIGHTS AND EQUIVALENT IN THE SINGLE PROSECUTION CASE IN THE LAST TWO YEARS STRONGLY SUGGESTIVE OF HEAVY INVOLVEMENT OF FULL PANEL OF ADVISORY SENIOR COUNSEL.

1. Two years ago commencing a blizzard of harassment by multiple inspections by council inspectors.
2. Use of multiple sets of laws and regulations concurrently producing clear conflict and inconsistency of different laws in different circumstances.
3. Relevant legislation and regulations of 1980s excessively vague and generic.
4. Legislation of 1980s confers extensive quasi police powers for enforcement of these powers with out appropriate regulations or controls.
5. Recent auditor generals report of enforcement powers of councils in 2006 totally failed to pick up these inconsistencies.
6. Poor provision for appeal against many of statutes of 1980s since inconsistency with VCAT.
7. Specific antiterrorist type raid by inspectors clearly acting under orders of a highly organised sophisticated short term intensive monitoring operation.
8. Targeted long term by high level illegal intrusive surveillance and investigation police campaign.
9. Gross failure of Office of Police integrity to investigate police involvement in above especially failure to tap police prosecutors for misconduct—see below.
10. Gross failure of Ombudsman to independently investigate public service involvement in above.
11. Police prosecution use Theophanou type techniques in rewriting witness statements.
12. Persistent misconduct by prosecution.
13. Prosecution witness interferes with response of FOI by government departments.
14. Enforcement associations also interfere with Foi requests for which THERE IS a nine month delay to obtain correct response. ie there is a massive war by attrition using document
15. POLICE prosecutors SETTING rules for conduct by court registrars rather than reverse.
16. Police prosecution refuse to attend special hearings on the spurious grounds of lack of resources.
17. Prosecution illegally contact non formal representatives
18. Interference with my formal legal representatives.
19. Further confusatory and confounding exceptional factors in that many of the principal witnesses and figures appear to be recycled from previous experiences.
20. The complexity of the case so upset two magistrates involved in the case that they regressed to states of rage which is of exceptional concern in the light of the two judicial cases which came before the NSW legislature.
21. The use of a complex set of sophisticated criteria as listed above implies the very heavy involvement of experienced and senior counsel.
22. There is an extremely strong suspicion that all above is funded by private resources outside standard government auditor general controls and accountability.
23. The above list is a compilation of conclusions and obviously requires a full report.
24. I am absolutely certain that an experienced criminal barrister could find another additional twenty issues and problems in the above case because of its exceptional nature.

However it is the extraordinary response of the legal profession to the above litany of unprecedented breaches of legal rights which should be of truly major concern to legislature namely their total failure to act rationally and sensibly to the above list in that nobody realised that the matter was way above their heads and required direct involvement of senior counsel along the lines of the Bar Counsel submission.

25. Altogether nine solicitors and three barristers (albeit junior) were bamboozled and nonplussed even when I supplied them with lists of above exceptional levels of legal issues and defaults and were stuck in a narrow tunnel of following standard conventional rules and algorithms rather than realising that they were facing an exceptional situation normally seen in Supreme Court.

The reason for the mass confusion is that there were too long a list of serious types of breach of my legal rights, and secondly initially lawyers are trained to follow narrow sequential stand alone rules which beginners use but not use the wider holistic coupled or dichotomous human rights method used by experienced counsel. Hence they could not see the wood from the trees and refused to consult senior counsel even though I advised everybody that the case was obviously constructed or formulated by very experienced senior counsel. i.e. human rights cases requires senior experienced counsel.

26. therefore if the Bar Council receives funds for further advocacy support then there should be commensurate regulations warning junior counsel that if they encounter human rights or legal liberties issues then they are legally obliged to notify the Bar Council of such before ignoring the human rights aspects of the case.
ANALYSIS

The use of a complex set of sophisticated criteria as listed above implies the very heavy involvement of experienced and senior counsel. The further implications is such that the system is unaccountable and out of control.

conclusion

It is now obvious that a secret panel of senior counsel are now manipulating and controlling important functions of the executive and therefore there is a new type of government projection of power is being used ie government of legal system by a cabal of secret senior counsel.

Hence as there is the above new feature in political process then there requires to be a commensurate institutional response (Montesquieu principle).

The above single case involving twenty breaches of human and civil rights occurring over two years is a sad indictment of a system which is ignoring the charter of human rights. I am not saying that this is not occurring elsewhere in Australia and in common law world but in West Australia at least there has been some progress (Malcolm McCusker QC) and the UK are improving incrementally.

REASONS WHY SENIOR AND EXPERIENCED INDEPENDENT INSPECTOR OR GUARDIAN OF CIVIL AND HUMAN RIGHTS IS REQUIRED

From above it is now clear that an independent inspector or trustee is now required because of the fact that the area of bypassing of rights of charter is expanding and are now becoming highly professionalised as well as politicised.

Additional reasons is that the majority of legal profession are not properly trained and equipped with appropriate jurisprudence models to realise when a significant human or civil rights issue is of major significance rather than being minor.

URGENT NEED FOR PROPER DEDICATED ACCOUNTABILITY AND MONITORING SYSTEMS FOR HUMAN LEGAL AND CIVIL RIGHTS

Due to the nature of my illnesses and my scientific knowledge of these conditions I have been the target over last 25 years of a campaign of harassment almost identical to the case described above. This campaign commenced with a prosecution by Mr. Rapke 25 years ago but who behaved according to the books ie by correct procedural rules. Subsequent to Mr. Rapke I have been the campaign target of multiple prosecutors most of whom indulged in taking advantage of the fact that I suffered multiple illnesses which are the subject of immense scientific controversy. (At no stage was I ever prosecuted by Mr. Faris QC but I have certainly been on opposing sides of the bar table against Mr. Faris).

There is no doubt that that I was heavily targeted in last two years as a cover up for the campaign activities of the prosecutors against me following but not including Mr.
Rapke. It is of great irony that the Rapke affair blew up a year ago bringing to the fore the fact that I have been the target of an exceptional campaign of harassment culminating in the recent McDonalds type criminal prosecution ("with the lot") that may be unprecedented in "democratic" common law countries and more consistent with police states like apartheid South Africa.

CRITICAL ROLE OF RECENT RESIGNATIONS OF VERY SENIOR administrators in justice and LAW SYSTEMS

The sad and unnecessary recent resignations of DPP, solicitor General and chief commissioner of police are a reflection of lack of proper accountability, regulatory and review areas in this field of law. However their errors are of a specific kind (apparent breach of fiduciary or equitable duty) which indicates the important positions they hold for society that is their power is held in trust for the governor, government and legislature.

The whole field of fiduciary obligations and trust is not well known to criminal lawyers as it is a civil ("common law ie non statutory") type of concept. It is increasingly having important administrative ramifications although justice Paul Finn of Federal Court noted this link over twenty years ago.

Hence there is an obvious need for institutional reinforcement of human and civil rights via both the Bar Councils method and also there is a need for an experienced protector or reviewer of system of use of Charter human rights at the level of experienced senior counsel or retired judge etc. This can only be done if there is a level of direction to all solicitors, junior judges and barristers that all possible human rights and similar cases must be transferred to higher courts where they are properly represented by appropriate counsel at appropriate time place and method not by surprise or ambush or non disclosure.

The full description and ramifications of the sentinel or salient case briefly described above requires time for fuller elaboration which has not been available to me due to recent illness.

yours sincerely

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