Mr Edward O’Donohue, Chairperson
Scrutiny of Acts and Regulations Committee,
Parliament House, Spring Street,
East Melbourne. Vic 3002

Submission to Four-year Review of Victoria’s Charter of Human Rights and Responsibilities

This submission is concerned with the following question in the terms of reference for the committee: What if any, have been the overall benefits and costs of the Charter?

The overall benefits of the Charter are limited. Advocates, such as George Williams (2010), argue that the Charter changes Victoria’s legal system at a deep level by introducing a new assessment regime for drafting laws and requiring new decision processes in other government decision processes, and increases the scope for remedies against government decisions.

However, the Charter is not necessary to bring about these changes for two reasons. Firstly, our common-law system already protects civil rights. Centuries of jurisprudence have resulted in robust principles of common law that provide an established and highly effective basis for dealing with the question of where one person’s rights and responsibilities end and where another’s begin. The Charter, by contrast, describes these rights in general terms that almost no-one would disagree with (for example, the right to free speech, a fair trial, or protection of the family unit). The problem is that these terms are not defined precisely: there is virtually universal support for the principle that families should be protected, but the Charter does not define family or protection. Each is therefore subject to the interpretation of the judge presiding over any cases involving the Charter.

Indeed, in its first four years, the Charter has been used primarily as a vehicle for enhancing the defences available to well-resourced defendants whom the courts would otherwise have determined to have broken the law. The Momiclović case is an example of this use of the Charter, which resulted in the court issuing a declaration of incompatibility” between the Charter and the state’s Drugs, Poisons and Controlled Substances legislation. The state is now required to amend the legislation at the behest of the courts.

Secondly, the additional compliance process required for each and every new piece of Victorian legislation adds a significant cost to the legislative process. However, because the Charter is so general and does not define basic terminology, there is no guarantee that a court will agree with the Scrutiny of Acts and Regulations Committee’s assessment of the legislation’s Charter-compatibility. Mandating public reporting by Government Departments and Local Government bodies would similarly impose a huge burden, both to produce the reports and to review the reports. The Victorian Local Governance Association (VLGA) for example, in its submission to this review, reports on Page 5 that generally, local governments have found meeting obligations of the Charter to be “onerous and resource intensive,” particularly for smaller rural and regional local governments. Specific issues cited include the cost of reviewing local laws (particularly engaging a law firm), and the significant opportunity cost of providing human rights training to local councillors, executive management, and all other staff involved in service delivery.

Given these shortcomings and that there is simply no need for the superfluous protections that the Charter purports to offer, the Charter should be repealed.
Sincerely,

[Signature]

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References