Submission to
The review of the Victorian Charter of Rights and Responsibilities

Bill Muehlenberg
Secretary
Family Council of Victoria

June 2011

The Family Council of Victoria is happy to put in a submission to the Victorian Government's review of the Charter of Rights. Instead of giving detailed proposals as to amending this legislation, we will simply make one argument. The real question is, do we even need such a Charter or Bill of Rights (BoR)? We believe the answer is no. Here are ten reasons why.

One. We already have all major rights fully protected in Australia. The right to vote, freedom of speech, freedom of religion, and so on are already carefully protected rights. Australia has, through common law, various institutions and customs, and the three arms of government, a wide variety of rights already securely in place. The burden of proof must lie with those seeking change to show that major rights violations and shortcomings are currently taking place.

Two. Australian democracy already has a good safeguard of human rights in the form of its system of checks and balances. Indeed, given the merits of the existing system, there is very little public demand for a BoR, except by judicial and social activists and certain vocal minority groups. The old dictum, "if it ain't broke, don't fix it" applies here.

Three. Rights enshrined in a BoR become fixed and very difficult to remove. It may well be that 'rights' and values promoted by society today may be rejected in the future. To set in stone certain rights ignores the changing nature of societies, and overlooks the evolving nature of political culture.

In one sense no right is absolute, although rights can be arranged in an hierarchical fashion. And rights can and do conflict. Thus perceptions and opinions about rights do change over time, and a fossilised encasement of rights may in fact be a bar to the realisation of other rights.

Four. A BoR will bring major changes to how legislation and policy are made. Parliaments are meant to perform these functions, not the courts. In a BoR, major policy and legislative issues are wrested from the legislature and given to the judiciary. But important and controversial social issue deserve to be properly debated by the people via their Parliamentary representatives, not by unelected judges and bureaucrats.

The legislature is further undermined as more and more laws are seen to conflict with these chosen rights, and/or are reinterpreted in the light of this list of rights. Thus judges end up becoming legislators and policy makers, while the parliamentary process is eroded. Law is meant to be made by Parliaments, not judges. Unelected and unaccountable judges take the place of elected and accountable politicians under this arrangement. Thus the democratic process itself comes under threat.

Five. The courts become politicised and activist minority groups and special interest groups can use the courts to promote an agenda at odds with the majority. People who are willing to use the mechanism of law will increasingly determine the political landscape, instead of a duly elected Parliament.

As more tribunals and commissions are set up to enforce these rights, those found to have violated the law will not be assured of trial by an impartial body (e.g., trial by peers), but by activists and those with an agenda. Those sitting on our Equal Opportunities Commissions, and other quasi-judicial administrative tribunals, are often far from representative of mainstream opinion.

Six. A BoR will lead to even further litigation and frivolous court cases. Our already litigious society does not need to become more so. A culture of litigation in the end leads to the diminution of democracy, not its enhancement.

Indeed, we are already way too prone to threaten a lawsuit at the drop of a hat. We are too inclined to blame someone else instead of shouldering some of the responsibility ourselves. A BoR will simply compound the problem. And that has been exactly the case where countries have recently adopted a BoR, such as Canada and New Zealand.
Seven. The enactment of a BoR will further add to the “rights culture” that is so characteristic of modern Western societies, along with a further erosion of responsibility. Everyone is demanding rights these days, but few are advocating duties and responsibilities, without which rights talk becomes empty blather.

This explosion of rights claims undermines the moral habits and virtues necessary to sustain free institutions and democratic governance. No society can long last that emphasises rights over against corresponding duties and moral responsibilities.

A BoR will certainly encourage people to demand rights, but will not be likely to enjoin them to uphold obligation and responsibility. Indeed, rights claims can be used to cover almost anything, with a never ending stream of new rights being discovered and demanded. And if the courts become inundated with rights cases, the wheels of justice may well grind to a halt. Individual responsibility, virtue and self-control are the means by which a democracy flourishes and rights are respected. A BoR cannot replace individual responsibility.

Eight. A BoR has not prevented human rights abuses in nations that have adopted them. Some of the most oppressive societies on earth, including the former Soviet Union, have had elaborate and exquisite BoRs. On paper these superb constitutions have covered every imaginable right, but reality has been a different story. Thus a BoR is no panacea, and can certainly offer no guarantees of a genuine promotion of rights.

Nine. It would appear that whatever can be achieved by a BoR can by achieved by existing means, or other less intrusive and unwelcome means. Thus if there are any glaring deficiencies in human rights in Australia (a questionable assumption for most, except for some activist minority groups), they can best be dealt with by existing mechanisms, and not by means of a new bureaucratic sledgehammer. And we must insist that any claims of such glaring deficiencies must first be demonstrated.

Ten. Lastly, it must be remembered that rights just do not— or should not— spring from anywhere. For the Western world at least, rights claims have been based on two fundamental sources: the Judeo-Christian worldview, and natural law. While both sources can be debated and discussed, they have provided a firm foundation on which to work for fundamental rights and justice. We dare not so readily remove the base of our Western system of law before we are sure that what we are replacing it with will make for a better foundation. And we dare not entrust such a process to social engineers, activists and those with a political agenda motivating them.

In sum, the case for a Charter or Bill of Rights contains a number of fundamental weaknesses. Prudence would dictate that we avoid radical and rapid social and political change unless it can first be proven that such change is necessary. That case has yet to be made. Thus we ask that this charter be repealed altogether.