IsaiahOne

submission to

Inquiry into Charter of Human Rights and Responsibilities Act 2006

1 July, 2011

Attention to:

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

IsaiahOne welcomes an opportunity to share with the Scrutiny of Acts and Regulations Committee its views concerning the Victorian Charter of Rights and Responsibilities (“the Charter”).

We are pleased to share the views of Christians from diverse backgrounds who are committed to serving God and expressing the love of Christ in service of the community. We welcome the scope of this inquiry and its evidence-based approach. We look forward to the Government taking a constructive approach to further enhance the protection of the human rights of Victorians, in particular those who are most disadvantaged.

Rev Angus McLeay, Director
Erin Sciola, Director

2. About IsaiahOne

IsaiahOne is a cross-denominational Christian organisation educating and advocating on human rights. Its name is inspired by the 8th century BC Hebrew prophet Isaiah, who called the people of God to

“seek justice, encourage the oppressed, defend the cause of the fatherless, plead the case of the widow” (Isaiah 1:17)

These words encapsulate a defining theme of the Bible, as well as Christian tradition and experience across all Christian denominations. The imperative to give aid to the needy and defend the weak has led Christians over two millennia to establish hospitals, aged care facilities, orphanages, homeless clinics and aid agencies and undertake welfare services of many kinds. Scripture, the person of Jesus, and the experience of the Holy Spirit have inspired and led Christians to these efforts.

Many in the Christian community are passionate about human rights and their potential to work towards this Biblical calling. Yet there is sometimes also a measure of uncertainty among Christians about how to understand and apply human rights, an uncertainty which is also seen in contemporary Victoria. Some within the Christian community regard human rights with suspicion and see it as a threat to religious freedom and incongruent with Christian teaching.

IsaiahOne has spent much time over the past two years speaking with Christians and others in the community about human rights. It is apparent from this that the diversity of Christian views on human rights can be better expressed in the public domain. IsaiahOne has sought to do this by arguing that human rights cohere with many fundamental aspects of Christian tradition and teaching.1

1 A recent comprehensive defence for this position has been made by the eminent Christian philosopher, Nicholas Wolterstorff, Justice: Rights and Wrongs (2008).
Many - but not all - larger Christian organisations may make submissions on the Charter. Many other Christian groups and individuals will lack time, resources or familiarity with this process to communicate their views. Therefore as Reverend Tim Costello, CEO of World Vision Australia, states

"It is important that decisions about human rights reflect wide participation and dialogue, including the full range of faith perspectives. Isaiah One reflects one strong body of opinion among Christians, and has undertaken very extensive consultations about human rights among Christian churches, organisations and institutions in Victoria, and its participation in this dialogue is important."

Rev Tim Costello, CEO World Vision Australia

To this end a number of Christian leaders as well as others actively involved in the community have contributed to this submission. To indicate where a contribution has been specifically provided to IsaiahOne the person’s name and organisation / position is in italics below and cited in the endnotes, “for IsaiahOne submission”.

3. Summary of Conclusions and Recommendations

The Charter should:

1. In general terms retain its effectiveness in establishing human rights standards that are enforceable and binding on public authorities, Government and judiciary, as per existing provisions:

   Sections 28, 30 – Statements of Compatibility
   Sections 32, 33, 36, 37 – Interpretation of Laws
   Sections 38, 39 – Obligations on Public Authorities

2. Be amended so that Section 7 limitations on rights are unambiguously applicable only to ‘derogable’ rights, and therefore not to the right to religious freedom as in s 14(1)(a).

3. Be amended so that Section 31 override powers cannot be applied to ‘non-derogable’ rights including the right to religious freedom; and that the Section 31 override powers be made non-renewable.

4. Be amended at Section 14 so as to reflect the substance of Article 18(4) of the International Covenant on Civil and Political Rights, the international legal document on which domestic human rights Acts and similar instruments are based.

4. Reference and Responses

This submission addresses Terms of Reference (5) – (7). The committee will receive expert submissions from a range of legal and other authorities well placed to examine other Terms of Reference. We focus on the areas of most attention within Christian communities in Victoria, in particular the following:

5. What have been the effects of the Charter Act on –
(a) the development and drafting of statutory provisions;
(b) the consideration of statutory provisions by Parliament;
(c) the provision of services, and the performance of other functions, by public authorities;
(d) litigation and the roles and functioning of courts and tribunals; and
(e) the availability to Victorians of accessible, just and timely remedies for infringements of rights?

6. What if any, have been the overall benefits and costs of the Charter?

7. What options are there for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria?

5. Christian Human Rights Involvement

Christian organisations and individuals make a very significant contribution to community service. Research from the 2006 National Church Life Survey indicated that 19% of Australian church attendees had a particular focus on human rights and social justice issues, with a further 5% focused on overseas aid, debt relief and international trade. In 2006, 43.4% of Melbourne churches were involved in activities described as “political / social justice activities”.2 (Activities in areas such as migrant support services, community counseling, youth support services, community development, prison support ministries, disabled and aged care support work may be additional to these “social justice activities”.) It would not be unusual to find a dozen or more community service activities referenced on any given church’s foyer notice board or newsletter.

Christian involvement with human rights and social activities is long-standing. The Christian-led movement to abolish slave-trading in the 18th century is regarded as an archetype of human rights-based social change. Prominent church leader, Rev Peter Corney OAM notes the strong connection between Biblical and human rights ideas,

“When English Christians in the late 18th and early 19th C. began the process of sensitizing their nation’s conscience to its involvement in the Trans Atlantic slave trade they chose a very significant campaign logo. The logo was a picture of an African slave in chains, his hands raised in pleading, surrounded with the words “Am I not a man and a brother?”

This logo and these words captured succinctly two fundamental Biblical and Christian ideas that deeply influenced the Abolitionists and have profoundly shaped the development of international charters of Human Rights. “Am I not a man...?” implied for the Christian abolitionist the Biblical idea that because we are all made in the image of God we are all equal and precious and should be treated as such. The second part; “... and a brother?” conveyed the idea that we are brothers and sisters, not only in the sense of ‘the universal brotherhood of man’ but also in the New Testament sense that in Christ “there is neither Jew nor Greek, slave nor free, male nor female, for you are all one.” (Gal.3:28).

2 P. Hughes & S. Reid, All Melbourne Matters: Research of Church in Melbourne (2009) p78.
Rev Peter Corney, Vicar emeritus St Hilary's Kew, church consultant & leader

The association between Biblical ideals and human rights is strongly apparent in many Christian groups serving the Victorian community today. One aim of this submission is to convey the views of those who serve the Victorian community and their views on human rights in light of the Christian faith.

6. Effects of the Charter on Provision of Services and Remedies for Infringements of Rights

5. What have been the effects of the Charter Act on—
   (c) the provision of services, and the performance of other functions, by public authorities;
   (e) the availability to Victorians of accessible, just and timely remedies for infringements of rights?

Terms of Reference 5 (c) examines the effects of the Charter to date on the provision of services and other functions by public authorities. The provision of services by public authorities has particular meaning for the most dependent members of the community, as well as many outside the mainstream. The effects of the Charter Act on the vulnerable, needy and marginal is of deep concern to many Christians who are actively serving the community. A snapshot of the nature of those concerns is expressed below. For instance, Chris Lacey, Executive Director of Urban Seed, Collins Street Baptist church, observes:

"Many people Urban Seed sees each day are frustrated at the experience they have daily in dealing with government agencies and public authorities. There often seems to be little or no consideration given to the rights and needs of the whole person as they are broken down into categories surrounding their individual circumstances, which may include homelessness, addiction and mental illness."
Chris Lacey, Executive Director, Urban Seed, Collins Street Baptist Church Melbourne

Another example comes from a disability support worker:

"My work in recent years has been in the area of providing holidays for people with intellectual disabilities. For some it is their one chance in the year to have a break away from their place of residence, whilst others may not have been on vacation for years. Whatever holiday they get, will, in the majority of cases, have been decided by someone else. Because of their special needs, our passengers are often entirely dependent on the goodwill and voluntarism of those who support them. I have been deeply moved on several occasions on seeing passengers with quite severe intellectual and/or physical disabilities, showing enormous patience and good humour in the face of overwhelming hurdles or frustrations. Whether the slow and arduous process of hauling oneself out of a wheelchair and up the steps of the bus, the indignity of incontinence and having to depend entirely on someone else to clean up for you, having to wait while your carer attends to the needs of your similarly disabled"
friends before being able to get round to your needs, the humility and forbearance exhibited is often striking.
I have experienced powerful feelings of anger at the thought that such lovely people might be at risk of being treated with less dignity and care—their needs not as well heeded as mine—just because of their disability—their vulnerability.
For those whose networks of support may be weak or indifferent, instruments such as the charter of rights and responsibilities may be the only guarantee they have available to them to determine the quality of care and attention that they receive. Such beautiful humanity need to have their rights upheld for them when they are not able to do so themselves.”

Charles Robin, Wantirna

All human beings, including prisoners, deserve to have their basic rights respected according to a prison chaplain:6

“Having worked as a prison chaplain for seven and a half years I am very much aware that ‘behind each story there is a story’. I listen to the life experiences of many men and frequently am hardly surprised that life for them has turned out the way it has...One cannot condone the actions that lead to incarceration but each and every individual in prison must have their basic human rights protected. Denial of rights would exacerbate the problems [of the correctional system] and make matters far worse.”

John Waddell, Anglican Chaplain - Metropolitan Remand Centre, Barwon Prison, Marranget Correctional Centre

A Baptist Professor of New Testament expresses his view about the character of a society in relation to its treatment of minorities:8

“Our society is only as civilised as the treatment it gives to those it marginalises: the wards of state, the elderly, the indigenous, the sex-worker, the refugee, the asylum seeker, the homosexual, the prisoner, the homeless, and the intersexual. The Good News of Jesus repeatedly tells us that Jesus stands with such as these, shares table-fellowship with them, and affirms God’s presence with them.”

Professor Keith Dyer, Whitley Theological College (Baptist College)

An Aboriginal pastor shares his support for the Charter’s protection of Aboriginal Australians,

“Aboriginal persons need their cultural rights respected and upheld. In no circumstances must those rights be tampered with, specifically as described in section 19 (2) and its subsections. I encourage the Government to ensure that our rights are upheld.”

Pastor Lloyd Hollingsworth, Nunawading

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5 For IsaiahOne submission.
6 All Melbourne Matters, p78. The report notes that 60.3% of Melbourne churches were involved in visits to prisons and hospitals — although the breakdown between the two is not available.
7 For IsaiahOne submission.
8 It is worth noting that Christian communities are themselves frequently the ill-treated minorities in question in many parts of the globe. An excellent overview of religious persecution is by R. Finke and B. Grim, The Price of Freedom Denied (2009).
9 For IsaiahOne submission.
10 For IsaiahOne submission.
“St Kilda Gatehouse is a not for profit organisation based on Christian principles which works alongside those who are marginalised and have life controlling addictions, particularly street sex workers. For many who come from a background of abuse and poverty it is a source of support, dignity and hope – and where they can find the support and care needed as they attempt to build a life off the streets and beyond drug addiction. A very unfortunate aspect of our culture is that marginalised people, in addition to suffering from the hardship of their situation, are subjected to alienation and discrimination by mainstream society.

One of the most significant barriers we find, working with the women, is their sense of social exclusion, of feeling different and unable to access mainstream society. As one woman said “we’re a group who just don’t fit in”. The individuals who we work with are daily seen by society as commodities rather than as human beings. Their rights are particularly at risk and need strong protection.”

Sally Tonkin, CEO St Kilda Gatehouse, St Kilda

Evidence shows that in the last 4 years of operation, the Charter Act has positively demonstrated a capacity to provide just, timely remedies for infringements of the rights of Victorians. Examples include court-based remedies but also many others which avoid the judicial system. They are well-documented in various reports, submissions and websites. Below is a selection of some of these, summarised here for brevity.

6. (A) Advocacy-based Outcomes

1. An asylum seeker otherwise denied basic medical treatment being given access to a hospital when the Charter was used to advocate on her behalf.

2. A single mother of two avoided eviction into probable homelessness when her barrister used the Charter to negotiate a solution with the Housing Commission. Doing so avoided escalating the dispute through the courts.

3. A boy with Aspergers Syndrome was eligible for disability support after a court application using the Charter prompted the Government to review and revise its disability definition (autism disorders now include Aspergers.) This policy change affects all those with Aspergers who require disability support.

4. The Charter was used to help negotiate a common-sense outcome for a man whose recently deceased partner was the public housing lease-holder. This greatly reduced the risk of him falling into homelessness.

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31 For IsaiahOne submission.
33 Source: West Heidelberg Community Legal Service. Relevant rights: right to life; protection from cruel, inhuman or degrading treatment; right to non-discrimination.
34 Source: Michael Pearce SC. Right to family life, protection of children, s 17.
5. The Charter was used to assist an Iraqi refugee with an intellectual disability who was moved by public authorities to a facility isolated from family and inflexible with regard to his language, cultural and religious circumstances. The man’s rights to family life and respect for his religious beliefs - such as being provided Halal food – were used to find more suitable accommodation.  

6. Several young people with brain injuries who were due for discharge from a rehabilitation centre were going to be accommodated in aged-care facilities. This facility lacked important recovery services for the young people. The Charter was used as a basis for re-considering rehabilitation options leading to alternative arrangements better suited to the young people and their families.

6. (B) Court-Based Outcomes

1. A man with a mental illness gained a review of distressing involuntary drug treatment, otherwise denied by existing systems and procedures which were meant to allow this.

2. A single father facing sudden and immediate eviction from public housing was granted an extension of time to find alternative housing so as to avoid becoming homeless. This case is particularly important as a precedent for handling decisions affecting all Victorian families in public housing.

3. The Charter was used to enable evidence to be given in court against a pedophile. The right of two child victims to testify against the perpetrator was being denied by a minor technical procedural issue that the Charter helped to overcome.

6. (C) Systemic Reform Outcomes

1. The Charter was used by a disability service to recognise and enable their clients to exercise their right to vote.

2. The Charter was used in training and modifying procedures allowing for the humane treatment of detainees in facilities operated by a private contractor. Changes included improved strip-search procedures and measures designed to respect detainee’s religious beliefs.

3. The wearing of turbans in court by police was permitted in a regional area of Victoria following consideration of the Charter’s right to freedom of religion.

Christian groups and individuals welcome the way the Charter has delivered remedies like these to Victorians whose rights have been overlooked. The following statements are examples of these views:

Source: Youth Affairs Victoria, National Human Rights Consultation Submission. Right to religion, s 14 (1)(b) & (2); right to cultural life, s 19.


Source: Director of Housing v Sudri [2010] VCAT 328. Right to family life, protection of the rights of the child, s 17.


Source: Victorian Council of Social Service.

Source: Federation for Community Legal Centres (Vic). Right to humane treatment when detained, s 22.

Source: Victoria Police.
"As a Christian community organisation based in Victoria and founded in Victoria over 40 years ago, TEAR Australia is committed to Human Rights and encourages the Victorian Government to uphold and strengthen its commitment to Human Rights through the Victorian Charter of Human Rights and Responsibilities."
Viv Benjamin, National Advocacy Co-ordinator, Tear Australia, Blackburn

"The Victorian Charter of Rights is an important instrument, not only for the work it does in keeping law and policy makers accountable, but also in what it aspires to. As the only Western liberal democracy in the world without a Human Rights Act, Australia suffers a lamentable lack of awareness and understanding of human rights. This gap in society's insistence on human rights is what leads to some of the most entrenched human rights violations in Australia. (Broad popular and political support for a system of mandatory indefinite detention of asylum seekers is just one of many glaring examples of this). In a nation where human rights are so often sacrificed in favour of political popularity and expediency, a black-letter instrument that protects the rights of any vulnerable group is something extremely valuable. Any step away from the Charter would be a pity for the legal and human rights landscape of this country. If there is any role for religion in politics, surely it would be to exhort our leaders to aspire to the biblical notions of justice, mercy and compassion for the least protected in our society."
Jessie Taylor, Lawyer & Refugee Advocate, Melbourne

"Anyone involved in the Victorian Criminal Justice System knows that for the average defendant experiencing ‘justice’ is more an ideal than a reality. Bureaucratic, cumbersome, expensive – the present system is an anachronism long overdue for reform. The mounting human and social cost of our flawed Criminal Justice System places a high burden on Government to do something. Particularly in relation to the imprisonment of people, the Criminal Justice System needs to be much more transparent and accountable. A former prisoner myself, with over 30 years experience as a penal practitioner, I fear the ‘system’ has become progressively less open and accountable. Whereas the monolith we have created cannot easily be turned around, a good starting point is The Victorian Charter of Human Rights and Responsibilities. I urge the present Government to show foresight and wisdom in not abandoning this important instrument."
Arthur J Bolkas – CEO PASS – Reintegration Support for Released Prisoners; MA Criminology, Churchill Fellow 2000, Footscray

"As a Christian who is a refugee and immigration lawyer, and a manager of refugee settlement programs in the community, I am committed to the Victorian Charter's role in protecting the vulnerable and needy in our society. While the Victorian Charter does not reach the injustices that plague the Federal Government's immigration processing that takes place in Victoria, it does play a valuable role for refugees and vulnerable settlers who have visas issued to them and are making a new life in Victoria. Many refugees who settle in Victoria have fled religious persecution - such as Christians who fled Iraq, Falun Gong from China, or Hazara Shia Muslims from Afghanistan - to name a few. For them, there can be ongoing

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15 For IsaiahOne submission.  
16 For IsaiahOne submission.  
17 For IsaiahOne submission.
fear and trauma around religion and persecution by the dominant majority of minorities. The fact that Victoria actively protects freedom of religion in the Charter, as well as protects against racial discrimination, are steps in conveying the safety of our multicultural society, and healing from past persecution. Such protections confirm the DNA of Australian fairness, love for freedom, generosity towards each other and religious tolerance. These are things worth celebrating and preserving into the future for all."

Jo Knight, Refugee and immigration lawyer and member of the national Anglican Refugee and Migrant Network, Kew

"As a Christian and a manager working in the community, legal and education sectors, I believe the importance of the Charter as a 'statement of commitment' by the State and as a tool for education is an aspect that is often overlooked. Human rights understandings in Victoria are very limited and there is absolutely minimal human rights education, whether in schools or the broader community. Yet human rights principles of Freedom, Respect, Equality and Dignity are fundamentally in accord with Christian theology, values and teaching as well as community values and new ways of educating all ages about these should be encouraged in a wide range of settings.

ECLC's human rights education work with children and young people has been highly effective using simple sporting metaphors – this has been especially so in multicultural and multi-faith contexts. As we say, "The right to wear a team scarf should be the same as the right to wear a head scarf."

Michael Smith, CEO, Eastern Community & Legal Centre and Chair, Youth Ministry Support Team, Banyule Network of Uniting Churches, UCA

6. (D) Conclusion: Effects of the Charter on Provision of Services, Remedies for Infringement of Rights

Overview of Charter Outcomes and Alternative Options

Several threads run through these and other cases which recognise rights and remedy breaches:

- Advocacy drawing on the Charter outside the judicial system is often used to improve service delivery and provide remedies;
- Some Charter cases involving individuals have spurred important wider reforms, such as improved Housing Commission eviction procedures;
- Protection of family life under the Charter frequently recurs;
- The Charter is being used to recognise and protect religious freedom.

As a mechanism for addressing human rights concerns, the Charter Act offers several key advantages when compared with alternatives such as additional legislation targeting human rights breaches and strengthened powers for Ombudsmen:

1. The Charter's content is based upon the civil and political rights in the Universal Declaration on Human Rights. As such it offers a well-recognised and formulated

28 For IsaiahOne submission.
29 For IsaiahOne submission.
account of the community’s rights. This may enable Government and public authorities to be more galvanized and effective on human rights issues than by trying to formulate their own policies and guidelines de novo.

2. Government and individual public authorities can develop specific applications appropriate to their circumstances with reference to the Act’s general statements. Expanding the list of enumerated rights too far risks overloading Government with too many responsibilities to effectively apply.

3. The Charter mechanism is a prompt and pro-active approach to human rights breaches. Other monitoring systems such as Ombudsmen, are important review mechanisms but are primarily retrospective in process and effect. That is, a problem or set of problems are reported, reviewed and a report is produced. Responses then need to be effectively implemented. Human rights abuses may go on for long periods before being recognised and remedied by such retrospective systems. This is of particular relevance to marginal groups such as indigenous Australians.ˆ0

There is broad-based, concrete evidence that the Charter Act has produced tangible and significant benefits for many Victorians who are most in need of human rights protection. As seen from the comments above, this outcome is of great importance for many Christians, not least those involved in serving the community. From this concern the submission turns to consider another, the protection of religious freedom.

7. Religious Freedom and the Charter

Terms of Reference and Responses

6. What if any, have been the overall benefits and costs of the Charter?

The Charter explicitly protects religion at Section 14:

(1) Every person has the right to freedom of thought, conscience, religion and belief, including—

(a) the freedom to have or to adopt a religion or belief of his or her choice; and

(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Despite this, the Charter’s possible effects on religious freedom have been of notable concern for a number of Christian groups. Indeed the area of religious freedom and the Charter has achieved such public notoriety that Terms of Reference (6) must be addressed as a question for religious freedom as a “cost” rather than a “benefit”. So the Terms of

To take just one instance, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Second Report Executive Summary (1994) commented on the implementation of the 1991 Royal Commission into Aboriginal Deaths in Custody: “One is irresistibly reminded of the likening of bureaucratic activity to the sex life of elephants: much trumpeting, a lot of activity at high level and no outcome for three years”.

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Reference for religious freedom will be posed as the question, “has the Charter Act been a cost to religious freedom?”

7. (A) A Christian Approach to Rights and Freedom

Before considering the evidence, it should be acknowledged at the outset that many Christians understand the ‘right’ to religious freedom in a different sense from that often understood in the political sphere. In the public domain debates about ‘freedom’ are heavily indebted to political philosophies, such as classical liberalism and libertarianism. Many Christians draw a distinction between Christian ‘freedom’ and the political philosophies of freedom upon which debates about rights are based. Although there are areas of overlap, libertarian or liberal concepts of freedom are not identical with Christian concepts, partly because the Kingdom of God is to be fundamentally distinguished from human instituted governance.\(^3\)

One example of this distinction during the National Consultation on Human Rights appeared in an article on ABC online by Rev Dr John Dickson and Dr Greg Clarke from the Centre for Public Christianity. They articulate what many Christians regard as a distinctive Christian approach to freedom in the context of human rights:

> “The principle of self-sacrifice should take precedence over self-interest. Christians ought to reject the desire to legislate Christian morals. In a secular society, the duties of the Christian community are to persuade others of biblical truth and serve others in Christ’s name, not to impose its viewpoint on the nation.

> In a sense, Christians have no rights. Even if the freedoms currently enjoyed by churches were to be curtailed, this would not be a sufficient reason to oppose a charter.

> Christians follow the crucified Jesus; he epitomises giving up rights for the good of others. Christianity certainly does not need political or legislative power to achieve its aims. In the first three centuries of Christian history, right up until the time of Emperor Constantine, believers had no power, no sway over laws, and yet they thrived, winning countless thousands of individuals throughout the empire to the way of Christ.

> We have no view on the specific question of a Charter of Rights. But we are clear on this: Christians ought to be willing to surrender their rights for the good of others, in particular the poor, oppressed, weak and socially excluded.”\(^\text{4}\)

IsaiahOne believes that the distinction between theology and politics needs more clarification in the public domain, not least in passionate debates over ideals such as ‘freedom’. Further Christian views on balancing the benefits and costs of the Charter are expressed below. Before that, however, the key evidence of the Charter’s impact on religious freedom over the past four years shall be examined. The evidence is divided into three sub-sections:

1. Major Episodes of Concern over Religious Freedom
2. Court Cases Involving Religious Freedom under the Charter
3. Comparative Evidence of the State of Religious Freedom

\(^3\) The distinction between the two forms of sovereignty was most famously set out by St Augustine in The City of God in the 5th century AD.

7. (B) Three Major Episodes of Concern over Religious Freedom

In the course of the National Consultation on Human Rights, 2008-10, the Victorian Charter was often referred to. The Committee found that three matters kept recurring with regard to Victoria’s Charter and religious freedom. These were:

- the Catch the Fire Ministries case under the Racial and Religious Tolerance Act (2001) (Vic)
- the Victorian abortion law reforms (2008)
- changes to the Equal Opportunity Act (1995) (Vic)

Episode 1: Catch the Fire Ministries – Racial and Religious Tolerance Act

The Catch the Fire Ministries case is important because the episode was perhaps the most hotly contested issue involving freedom of religion in Victoria for many years, perhaps decades. It has acquired a notorious reputation in several Christian communities and attracted enormous media attention, not only in Victoria but around the world. Indications of its singular profile include a petition of 27,000 signatures collected by major churches calling for the Act’s amendment; more than 5,000 letters sent to Government protesting the case and a protest rally involving several thousand Christians.

It is against this background that efforts to link the Charter and this case should be understood. No credible link can in fact be made. The court cases involved occurred in 2005-2006 well before the Charter had come into effect. Likewise the Racial and Religious Tolerance Act was enacted in 2001, six years prior to the relevant provisions in the Charter becoming operative. Given the obvious irrelevance of the Charter it is striking that the National Human Rights Consultation found that the Catch the Fire Ministries episode was so often cited in concerns over the Charter.

This does not deny that legitimate concerns are raised by the Racial and Religious Tolerance Act on issues of free speech and freedom of religion. Had the Charter been operative at the time the Bill was tabled community and Parliamentary debate may have paid greater attention to how well the legislation upheld rights to free speech and religious freedom.

Episode 2: The 2009 Abortion Law Reforms

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33 For example, B. Carr, “Victoria has just decriminalized abortion. Section eight of the Abortion Law Reform Act requires doctors and nurses who conscientiously object to abortion to nonetheless perform such a procedure in an emergency. An issue of conscience, surely. A group of doctors and nurses sought the protection of the Victorian Charter of Rights. They were turned away.” “So, whose rights reign supreme?”, The Age June 5 2009.
34 National Human Rights Consultation Report, pp48-49.
37 The parts of the Charter relevant to courts (in Division 3) did not come into operation until 1 January 2008, section 2(2) of the Charter Act.
38 Namely, statements of compatibility for legislation.
39 Sections 14 and 15 of the Charter deal with religious freedom and the free speech.

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The second example involves Victoria’s abortion law reforms in 2008-09. Unlike the first example, it did occur following the Charter’s enactment and thus may be relevant.

Amendments to Victoria’s abortion laws particularly raised questions of freedom of conscience because one clause was seen by many as infringing the right of medical practitioners who object to abortion on religious grounds. Section 8(1) of the Abortion Law Reform Act (2009) obliges a registered health practitioner who has a conscientious objection to abortion to refer a woman requesting an abortion to another registered health practitioner “who the practitioner knows does not have a conscientious objection to abortion.”

Several objections were raised at the time against this clause. It was seen as coercive for a medical practitioner to be forced to reveal the basis of his or her objection. The medical practitioner is also arguably in a position where they must facilitate a procedure they object to by referring the patient onto a practitioner they “know” will perform an abortion.

The then Brumby Government rejected the claimed deleterious effect on religious conscience. However many felt the then Bill put religious conscience under undue pressure, including general commentators such as The Age. Section 14 of the Charter states that “a person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief” and that everyone is entitled to “freedom of thought, conscience, religion and belief”. Section 28 of the Charter requires that all Bills tabled in Parliament have a statement of compatibility accompanying them. The Abortion Bill should have been subject to this compatibility check. In particular, the provisions in s 14 regarding religious conscience would have added an important dynamic to Parliamentary debate. But the Statement of Compatibility was not tabled. Why?

In a second reading speech the Minister who tabled the Bill stated:

“In accordance with section 48 of the Charter of Human Rights and Responsibilities, a statement of compatibility for the Abortion Law Reform Bill 2008 is not required. The effect of section 48 is that none of the provisions of the charter affect the bill. This includes the requirement under section 28 of the charter to prepare and table a compatibility statement and the obligation under section 32 of the charter to interpret statutory provisions compatibility with human rights under the charter. I move that this Bill be now read a second time.”

What is section 48? It is a special clause (or “savings provision”) – unlike any other in comparable Charters. It states:

“Nothing in this Charter affects any law applicable to abortion or child destruction...”

The savings provision curtails the Charter’s applicability to laws made concerning abortion. This may mean that sections such as right to life (s 9) would have no capacity to challenge common law on abortion.

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42 Nor does the ACT’s Human Rights Act have a comparable clause.

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Some Christian leaders declared that the exclusion of a Charter from issues like abortion is
evidence of the ‘secularity’ of Charters. In public hearings for the National Consultation on
Human Rights the Australian Christian Lobby declared:

"From a faith perspective there is for me a real crisis of confidence in an
instrument [a Charter of Rights] which purports to protect human rights and yet in
both the act and, Victorian examples, given as possible models by charter
proponents, the act explicitly excludes the right to life of a child before birth..."43

However, this speech, and other commentary along the same lines, does not acknowledge
the role of the Church in the formation of s 48. Then Attorney-General, Rob Hulls, stated in
an interview with the ABC on 23 September, 2008:

"It has to be remembered that abortion was specifically precluded from the charter,
that was actually at a request after discussions with the Catholic Church."44

The use of s 48 in the debate has been broadly criticised. The Victorian Government’s own
Scrutiny of Acts and Regulations Committee (SARC) saw serious problems with using s 48 as
a reason for not tabling a Statement of Compatibility. It sought a written explanation as to
why such a Statement should not be tabled, particularly in light of questions it had about the
compatibility of the Bill (including clause 8) with the rights in the Charter, for instance:

"The Committee refers for Parliament’s consideration the question whether the
provisions of the Bill constitute an undue trespass to rights or freedoms within the
meaning of the Act."45

Whatever the precise rationale for its existence, the presence of s 48 is a seriously
complicating factor in judging what the Charter should have been able to achieve with
respect to the Abortion Bill.

During the abortion debate s 48 was used to nullify the Charter’s operation, including the
application of s 14 to religious conscience. Although the Charter existed, it was not allowed
to have effect. Had it been operative it could have, indeed should have, supported religious
conscience.46 It therefore seems odd to make the argument that an inoperative Charter is to
blame for legislation which, had the Charter been working, could have been improved. The
Charter was not the origin or reason for the offending clause in the Abortion Law Act; it was
simply a possible means to overcome its flaws.

One additional point of background warrants mention. It is true to say that Charters of
Rights around the world do not extend ‘right to life’ protections to the unborn. Many
Christians will find this a deficiency. Nevertheless that absence is not thereby a conscious
effort to rule out the rights of the unborn. Statements of human rights tend not to be
specific on issues of disputed social policy such as abortion, euthanasia and same sex

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43 Speech, National Human Rights Consultation, public hearings Canberra, July 2009. Retrieved from
44 ABC radio. Other comments making the same claim on the public record include Anne O’Rourke,
reported in The Australian, February 27 2009; Julian Burnside, The Australian 10 October, 2008;
George Williams, The Australian, May 27 2009. IsaiahOne is not aware of public responses or
comments regarding these claims by the Catholic Church.
45 Alert Digest No. 11 of 2008.
46 As several legal advices indicated, such as DLA Phillips Fox.
marriage. Rather human rights decisions typically defer to the State to determine the specific detail of social policy. On the issue of abortion the European Court of Human Rights has held that determining the question of when life begins lies within the "margin of appreciation" for individual states\textsuperscript{47}. In other words the court is saying controversial social policy issues of this kind should be determined by Parliament. Moving social policy away from the courts to the Parliament is (ironically) advocated by the same people who criticise the Charter on the grounds that its rights don’t specifically include a right to life which precludes abortion.

\textit{Episode 3: Amendments to the 1995 Equal Opportunity Act (Vic)}

The third episode involves a review of, and subsequent amendments to, the \textit{Equal Opportunity Act (1995) Vic}. For example, Jim Wallace from the Australian Christian Lobby declared that

\begin{quote}
"we have been forced to spend nine months defending their right to employ people who share their faith and values. Although the vast majority of Australians would support the need for church organisations to protect their ethos in this way, the Australian Greens and homosexual activists used the Victorian Charter of Human Rights and Responsibilities to try to remove this UN-guaranteed right." \textsuperscript{48}
\end{quote}

The specific amendments at issue for religious bodies date back to 1977.\textsuperscript{49} Needless to say, legislation is often reviewed and revised over time in response to changing circumstances. The original Act is itself an example of changing social values. As with the abortion law reforms, it is difficult to find evidence that the Charter Act was responsible for the amendments in question.

It is true that human rights concerns were frequently cited by proponents for these amendments but these cut both ways: freedom of religion is as much a human right as equality. As with the abortion laws, the primary role of the Charter lay with s 28, that is, that amendments be Charter-compatible. It is noted that the then SARC made extensive use of Charter principles and did not recommend an inherent requirements test, thus allaying the primary concerns of many Christian groups.\textsuperscript{50} The then Brumby Government did not adopt this recommendation and settled on the legislation in consultation with stakeholders such as

\textsuperscript{43} Evans \textit{v} Amicus Healthcare Ltd (2004) EWCA Civ 727. See [19]. Several recent decisions in the European Court of Human Rights have affirmed the right of Government to determine social policy issues which exceed commonly held thresholds of fundamental rights. For example, a recent decision involving a same sex couple who sought the right to "marry" found that since the couple's basic rights were protected under existing domestic partnership law, it was not for the European Court of Human Rights to intervene into social policy. Schalk \textit{v} Kopf \textit{v} Austria [2010] ECHR 30141/04 found against the couple's right to marriage. The court found that evolving social policy marriage lay within a state’s "margin of appreciation". A similar example in the area of religious – secular policy is the recent European Court of Human Rights decision in Lautsi \textit{v} Italy - discussed below.

\textsuperscript{46} "Rights overkill isn’t majority view," \textit{The Australian}, October 13, 2009.

\textsuperscript{47} The amendments involved ss75-77 of the 1995 \textit{Equal Opportunity Act (Vic)}. Opposition from Christian groups, as well as members of the then Opposition, was over the "Inherent requirements test". This required certain religious bodies to demonstrate that employment decisions (which would otherwise fall under discrimination provisions) were exempted because of the job's 'inherent requirements' in relation to the sustenance of the religious body.

\textsuperscript{50} Recommendation 50, Scrutiny of Acts and Regulations Committee, \textit{Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act 1995}.
the Catholic Church. The Baillieu Government has subsequently repealed some changes, demonstrating that the Charter is subject to Parliamentary sovereignty.

Despite the frequent reference to these episodes as examples of how the Charter is negatively affecting religious freedom, properly understood they offer negligible evidence for any such effect. In fact, it can be argued that had the Charter been applied to Catch the Fire and the abortion law reforms it would have assisted in strengthening religious freedom.52

7. (C) Specific Cases of Concern Over Religious Freedom: Court Cases

As already noted, the Charter is playing an advocacy role in favour of religious freedom.53 However, there are few instances in the past 4 years where the Charter has had a bearing on court decisions relating to religious freedom. The two cases known to IsaiahOne are examined below.

Anti-Discrimination Exemption on Cultural and Religious Grounds

In the case involving the YMCA - Ascot Vale Leisure Centre a public pool was granted an exemption to normal anti-discrimination requirements so that it could open for women-only swim sessions.54 The Muslim women who sought the exemption stated that they could not swim in mixed gender environments for cultural and religious reasons. The YMCA - Ascot Vale Leisure Centre applied to have an exemption from the Equal Opportunity Act (1995) to allow it to conduct women-only swim classes outside normal opening hours for these women.

V CAT found that the application did invoke the Act’s prohibition against discrimination. But it decided to grant the exemption. The court used the limitations section (s 7[2]) of the Charter to weigh the interests served by the proposed exemption against those of the prohibitions. The court considered the aim of the exemption, whether the goal could be attained in a less restrictive way and the financial impact of the exemption on the centre. It found:

"In summary, the program aims to give opportunity for sport and recreation in the way of swimming and learn-to-swim programs to women who, for cultural or religious reasons, cannot take advantage of those opportunities in mixed gender company...In my view, the proposed exemption does represent such a reasonable limit [as s7 of the Charter requires]. Its aim is to redress a disadvantage currently suffered by certain women because of their religious or cultural beliefs in relation to access to recreation – a disadvantage not suffered by those without those religious or cultural beliefs."55

53 For example, the Iraqi man’s right to religious dietary observance (Halal food); new court procedures allowing wearing of religious clothing; revised prison procedures to respect religious issues.
54 YMCA – Ascot Vale Leisure Centre (Anti-Discrimination Exemption) [2009] VCAT 765 (4 May 2009)
55 YMCA – Ascot Vale Leisure Centre, paragraphs 16 & 20.
Discrimination on the basis of sex was permitted in order to allow for the cultural and religious rights of a section of the community. The case is an example of a court using the Charter in such a way as to recognise and protect religious rights.

*Cobaw v Christian Youth Camps*

Another decision in VCAT has made more extensive use of the Charter in relation to religion. Many Christians will consider aspects of the Tribunal’s reasoning to be an example of poor handling by the courts of religious matters. This outcome is not, however, a direct result of the Charter itself. As with the examples involving legislative improvements, the primary fault lies with a failure to adequately employ the Charter in regard to religious conscience. At the time of submission this case was on appeal and the Court of Appeal may consider these.

*Background to the Case*

WayOut is a support group for same-sex attracted youth at risk (a project run by Cobaw Community Health Services). WayOut made a discrimination complaint for being turned away when trying to book the Phillip Island Adventure Resort. The resort is operated by Brethren-run Christian Youth Camps, or CYC. The *Victorian Civil and Administrative Tribunal* (the Tribunal) found that CYC discriminated against Cobaw in denying the booking:

"The conduct of the respondents in refusing the booking was clearly based on their objection to homosexuality."  

The Charter played no role in this complaint being brought to court for the simple reason that it cannot be a ‘cause’ (basis) of legal action. In addition, the decision by CYC to turn WayOut away from its campsite was not subject to the Charter as only “public authorities” are bound by the Charter. The Charter was only used in the case to interpret the scope of exemptions under the Equal Opportunity Act. Despite this, the Charter was not decisive for the Tribunal’s interpretations, which were established on common law grounds. Nevertheless, aspects of the Tribunal’s approach to religious belief raise questions about how religious belief and practice have been handled in this case.

*Court Determination of Religious Belief and Conduct*

The Christian campsite, CYC, claimed an exemption from the EO Act on the grounds that it was a ‘religious body’ as defined in the Act. Partry to address this question and partly to address other possible grounds for an exemption, the Tribunal analysed questions such as:

1. Did CYC’s conduct conform to the doctrines of the religion?  
2. Was the conduct necessary to avoid injury to religious sensitivities?  
3. Was the conduct necessary in order to comply with genuine religious beliefs?

56 *Community Health Services Limited v Christian Youth Camps Limited & Anor* [2010] VCAT 1613 (8 October 2010)  
57 "same sex attracted" is a description for those with feelings of attraction to people of the same sex rather than a designation of sexual orientation. The term 'at risk' refers to problems associated with one's sexuality, such as family conflict, bullying, violence, substance abuse, depression and suicide.  
58 *Cobaw*, 361.  
59 “Public authorities” are defined in Section 4 of the Charter and are either bodies of the Government or identified with functions of Government.  
60 For example see paragraph 11.
The nature of the conduct was important for defining a religious body because the Tribunal held that the definition had to be established on broader grounds than whether CYC had been originally set up as a religious body. Rather, CYC had to be operating on a religious basis (in the present) to be defined as a religious body. Other claims to religious exemptions under the EO Act – such as for religious conscience - could only qualify if the conduct was in actual fact religious by nature.

This approach led the Tribunal to apply 'objective' tests to the conduct at the centre of the discrimination complaint. That is, the Tribunal examined whether the conduct was actually in conformity with the religious doctrines of the defendants, whether it was truly 'necessary' to avoid injury to religious sensitivities.

In order to show the difference between 'subjective' and objective standards, observe how the decision recognised that 'genuinely held' beliefs were claimed by the defendants as the basis of the conduct:

"I am satisfied the opinions he [a respondent] expressed about his religious beliefs, the connection between those beliefs and the refusal to accept the booking, and the CYC Board's support for Mr Rowe's actions in refusing the booking reflected the opinions of his fellow directors. I am satisfied the opinions of the directors on these matters can properly be characterised as the opinions, beliefs or state of mind of CYC." 63

The court accepted that the opinions of the Defendant (Mr Rowe) reflected those of the CYC Board that the refusal of the booking arose from their beliefs. However Her Honour did not accept that those opinions in fact (objectively) conformed with Brethren doctrines.

"Even if I were satisfied that CYC was a body established for religious purposes, and that Mr Rowe's beliefs, and those of the Christian Brethren in Victoria about marriage, sexual relationships and homosexuality amounted to a doctrine of the Christian Brethren religion, I am not satisfied the refusal of the booking conformed with the doctrines of the religion." 64

The decision went on to reject the Defendant's claim that their conduct was in conformity with doctrine of the Brethren church. 65 It went further by concluding that the Defendant’s beliefs were not part of the doctrine of their own church:

"I am not satisfied those beliefs constitute a doctrine of the religion of the Christian Brethren, as I have defined that term." 66

The problem for religious freedom with the Tribunal's reasoning is that it placed itself as an arbiter of religious doctrines and what they entail by way of conduct. The court took

63 The Tribunal found that CYC was a commercial enterprise, thus disqualifying it from the definition of 'religious body'.
62 And, correspondingly, also necessary in order to actually comply with genuine religious beliefs.
63 Paragraph 352.
64 Paragraph 308. And compare, "I am satisfied Mr Rowe, Mr Buchanan, and Ms Mustafa and Mr Keep genuinely hold the beliefs they express about marriage, sexual activity and sexual orientation."
Paragraph 355.
65 Eg. Paragraph 318.
66 Paragraph 307.
extensive evidence about the very definition of "doctrine" itself. This approach to religious matters lead the Tribunal to assess very personal and subjective spiritual views which many would suggest are not easily grasped in a judicial environment. In fact, this point has been highlighted by courts overseas which deal with human rights and religious freedom. For this reason such an approach is generally avoided by the courts in such cases and the Cobaw case is an anomaly in this regard.

7. (D) International Human Rights Jurisprudence

International human rights jurisprudence shows that in the first stage of analysis, religious conduct or belief is best accepted by a simple 'face-value' test rather than interrogated for objective legitimacy. For example, leading Canadian jurisprudence does not require a person to objectively demonstrate that his or her religious beliefs or practices are supported by a particular doctrine of their faith. The Supreme Court of Canada stated in its decision in the case, Syndicat Northcrest v Amselem (Amselem) that,

"...a court is not qualified to rule on the validity or veracity of any given religious practice or belief...Indeed, the court's role in assessing sincerity [of religion] is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice."

In another complex legal matter involving religion, the Canadian Province of Ontario’s Human Rights Tribunal applied Amselem’s approach to examining religious belief as follows:

"What flows from the Court’s decision in Amselem is that in defining the creed in this case, the Tribunal should not inquire into whether Christian Horizons’ beliefs, or its view of what it means to be a Christian, or an Evangelical Christian, are necessary, or reasonable, or based on a proper interpretation of the Bible. That is not for the Tribunal to decide."

The reasoning in Amselem allowed for religious beliefs, including related conduct, to be accepted in the initial stage by a simple test. The Supreme Court of Canada argued that by doing so the courts avoided engaging in what it described as,

"...unwarranted intrusions into the religious affairs of the synagogues, churches, mosques, temples and religious facilities of the nation with value-judgment indictments of those beliefs that may be unconventional or not mainstream."

By contrast the Cobaw decision sought to establish whether the defendant’s conduct was 'objectively' required by their religion and indeed whether the stated beliefs of the Defendants qualified as 'doctrine'. The approach had the effect of sideling the Defendant’s religious beliefs as mere 'opinions'. Had the Defendant’s religious convictions been accepted in the manner of Amselem or Heinz, the Charter’s freedom of religion provisions would have become relevant.

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69 Amselem, paragraph 55.
70 Based on a very particular interpretation of ‘doctrine’ which distinguished it from ‘belief’.
71 Of course, as in Amselem, further questions need to be addressed as per s 7(2) of the Charter.
It is to be expected that Victorian tribunals and courts will take time adjusting to Charter jurisprudence. It is hoped that in the longer term this jurisprudence will offer valuable resources as courts deal with an evolving multi-religious / non-religious social landscape. One recent example of such jurisprudence is the Lautsi case in the European Court of Human Rights Grand Chamber (the highest decision-making body). It affirmed the display of crucifixes in Italian public school classrooms and was warmly welcomed by Pope Benedict XVI and many other religious leaders. The European Centre for Law and Justice, which intervened in the case, applauded the decision as follows.

“The ECLI welcomes that the European Court has thus renounced the promotion of a radical conception of secularism. This decision is a victory for Europe, as Europe cannot be faithful to itself by marginalizing Christianity. This decision is more of a victory for Europe than for the “crucifix”; Europe refuses to deny its own identity by rejecting the suppression of Christianity in the name of Human Rights.”

Leading international human rights jurisprudence shows that religious rights can be argued forcefully and without prejudice to one set of rights, be they religious or not, over another.

7. (E) Conclusion: Costs of the Charter to Religious Freedom (the courts)

Over the past few years the Charter’s religious freedom provisions have been rarely dealt with by the courts. In one instance religious issues were dealt with positively. In another instance, some parts of the decision raise concerns about the way in which religious belief, conscience and conduct can be handled by the courts (although, as noted above, the Cobaw decision is on appeal). The limited experience of the Charter involving the courts does not allow a firm conclusion that its operation is at a cost to religious freedom. International human rights law suggests that in time, the Charter is more likely to protect than erode religious freedom.

8. The Charter and Legislative Effects

Terms of Reference

5. What have been the effects of the Charter Act on –
   (a) the development and drafting of statutory provisions;
   (b) the consideration of statutory provisions by Parliament;

The abortion law changes and the Equal Opportunity Act episodes are controversial with respect to the Charter primarily because it did not improve legislation before the Parliament. For example in the following statement, the Charter is portrayed as not only open to misuse (“abuse”) but as complicit in efforts to erode religious freedom:

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72 An authoritative overview of the dramatic changes in Australia’s religious scene is available in James Jupp [ed.], The Encyclopedia of Religion in Australia (2009).
73 Case of Lautsi and Others v. Italy Application no. 30814/06 (18 March 2011).
"I fear a charter could be used or abused to limit all sorts of freedom, and religious freedom. Already in Victoria legislation is attempting to coerce prolife doctors to cooperate in abortions."\(^{75}\)

Commentary over religious freedom often carries an assumption that the Charter should have resolved problems with the legislative bills in question. But the Charter's power to affect bills before Parliament is limited to one section, the statement of compatibility (s 28). And as noted earlier, the Charter's inoperability in respect of religious conscience and abortion (s48) is not evidence of a failure to engage ss14 and 28. Much less is its inoperability evidence that it instigated such legislation.

There are further reasons why the Charter cannot be deemed liable for these controversies over religious freedom. The Act has very limited influence over legislation for several reasons. One is Australia's heritage of Parliamentary supremacy. This means that it is (relatively) culturally and practically easy for Parliament to disregard the Charter in forming legislation. An obvious example is when the same Government which introduced the Charter, tabled the *Summary Offences and Control of Weapons Bill* (2009) with a statement of incompatibility. Even in Canada, with a heritage which divides power more evenly between Parliament and Judiciary there are many examples of Parliament overriding the Charter (in its equivalent jurisdictions).\(^{76}\)

A second reason the Charter has limited legislative influence is that it allows for itself to be legally overridden in two separate ways. By default, laws which are Charter-incompatible continue in force regardless of their incompatibility.\(^{77}\) In addition (and arguably redundantly) the s 31 override provision can be invoked and renewed without limit.

Following a year of the Charter's operation, Associate Professor Jeremy Gans noted the following in regard to the Charter's Parliamentary dialogue arrangements,

"Charter-inspired parliamentary dialogue has been going on for over a year now. As many have pointed out, such dialogue is subject to many of the limitations that apply to regular parliamentary debate: party politics, lack of legal knowledge in rights, parliamentary incapacity to assess the effects of the bills they pass and the difficulty of making complex amendments on the floor of the house."\(^{78}\)

Critics of the Charter highlight its inability to effectively protect human rights. Yet Gans adds, "(H)owever, those limitations do not prevent the dialogue from having an impact" going on to illustrate its impact in a particular case study.\(^{78}\)

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\(^{76}\) David Johansen and Philip Rosen detail the use of the Canadian override (or "notwithstanding") clause in "The Notwithstanding Clause of the Charter", Parliamentary Information and Research Service (2008).

\(^{77}\) Section 29, and for example, *R v Moncilovic* [2010] VSCA 50.

Conclusion: the Charter and Legislative Effects

The most prominent Christian concerns over religious freedom and the operation of the Charter in the past four years have centered on controversies involving the Charter’s influence on legislation. The concerns could be addressed if the Charter was given greater power in Parliamentary and community debates so that its religious protections had more heft.


Religious freedoms can be difficult to measure. The world’s most authoritative global survey of religious freedoms is undertaken annually by the US Department of State. Entitled the International Report on Religious Freedom, it comprehensively surveys the state of religious freedom in almost all countries, producing detailed individual country chapters. The Report is reviewed below over the three years following the introduction of Victoria’s Charter (2008, 2009, 2010) to assess whether any changes are apparent with regard to religious freedom.80

These reports have not noted an increase in incidents of concern in Victoria (or the Australian Capital Territory) as compared with other jurisdictions without Charters.81

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<td>Victoria / ACT</td>
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<td>2009 None</td>
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<td>2008 One (Catch the Fire Ministries)82</td>
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The chapter on Australia of the International Report on Religious Freedom for the years 2008, 2009 and 2010 maintains the same conclusion about respect for religious freedom:

"There was no change in the status of respect for religious freedom by the Government during the period covered by this report."

There is no indication from the Reports on religious freedom by the US State Department that there has been a material change to the conditions of religious freedom under Victoria’s Charter.

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80 Available from http://www.state.gov/g/drl/rls/irf/.
81 Each report covers the year previous to the report year. As of the date of this submission the 2011 report (for 2010 events) was not available.
82 In addition the Report notes anti-Semitic incidents as recorded by the Executive Council of Australian Jewry. Anti-Semitic incidents rose nationally from 652 to 962 between 2009 and 2010. There is no known connection between the Charter and such incidents.
83 The Catch the Fire episode spanned 2003-07 and is cited in previous reports. The reference in this report is to the settlement between the parties in 2007.
10. Conclusion: On Balance the Charter Should be Retained

The lack of tangible evidence linking the Charter with detriment to religious freedom does not mean these concerns are unimportant. What it highlights is the sensitivity and concern for religious freedom in the current cultural context. Many Christians are conscious of the importance of religious freedom alongside other elements of the Charter’s operation. Nevertheless in IsaiahOne’s view most take a more balanced position than the single-issue focus apparent in some commentary. Even those with significant concerns over potential costs for Christianity may well over-rule those concerns by recognising benefits for others.

Below are several statements expressing views on finding a balance between the Charter’s real or potential shortcomings / benefits:

“As a lawyer and an Anglican minister, I have for many years questioned the place of human rights legislation within a Christian world-view. I am personally invested in the church having the freedom to self-govern according to biblical standards, but as a Christian I am also concerned that our legal system upholds the equal value of all human life. Both of these issues are paramount to Christians as we seek to participate in the reign of God on earth. I think it would be foolish to suggest that a Human Rights Charter poses no threat to religious freedom or to Christian organisations, who seem to be subject to increasing media slander and discrimination. However, on the balance, I have to support human rights legislation. I believe the dangers posed by a Human Rights Charter to the body of Christ, are miniscule compared with the benefits of bringing this much needed check-and-balance into our legal system.

In my experience, the separation of powers between the judiciary, the executive and the legislature, doesn’t do enough to protect the most vulnerable members of our society. This is plainly because the legislature is inevitably motivated by the needs and views of the majority, and the executive and the judiciary, too often by efficiency. The elderly, those in prison, the drug addicted and the mentally ill, are particularly at risk of human rights abuses, because they cost our society money and time to care for. Human rights legislation gives a greater scope for individuals who have been overlooked by the system to seek review. This also places pressure on our government to legislate in such a way that considers the least among us. For this reason I support human rights legislation, and continue to place my absolute faith in Jesus Christ, to shepherd and protect his persecuted Church.”

Heather Cetranqolo, lawyer, counselor and Anglican minister, Burwood

“In relation to the examples of the Charter’s impact on the community I have been Executive Director of Urban Seed working with homeless people in the city. I have seen firsthand the positive impact that lawyers from PILCH using the human rights framework and charter had upon maintaining the human dignity of homeless people on matters such as inability to pay tram fares and relieving consequent catastrophic penalties. I and my family also visit prisoners regularly, one remarkably reformed after many years, now awaiting the award of his PhD and beginning his parole process. I have seen the importance of a human rights framework and charter to his getting to his current position about to become a free, contributing member of society on the outside. I also have a 28 year old son with bipolar disorder who had some dealings with the law pre-human rights charter and would have found such a

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83 For IsaiahOne submission.
charter of immense help in helping him overcome his problems in negotiating the legal and mental health system at the time. Finally, I have strong convictions about freedom of religion and understand from the inside some of the fears some Christian groups have of Rights Charters but believe that with proper safeguards for such freedom, they are beneficial to Christians and other religious people, as in the case of the Muslim young man and his access to Halal food. For all these reasons I commend this submission from IsaiahOne and the maintenance of the Human Rights Charter for its important role of safeguarding our God-given human dignity and rights.”

Rev Dr Gordon Preece, Ethos: Evangelical Alliance Centre for Christianity and Society, Brunswick

“Jesus of all people would champion an affirmation of fundamental human rights, which especially benefits marginalised groups in society and those least able to protect themselves. On the matter of the fundamental dignity of every human being, [Jesus’] story of the Good Samaritan is instructive. It is a narrative with radical implications. Told in the context of the conflicted multicultural society of Jesus’ day, it is the story of a man who is beaten and left for dead on the side of the road. Two religious leaders from the same ethnic and socio-religious background as the victim pass him by and do nothing for him; perhaps out of fear, or even worse, perhaps because their religious sensibilities tell them not to touch one presumed to be dead. Eventually a Samaritan, a man belonging to the group most despised both by the victim and the ones who passed by, stops and cares for the beaten man, not counting either the risk or the cost to himself. The shocking truth of this story is that the one considered most to be the enemy and least likely to know what is right and good proves to be the one who does what is right and good, even for a person from a group who despises him. This is a deliberately provocative and stark affirmation of the humanity of those most distant from us in every way. It tells the listeners that they only truly acknowledge the common humanity of every human being when they acknowledge that an ordinary member of the group most opposed to them is capable of doing what is right and good. This story asserts that when we see the other human being as one capable of goodness, we affirm the other person as truly human. This is even more potent than the other truth in the story: that whenever we see anyone in need, whoever they are, they deserve our help. At the heart of what Christians proclaim as the Gospel of Jesus Christ is this radical affirmation of universal human dignity as the basis of universal human rights.”

Bishop John McIntyre, Bishop of Gippsland, Chair of the Victorian Council of Christian Education

“As a Christian minister from the Baptist tradition, I see religious freedom as the cornerstone of my heritage. This submission identifies that a charter of human rights does not undermine freedom of religion. I’ve been working with some of the most marginalised people in our society for more than a decade and have seen how their human rights are particularly at risk. For their protection alone, many who rely on Government services, I encourage the Victorian Government to support human rights.”

Rev Brent Lyons-Lee, Baptist minister, Geelong

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For IsaiahOne submission.
For IsaiahOne submission.
For IsaiahOne submission.
"As a Christian, I believe that God loves all people and seeks to involve us in His work of fighting for justice with, and alongside, those who are most vulnerable in society. Having worked as a lawyer and in the international development sector in India, I have seen first hand the critical importance of advocating for just social, political and legal structures that protect and promote the dignity and rights of all people. Realising Human Rights is essential to addressing poverty and promoting just development. Once those who are living in poverty or who are victims of oppression have knowledge and experience of their rights they feel empowered and often have the confidence to not only bring about change for themselves and their families, but to hold their government to account in a way that benefits entire communities. I believe that development work that prioritises empowerment and human rights brings about greater and longer lasting transformation by analysing and addressing the underlying inequalities, discriminatory practices and unjust power relations which often obstruct human development and perpetuate poverty. In this context it is very encouraging for me to see the Victorian Government, through the Charter, prioritising human rights and allowing principles of dignity, equality and value of all people to inform and shape our legal and social systems."

Martine Wilson, former Legal Fellow with International Justice Mission, India, Balwyn\(^7\)

"As a Christian organisation Mission Australia seeks a balance between protecting religious freedom and maintaining human rights. Too often the vulnerable and marginalised that we serve are not protected as they should be and the current Victorian Charter has provided some positive protections to these people which should be maintained and if possible improved. At the same time it would be hard to argue the Charter itself has done anything to minimise religious freedom and we support the view that a charter is needed to protect religious freedom. On that basis we support this submission from IsaiahOne.

Our perspective is that a large number of Christians would do likewise."

Toby Hall, CEO Mission Australia, Melbourne\(^8\)

11. Options for Reform or Improvement of Protections for Religious Freedom under the Charter

Terms of Reference

7. What options are there for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria?

The scope and significance of Christian concerns over the Charter in connection with religious freedom cannot be overlooked. Many Christians recognise the importance of Article 18 of the International Covenant on Civil and Political Rights (ICCPR) for the protection of religion. IsaiahOne recommends that the scope and strength of religious protections in the Charter (s 14) be clarified in relation to Article 18 as follows:

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\(^7\) For IsaiahOne submission.

\(^8\) For IsaiahOne submission.
11. (A) the Limitations Clause is Too Broad

The limitations clause in s 7 (2) fails to distinguish between derogable and non-derogable rights within the Charter. Derogable rights are those which may be limited in certain circumstances. For instance, if two rights are in conflict one or both may have to be limited, or if there is an emergency, or to protect public health and morals. Non-derogable rights are those which may in no circumstances be limited, they are ‘absolute’\(^\text{a}\). The ICCPR indicates which rights may be limited (derogable). The distinctions have been further amplified since the ICCPR was drafted by the Human Rights Committee\(^\text{b}\), additional international human rights documents and through jurisprudence.

The limitations clause in s 7(2) of the Charter strictly applies to all rights contained therein. In doing so it allows for non-derogable rights to be limited. Such an approach is not consistent with the ICCPR or its subsequent elaboration. The right to freedom of thought, conscience, religion and belief is non-derogable.

Section 7(2) should be clarified so as to confirm that such rights are not subject to limitations, including the right to religious freedom.

11. (B) The Override Clause Can Suspend Too Much

A related concern is that, on the face of it, the Charter’s override clause (s 31) permits the suspension of non-derogable rights. The override clause enables Parliament to suspend the Charter in "exceptional circumstances"\(^\text{c}\):

"Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter."

The scope of the override seems at odds with the concept of non-derogable rights such as those in s 14(1)(a) which are not meant to be compromised under any circumstances. The problem is compounded by the unlimited renewability of the ‘sunset clause’ (s 31(8)).

The Charter should be amended to preclude suspension of non-derogable rights including freedom of religion.

11. (C) The Charter Does Not Reflect One Element of Religious Protection

A difference in wording between s 14 of the Charter and Article 18 of the ICCPR appears as below:

<table>
<thead>
<tr>
<th>Victorian Charter s 14</th>
<th>ICCPR Article 18</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Every person has the right to freedom of thought, conscience, religion and belief, including—</td>
<td>1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include</td>
</tr>
</tbody>
</table>

\(^{a}\) Article 4(2) of ICCPR.

\(^{b}\) The Human Rights Committee issues ‘general comments’ which guide interpretation of the ICCPR. A major document relevant to Article 18 of ICCPR is the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief.

\(^{c}\) Section 31(4). What constitutes ‘exceptional circumstances’ is not clearly defined.
<table>
<thead>
<tr>
<th>(a)</th>
<th>the freedom to have or to adopt a religion or belief of his or her choice; and</th>
</tr>
</thead>
<tbody>
<tr>
<td>(b)</td>
<td>the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.</td>
</tr>
<tr>
<td>(2)</td>
<td>A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>freedom to have or to adopt a religion or belief of his choice, and</th>
</tr>
</thead>
<tbody>
<tr>
<td>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.</td>
</tr>
<tr>
<td>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.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Comparable provision to Art 18.3 covered by s 7(2)\textsuperscript{92}</th>
</tr>
</thead>
<tbody>
<tr>
<td>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...[listed in s 7(2) (a) – (e)]</td>
</tr>
</tbody>
</table>

| 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. |

<table>
<thead>
<tr>
<th>Provision comparable to Article 18.4 omitted</th>
</tr>
</thead>
<tbody>
<tr>
<td>The State 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.</td>
</tr>
</tbody>
</table>

The right of parents to raise their children in accordance with their religion or belief is reiterated in Article 5 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

The Charter should be amended so as to reflect the scope of religious protections in Article 18.4 of the ICCPR.

Amending the Charter in these respects will not only make Victoria’s Charter more consistent with comparable instruments elsewhere, it will allay concerns about weaknesses in the Charter’s religious protections.

\textsuperscript{92} In addition to these issues comment was made in several church submissions to the National Human Rights Consultation that limitations on manifestation of belief are not strictly and narrowly framed in s 14(2) as per those in ICCPR Art 18.3. However s 7(2) applies to all rights on the same basis and consistency on the point suggests that the same limitations in Art 18.3 should be inserted into each and every right.
12. Conclusion and Recommendations

This submission recommends that the Charter should:

1. in general terms retain its effectiveness in establishing human rights standards that are enforceable and binding on public authorities, Government and judiciary, as per existing provisions:

   Sections 28, 30 – Statements of Compatibility
   Sections 32, 33, 36, 37 – Interpretation of Laws
   Sections 38, 39 – Obligations on Public Authorities

2. be amended so that Section 7 limitations on rights are unambiguously applicable only to 'derogable' rights.

3. be amended so that Section 31 override powers cannot be applied to 'non-derogable' rights; and that the Section 31 override powers be made non-renewable.

4. be amended at Section 14 so as to reflect the substance of Article 18(4) of the International Covenant on Civil and Political Rights.
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