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Dear Mr O’Donohue,

Review of the Charter of Human Rights and Responsibilities

I write to urge you and your Committee to endorse the enormous value of the Charter, and to urge the Government to build on its successes and to expand its coverage and effectiveness.

The Charter came into being because of the active support of the people of Victoria. The people value human rights, as opinion polls have repeatedly shown, and popular support for the enactment of a Charter was strong. At all times the enthusiasm of ordinary Victorians, as individuals and through the groups and institutions of civil society through which individuals participate in the political process and public life were the driving force required to persuade a reluctant government to act. The people wanted a Charter, and more particularly wanted better protection of human rights, for which a Charter, and its role in helping create a human rights culture, were seen as crucially important.

In many ways the Charter enacted in 2006 fell short of what people wanted. Now is the time to fix some of its inadequacies, and build on its strengths.

I was an early advocate of a Human Rights Charter for Victoria, and took part from 2001 (and even earlier) in the process that led to the establishment in 2005 of the Human Rights Consultation Committee (HRCC) and the subsequent enactment of the Charter.

I maintained then, and continue to maintain, that human rights are indivisible, and that the Charter should protect all the human rights that Australia has undertaken to respect, protect and fulfil by its becoming party to the several treaties following on from the Universal Declaration of Human Rights. As I wrote for Liberty Victoria’s submission to the HRCC:

Human rights are indivisible. Liberty is concerned by the [Human Rights Consultation] Committee’s stated focus on civil and political rights. Victoria’s Charter should protect all our human rights, as expressed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International
Covenant on Economic, Social and Cultural Rights (ICESCR) and other human rights treaties by which Australia is bound.¹

I, and Liberty, took this view for three reasons, all still relevant. First, because their indivisibility is a matter of principle and legal precedent. It is the position at international law. Human rights are inherent in the dignity of the human person and the respect that is owed to each by reason of their humanity. A life of human dignity is impossible without food, work, education, health care just as it is impossible without freedom and fairness. Indeed, without food, work and housing, freedom and fairness are worthless, as Anatole France wryly observed many years ago.²

Secondly, the value of the human rights framework is enhanced by its completeness, which is derived from and reinforced by the fact that its structure is beyond local politics and has developed with the consent and contributions of many nations and their courts and legal experts over many decades; it is diminished by partisan, parochial picking and choosing.

Thirdly, and most cogently, the people value and want the full panoply of human rights.

The democratic legitimacy, indeed imperative, of this commitment to seeking that the Charter should encompass all human rights was made clear from research into people’s attitudes in the years leading up to the Charter, and in the Consultation itself, and indeed in the recent Brennan committee’s report on a national charter.

Social science surveys, such as those by Mike Salvaris at Swinburne and now RMIT, show that Australians rate economic, social and cultural (ESC) rights equally with civil and political ones. In one survey, for example, the top ten in order of importance were: rights to a fair trial, to an education, to a decent standard of health care, to public safety and protection, to work, to free speech, to a decent standard of living, not to be discriminated against, to vote and have a vote of equal value to others.³

The HRCC acknowledged the strong support in the very large number of public submissions it received for the inclusion of ESC human rights in the Charter, and proposed that their inclusion should be a specific consideration in the formal review of the Charter which it recommended and is now taking place. I respect the HRCC’s view that “a Charter containing civil and political rights is a significant step along the journey towards the better protection of human rights in Victoria. That journey is in its early days and it should be for future governments to determine, in light of Victoria’s experience with the Charter, whether the protected rights should be expanded to include ESC rights.” I am mindful of the time it takes to effect cultural change, including raising awareness of the concept of human rights and the development of human rights practice as part of the ordinary business of government, and consider that it is time to take the next step along the journey the HRCC referred to. I therefore urge the SARC to recommend that now is indeed the time for that expansion.

There is already substantial legal scholarship, and precedent, especially from the Constitutional Court of South Africa, to show that (contrary to the views of some scare-mongering academics) ESC rights can be justiciable and courts can deal with

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¹ Submission to the Human Rights Consultation Committee, paragraph 7 (Liberty Victoria, November 2005)
² "The law in its majestic egalitarianism forbids rich and poor alike from sleeping under bridges, begging in the streets and stealing bread." Anatole France The Red Lily, 1894.
³ University of Tasmania, Centre for Citizenship and Education. 1998. Preliminary Results of ‘Citizenship in Australia’ National Survey 1997
them in a measured and appropriate way, fully mindful of the economic and political impacts and the respect due to the executive government in budgetary matters. That this works even in a jurisdiction where the rights are constitutional means that with a merely statutory Charter the tabloid anxieties about judicial interpretation of ESC rights are even more fanciful.

In considering whether some or all of the human rights currently guaranteed to Australians by Australia's treaty obligations, but not protected in law by the Charter, should be so protected, SARC needs to consider in particular the obligations under the treaties referred to in s.44(2)(a), namely the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CROC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Section 44 also refers to the right to self-determination, a human right so important that it appears in the first Article of both ICESCR and the International Covenant on Civil and Political Rights (ICCPR) on which most of the Charter rights are based.

Self-determination is a human right that relates to people's relations with their government. It is important to any identifiable group, most obviously indigenous peoples, but also other groups with a community of interest. It is a right that requires each part of our diverse community to be able to and actively encouraged to participate in the social, political and economic life of the community, and to have its views and experience taken seriously. The omission of self-determination from the Charter is explained in the Explanatory Memorandum as being because it is "a collective right of peoples," an excuse commensurate with the Thatcherite "There is no such thing as society." Human rights are about the conditions inherent in the possibility of human flourishing, which requires recognition of the fact that human beings are not only individuals but exist in and depend on groups. Self-determination is a human right essential to that recognition.

I also urge SARC to reconsider the other human rights in the ICCPR that were not included in the Charter. I agree with Attorney-General Robert Clark that the Charter should not have omitted coverage of many ICCPR rights that could have had State-based application, and it should now do so. Article 24, for example, concerns rights to birth registration and a name; while the HRCC thought it mainly a World War 2 relic, it still has relevance to indigenous communities in particular, as Paula Gerber of Monash University's Castan Centre has shown, and should be included in the Charter.

One of the purposes of a Human Rights Charter, however, is to establish a framework, not a rule-book, a statement of values, not an encyclopaedia. Its goal is cultural, not legal, though a legal framework is vital to the task of establishing a culture. I would therefore be very cautious about expanding the text with the full detail of CEDAW, CROC, ICESCR and other relevant human rights treaties. Rather the treaties should be referred to as giving internationally accepted detail and meaning to the general principles of the Charter. Some of their provisions are more akin to the detailed legislation that implements particular aspects of human rights rather than the framework itself. The Charter should, however, include express reference to the treaties, and incorporate at least the higher level rights they embody.

In relation to the human rights of children, for example, I consider that the existing child-specific provisions of the Charter—s.17 (Protection of families and children), s.23 (Children in the criminal process)—should be enhanced by adding provisions

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4 See, for example, the submission of the Castan Centre.
based on CROC articles 3 (best interests of the child), 6(2) (survival and development of the child) and 11 (illicit transfer and non-return of children abroad) at least.

There are more examples of the measured extension of the Charter's coverage that is needed contained in the submissions of the Law Institute of Victoria, the Castan Centre and Liberty Victoria, among others, and I commend those submissions to the Committee.

In a brief personal submission I cannot cover the breadth or depth that others have done. One aspect that I want to draw SARC's attention to, however, is the role of individual public servants and others bound by the Charter. The Charter incorporates human rights into the Public Service Code of Conduct. As the implications of this gradually come to be appreciated, the role of human rights considerations in everyday practice, in the delivery of services and the formulation of policy will become stronger and more beneficial. The development of such a human rights culture, first in public service and allied areas, and in due course in wider areas of the population, is a very important consequence of the Charter. It is, I submit, more important than the occasional high-profile legal case, or the occasional silliness dredged up by tabloid editors.

While the black-letter law of the Charter is important, its role in the gradual education of the community towards a human rights culture is even more so. I trust that the SARC report will play a valuable part in that development.

Yours sincerely,

Jamie Gardiner