Scrutiny of Acts and Regulations Committee

Inquiry into the Charter of Human Rights and Responsibilities

Melbourne Catholic Lawyers’ Association
The Melbourne Catholic Lawyers’ Association

The MCLA was established in 2001. It is an independent association of legal professionals. It exists independently from and does not purport to speak on behalf of the Catholic Archdiocese of Melbourne.

As an association it has a number of aims. First is to strengthen and develop the faith of all involved. The second is to provide a forum for lawyers to meet and discuss work, ethical and legal issues. Finally, the association is a network of like minded Catholic legal professionals.

The MCLA strives to strengthen society through professional integrity, commitment to justice and our Catholic faith. We seek to champion faith, hope and service of others.

The association is open to all legal practitioners including academics and law students.
Introduction

The terms of reference for the proposed review of the Charter of Rights and Responsibilities (the Charter) is broad. This submission does not propose to address all the terms suggested. Rather it seeks to focus upon two in particular, namely: the overall cost and benefits of the Charter, and options for reform or improvement for protecting and upholding rights and responsibilities in Victoria.

The MCLA has serious concerns about the Charter. It is feared that rather than protecting the rights and responsibilities of all Victorians, the Charter has been a divisive document serving the agendas of select interests. While the MCLA does not argue that to date this has disproportionately compromised the rights and responsibilities of others in the community, the fear is that the Charter, as it currently stands, does have the potential to do so in the future. As such the MCLA argues that the Charter in its current form should be repealed. If the Charter is to be retained the MCLA argues that it should be reformed such that it serves to encourage respect and tolerance of the rights and responsibilities, as contained in Part 2 of the Charter, of all Victorians.

A Shift in the Legal Nature of Human Rights in the Law of Victoria

Prior to the introduction of the Charter the Equal Opportunity Act 1977 (the Act) was the principal form of human rights protection in Victoria. It sought to protect against discrimination on the basis of sex, marital status, parental status, race, impairment, and religious and political beliefs or activity. This was expanded in 1995 to include age, carer status, lawful sexual activity and personal association. The Act was attempting to facilitate equality for all these groups. This is evident in the Second Reading Speech made by the then Attorney-General Jan Wade in relation to the 1995 amendments:
The government is committed to ensuring that all Victorians, regardless of age, sex, race or any other attribute have equality of opportunity to access public benefits and resources.

... 

The concept of equal opportunity is concerned with ensuring that all people have equal access to specified public benefits and resources, such as employment, accommodation and access to services.¹

The Act included exceptions and exemptions to these provisions. These exceptions and exemptions were part of the legislative framework designed to protect against inappropriate discrimination. The exemption afforded on the basis of religion is an example of this. As the Attorney-General explained in the Second Reading Speech:

The bill provides an exemption for discrimination that is necessary to comply with a person’s genuine religious beliefs or principles. It aims to strike the balance between two very important and sometimes conflicting rights – the right of freedom of religion and the right to be free from discrimination.

Equal opportunity legislation may sometimes compel individuals to change their conduct and practices in order to ensure that discrimination that may be harmful to others does not occur. However, the government recognizes that it is not acceptable to compel a person to act in a way that would compromise his or her genuinely held religious beliefs. I wish to emphasize that religious beliefs must be absolutely genuine in order to qualify for the exemption and if a complaint is made that quality will have to be proven to the commission and / or tribunal.²

¹ Hansard, 4 May 1995, p1254ff.
² Ibid.
In other words the Act recognized and protected various rights in two distinct ways, either by means of a positive recognition or, alternatively, by means of exemptions and exceptions.

The Charter seeks to protect human rights in a different manner.

Human Rights are defined in section 7 of the Charter:

7 Human rights—what they are and when they may be limited

(1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.

(2) 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—

(a) the nature of the right; and
(b) the importance of the purpose of the limitation; and
(c) the nature and extent of the limitation; and
(d) the relationship between the limitation and its purpose; and
(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

(3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

Defining human rights in this way the Charter departs significantly from the
approach taken in the Act. Unlike the Act the Charter does not seek to “strike a balance” between “important and sometimes conflicting rights”. Rather the Charter provides a mechanism by which rights can be subject to “reasonable” limitations. In other words the rights identified in the Charter are contingent.

Problems with the Charter’s approach to Human Rights

The approach to human rights taken by the Charter has the unexpected potential to undermine rights. Rather than recognizing human rights as equal it places them in competition with each other, by providing a mechanism by which they can be distinguished and placed in a hierarchy. As such certain rights can be afforded a disproportionate significance while others are undermined.

According to the Charter what a human right is will vary whenever it is under consideration in accordance with the provisions laid out in section 7 – ie on the basis of society at that time. At first this may not seem particularly troubling but when one calls to mind the fact that the Charter operates, in part, as a tool to interpret legislation (see section 32) it becomes more problematic. In effect the Charter takes the interpretation of legislation to a new level. Not only is the interpretation an interpretation of the law as it stands, it is an interpretation of legislation “consistent” with human rights. This provides something of a moral aura to the interpretation. In other words there is the impression of a double importance when perhaps in reality it is simply a single interpretation that in time will be subject to change.

The word “reasonable” is of particular significance here. Respect for a given right by virtue of the Charter is dependent upon what reasonable limits can be

3 With the caveat of “So far as it is possible to do so...” see section 32(1).
placed on it at a given time. Deciding what limits are reasonable is akin to deciding whether the right itself is reasonable – the more unreasonable the right, the greater the limits permitted.

This would seem to be at variance with the principle of enshrining rights in law. Presumably rights are defined within a legal framework to guarantee their existence when subject to the hostility of the state or segments of the community. By contrast, if rights contained in the Charter are considered as no longer “reasonable”, they are vulnerable to being curtailed.

The French writer Jacques Rancière makes an interesting observation about the way human rights are invoked. He points out that the rights of those who are disempowered, those whose rights are being transgressed, in effect those without rights, are reliant on others to come to their defence. Human rights are, however, vulnerable in this equation as they are the instruments not of the oppressed but of the powerful that invoke rights in the name of the oppressed. The decision as to which rights are to be defended is political and it is a political decision in the hands of the powerful. At this point litigation of a given right can become suspect. It may not in fact reflect the vindication of a particular human right but actually be a tool that is effecting the agenda of another group entirely. Ironically in this situation human rights instruments can become oppressive.  

From this perspective, human rights litigation is not a neutral dialogue of competing rights equal before the law by virtue of their recognition in human rights instruments. Rather, it is the means by which rights are set in an order of precedence according to what prevailing opinion deems to be “reasonable”. Rights can thus be separated into categories of “reasonable” rights which are

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afforded respect and "unreasonable" rights that, regardless of their recognition in the Charter, can be safely ignored. By this means, ironically, the Charter has the potential to actually undermine or at least seriously weaken the rights it purportedly seeks to protect.

A demonstration of this potential is evident in the recent case of Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination) [2010] VCAT 1613 (8 October 2010). This submission does not intend to discuss the merits or otherwise of this particular case. What it does wish to draw attention to is some of the reasoning employed by the presiding judge. The case involved an allegation that a conference facility owned and operated by the Christian Brethren had unlawfully discriminated against WayOut, a youth suicide prevention project targeting same sex attracted young people in rural areas. In her judgment, Judge Hampel referred to the ruling of Lord Laws in the British case of McFarlane v Relate Avon Limited [2010] EWCA Civ B1. Judge Hampel cites the following passage of Lord Law's judgment [at 309]:

The conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since in the eye of everyone save the believer, religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence.

This is an extraordinary assertion. First it wholly fails to consider the protection afforded the freedom of thought, conscience and religion under
section 13 of the Human Rights Act 1988 (UK). A particular moral position held as a position of faith is no mere subjective opinion. People act in accordance with their beliefs. As such it is activity afforded human rights protection under UK law which may or may not come into conflict with other human rights of equal legal value. His lordship simply ignores this fact. Moreover he reduces this activity to the position of a "subjective opinion" at variance with the "objective good". In so doing by mere assertion Lord Law radically undermines the protection of freedom of religion. While freedom of religion may be recognized by law, which presumably is the "objective good", he relegates it to the position of "subjective opinion". It is detached from the law which is supposed to protect it and is rendered both "subjective" and a mere "opinion". By citing Lord Law with approval Judge Hampel effectively adopts his lordship's diminishment of a legally recognized human right.  

It is worth noting here that there is nothing in the Human Rights Act 1988 (UK) that specifically curtails freedom of religion yet in practice it has been regularly invoked to restrict the practice of religion in the public sphere. There has been the case of the British Airways employee whose employment was terminated for wearing a cross, although not visible, contrary to dress regulations, or Caroline Petrie, a home care nurse, who was suspended from her job for offering to pray

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5 It might be argued that implicit in the reasoning of both Lord Law and Judge Hampel is the recognition of a right to hold a religious opinion. Neither say this specifically in their respective judgments. Yet even if this was an unsaid assumption it would amount to a bizarrely restrictive understanding of the freedom of religion. In addition to the right of freedom of religion, section 14 of the UK Charter recognizes freedom of thought, conscience and belief. The definition of the word "human rights" in section 3 makes it clear that human rights mean civil and political rights. It would be absurd to suggest, for example, that the Charter recognized the freedom to hold a political belief but did not extend that protection to acting lawfully in accordance with those political beliefs. Similarly, without specific provision to the contrary, it would be difficult to argue that the Charter afforded protection to hold a religious opinion but did not extend that protection to acting lawfully in accordance with those religious beliefs. Even if this was said to be not the case the Charter recognizes under section 15 that the freedom of religion is demonstrated in "worship, observance, practice and teaching, either by individuals or communities, in both the public and private sphere." (Our emphasis.) There is no sense that religion does not have a place in the public life of the state.
for one of her elderly patients. Developments surrounding the Equality Act 2006 (UK) has meant that Catholic adoption agencies have closed or severed ties with the Catholic Church despite the Church being active in this area for 130 years, beginning its work in the field at a time when few were interested or cared.

The extent to which poorly drafted human rights instruments can generate adverse discriminatory practices is demonstrated in the recent case of Lautis v Italy (Chamber Judgment of 3 November 2009). In Lautis v Italy the European Court of Human Rights held that the public display of crucifixes was contrary to the European Convention on Human Rights. This decision was overturned by the Grand Chamber on cultural grounds. It is nevertheless interesting to note that a religious symbol was singled out amongst all other symbols, whether political, social or cultural, because religion was recognized in the European Convention. The recognition of religion was used, not to protect a religious symbol, but rather to justify removing it from the public sphere.

It is important not to be distracted by the fact that this tendency to undermine human rights has been used principally with respect to freedom of religion. In Victoria, by virtue of section 7 it is a process that can be used against any right recognized by the Charter. As such all rights contained in the Charter are vulnerable to unsubstantiated judicial assertion that certain activity is not protected by law as a human right but rather is a mere “subjective opinion” at odds with the “objective good”.

As reported on the BBC website: http://news.bbc.co.uk/2/hi/uk_news/england/somerset/7863699.stm (as of 1 July 2009).
http://www.echr.coe.int/echr/resources/hudoc/Lautsi_pr_enG.pdf
The facts of the case recall the removal of all public crosses in Aldous Huxley’s Brave New World although perhaps not their replacement with giant Ts in honour of Henry Ford’s model T car.
See footnote 8 above.
Other Potential Models

Given the inherent weakness of the existing definition of human rights contained in section 7 of the Charter it is submitted that serious consideration should be given to considering alternative models of protecting human rights.

Three models are traditionally invoked for human rights instruments. There is the constitutionally enshrined model such as the United States Bill of Rights. Second, there is the dialogue model where the human rights instrument is open to judicial interpretation, but Parliament is responsible for substantive legislative change. This is the model which is currently in effect in Victoria. Finally there is the declarative model, where there is a statement of human rights which bodies are encouraged to adhere to as best practice. It would appear that this is the model adopted by the Human Rights (Parliamentary Scrutiny) Bill, currently before federal Parliament.

It is submitted that given recent developments at the federal level, the declarative model recommends itself for a number of reasons.

The Human Rights (Parliamentary Scrutiny) Bill provides a legislative framework by which Parliament itself considers whether legislation complies with human rights.¹¹ This would remove the weakness of judicial interpretation which the Victorian Charter is subject to. This Bill, however, is not perfect. It is subject to the Human Rights (Parliamentary Scrutiny) (Consequential Amendments) Bill which provides for administrative review before the

Commonwealth Administrative Appeals Tribunal.\textsuperscript{12} It is submitted that this would take the consideration of human rights compliance away from Parliament, making it subject to the courts in a manner that could render the rights the legislation seeks to protect vulnerable to the sort of legal diminishment evident in the case of McFarlane v Relate Avon Limited. If, however, the Charter was to be reformed so that it was an instrument that Parliament alone was responsible for, and by which Parliament alone could seek to measure its compliance with human rights, this would be avoided. As opposed to judicial interpretation, changes to human rights would have to meet the same, much higher standard as changes to other legislation: Parliamentary process as conducted by the state's elected representatives.

Reforming the Victorian Charter in light of the new Commonwealth Act would also have the benefit of legal consistency.

\section*{Conclusion}

The Attorney-General Rob Hulls said in the Second Reading Speech for the Charter of Human Rights and Responsibility:

\begin{quote}
This bill further strengthens our democratic institutions and the protections that currently exist for those human rights that have a strong measure of acceptance in the community -- civil and political rights. We must always remember that the principles and values which underlie our democratic and civic institutions are both precious and fragile.\textsuperscript{13}
\end{quote}

There is little doubt that human rights are fragile. Victoria has had an unenviable history of discrimination. There has been significant injustice perpetuated by

\textsuperscript{12} See above.
\textsuperscript{13} Hansard, 4 May 2006, pp.1289-1295.
virtue of adverse discrimination on the basis of race, gender, sexuality and religion. When the colony of Victoria was established Catholics had only recently obtained civil and political rights by virtue of the Catholic Relief Act 1829 but discrimination against Catholics remained widespread, particularly in the area of employment, well into the 1960s.14 While possessed of civil and political rights, the experience of the Jewish community in this state was similar. Prejudicial discrimination on the basis of gender and/or sexuality is now recognized and well understood. Discrimination on the basis of race perhaps cannot be better illustrated than by the experience of indigenous Australians in Victoria, the legacy of which continues to be felt today. Set against a background of such a history of systemic discrimination and historic hardship, it would be ironic indeed that legislation purporting to protect human rights for the benefit of disadvantaged groups was the tool by which those very rights were undermined, and thereby the means by which discriminatory practices once thought safely interred in the past were brought back to life.

From this perspective it is important to remember that while inappropriate discrimination, prejudice by another name, can take many forms, a common preoccupation is to remove the target group from the public domain - for example, barring women from the public sphere on the basis that their place was in the home. Such prejudice has been on occasion reinforced by law. The law has been employed to remove a specific group from the public domain most spectacularly with respect to race and religion. This has been in the form of both direct and indirect discrimination. That particular groups or activities are said to be formally protected by the Charter does not mean that this protection is real and substantive. And if the Charter is a device by which new forms of adverse discrimination can come into being its utility should be seriously questioned.

Request to appear before the Committee

The MCLA requests permission to appear before the Committee to provide a verbal submission. Alternatively, if the MCLA is not granted standing, Daniel McGlone requests permission to appear personally.