1. Under s 44 of the Charter of Human Rights and Responsibilities Act 2006 (the ‘Charter’), the Attorney-General must cause a review of the operation of the Charter within the first four years of its operation. This is a submission to the review which is currently being conducted by the Scrutiny of Acts and Regulations Committee of Parliament.

2. I write this submission in my personal capacity, rather than in my capacity as a Judge of the Victorian Court of Appeal. However, I have confined my comments to factual matters, and have not dealt with politically controversial issues, such as the possible extension of the operation of the Charter. The views which I express are based on:

(a) New Zealand, United Kingdom and Australian legal literature and articles in Australian and overseas newspapers and journals of opinion; which discuss the advantages and disadvantages of a statutory charter of rights of the kind which exists in Victoria;

(b) attendance at human rights sessions at two Commonwealth Law Conferences, one in Melbourne in April 2003 and one in London in September 2005; and
(c) public debate about the introduction of a statutory charter of rights at both Commonwealth and State level and subsequent debate about the success or otherwise of the Victorian legislation.

3. I am also familiar with overseas superior court decisions dealing with human rights issues (particularly House of Lords and Canadian Supreme Court decisions) and the decisions of the Victorian Supreme Court in which Charter questions have been raised. I was a member of the Court of Appeal bench in \textit{R v Momcilovic} (2010) 25 VR 436.

4. In the 1970s, when debate commenced about the best way of recognising and protecting human rights in Australia, I was somewhat sceptical about the usefulness of a statutory charter of rights of the kind which we now have in Victoria. The extensive political and academic debate which has occurred since that time, coupled with the United Kingdom, New Zealand and the ACT experience of the effects of human rights legislation, has persuaded me that a statutory charter has some important benefits.

5. The most important provisions of the Charter are found in:

(a) Part 3, Divisions 1 and 2 of the Charter, which provide for statements of compatibility and override declarations (the ‘parliamentary scrutiny function’);

(b) Section 38 of the Charter, which makes it unlawful for a public authority to act in a way which is inconsistent with a human right or to make a decision which is inconsistent with a human right which is
protected by the Charter (the ‘administrative accountability function’); and

(c) Part 2 of the Charter, which has the important educative function of setting out the human rights which the Parliament of Victoria (and through it, the Victorian community) believes are worthy of recognition and protection (the ‘educative function’); and

(d) Section 32 of the Charter which requires statutory provisions to be interpreted consistently with human rights, so far as it is possible to do so consistently with their purpose.

6. The effect of the parliamentary scrutiny, administrative accountability and educative functions of the Charter is likely to be dealt with in other submissions. My comments are limited to its effect on the volume of litigation, to the approach which Victorian courts have taken to s32 of the Charter and to the Supreme Court’s approach to s 36 of the Charter, which gives it power to make declarations of inconsistent interpretation.

7. Critics of statutory charters of rights argue that they are likely to result in ‘a lawyers picnic’ and that courts and tribunals will be swamped by Charter-related litigation.

8. They have also argued that statutory charters transfer power from parliament to an unelected judiciary. Prior to the introduction of the Charter in Victoria, it was argued that both the interpretive obligation now found in s 32 and the
power of the Supreme Court to make declarations of inconsistent interpretation under s 36, would diminish the sovereignty of parliament.

**Will the Charter result in an increase in litigation?**

9. Before the Charter came into operation, all Australian Courts invoked common law principles which provided some limited protection for human rights in appropriate cases. Examples of such principles include the right to a fair trial (*Dietrich v The Queen* (1992) 177 CLR 292) and the presumption that legislation is not intended to operate retroactively (*Maxwell v Murphy* (1957) 96 CLR 261) See also *R v Williams* (2007) 16 VR 168 (whether a person has a right to a counsel of their choice) and *DPP v Mokbel* [2010] VSC 331 (scope of right to a fair trial).

10. For many years Australian courts also recognised that international human rights principles can be taken into account in interpreting the meaning of legislation, developing the common law and reviewing administrative action. The Victorian decision of *Nolan v MBF Investments Pty Ltd* [2009] VSC 244, provides an example. In that case the trial judge, Vickery J took account of provisions of the *International Covenant on Civil and Political Rights* and international case law on human rights, in considering the scope of a mortgagee’s obligation to have regard to the interests of a mortgagor in exercising the power of sale under s 77(1) of the *Transfer of Land Act 1958*. (An appeal against the decision in this case, although not against the principle that international human rights instruments may be taken into account for the
purposes of domestic law, was upheld in *MBF Investments Pty Ltd v Nolan* [2011] VSCA 114).

11. In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, the High Court held that the Commonwealth government’s ratification of the Convention on the Rights of the Child created a legitimate expectation that the Minister would treat the best interests of a man’s children as a primary consideration in deciding whether he should be permitted to remain in Australia.

12. The circumstances in which international human rights conventions may be taken into account in deciding domestic law issues were articulated by Maxwell P in *Royal Women's Hospital v Medical Practitioners' Board of Victoria* [2006] VSCA 85, [75]-[78].

13. Victorian Courts will continue to apply both common law human rights principles and international human rights law in appropriate cases, irrespective of the existence of the Charter.

14. Since the Charter became law, there has been only one case in which the Court of Appeal, the highest court in Victoria’s court hierarchy, that has dealt substantively with a Charter issue (*Momcilovic*). This is also the only case in which the Supreme Court has made a declaration of inconsistent interpretation.

15. Few, if any, Supreme Court decisions have turned on the provisions of the Charter alone. Although counsel sometimes make arguments based on
Charter provisions, these are usually relied upon to reinforce arguments made on other bases, and submissions based on the Charter alone have rarely been determinative.

16. The Victorian experience is similar to that in other jurisdictions which have introduced statutory human rights charters. The concern that the Charter will result in a huge increase in litigation has proven false both in the ACT and in overseas jurisdictions. The United Kingdom experience was described in Lord Falconer’s 2006 review of the implementation of the Human Rights Act 1998 (UK):

there have been only 11 occasions upon which the superior courts have upheld Declarations that Acts of Parliament were incompatible with the Convention rights, and on each occasion Parliament has passed further legislation putting the law back into conformity. Similarly, the courts have used Section 3 of the Act (which requires the courts, if possible, to interpret legislation in a way compatible with the Convention), on only 12 occasions. Arguments that the Human Rights Act has significantly altered the constitutional balance between Parliament, the Executive and the Judiciary have therefore been considerably exaggerated.¹

**Does the Charter reduce parliamentary sovereignty**

17. Professor James Allen has argued that ‘Alice in Wonderland judicial interpretations will follow in the wake of the enactment of the Victorian Charter’: see ‘The Victorian Charter of Human Rights and Responsibilities:

18. In my experience, this concern has not been substantiated. The interpretive provision in s 32 of the Charter is narrower than the interpretive provision in s 3 of the Human Rights Act 1998 (UK). Section 32 requires legislation to be interpreted in a manner compatible with human rights, where it is possible to do so consistently with the purpose of the legislation.

19. As the decision in Momcilovic demonstrates, Victorian courts have not treated this provision as giving carte blanche to depart from the normal rules of statutory interpretation. In Momcilovic, the Court of Appeal rejected the broader approach to statutory interpretation taken by the majority of the House of Lords in Ghaidan v Godin –Mendoza [2004] 2 AC 557. As the Court noted in Momcilovic, there has also been some retreat in England from this broader view in Ghaidan see R (on the Application of Wilkinson) v Inland Revenue Commissioners [2005] 1 WLR 1718 and the comments on this decision by Tipping J in R v Hansen [2007] 3 NZLR 1, 54. Of course the High Court has not yet handed down its decision in Momcilovic, but in my opinion it is most unlikely to follow the House of Lords in Ghaidan.

20. There is also little evidence to support the claim that the Charter allows ‘unelected’ judges to apply their own personal values rather than legal principle in interpreting legislation and in making declarations of inconsistent interpretation.
21. In virtually all areas of the law where a dispute arises, judges have some limited scope to make value judgements. The application of the law to the facts does not always produce a clear answer. Examples frequently encountered in the Court of Appeal include the question whether a trial judge’s error in a jury direction has resulted in a ‘substantial miscarriage of justice’, whether a sentence is ‘manifestly excessive’ and whether a injury sustained in a workplace is ‘serious’. Such value judgments are the common currency of judicial decision-making at appellate level.

22. Just as in the above examples, the interpretation of legislation consistently with the Charter and the making of a declaration of inconsistent interpretation leave some scope for value judgment. But s 32 does not relieve judges of their obligation to decide cases according to law or to follow precedent, including the body of human rights law which has developed over many years in other jurisdictions. This is recognised in s 32(2) of the Charter and exemplified by the judgment of the Court of Appeal in *Momcilovic*.

23. At a more subtle level, judicial decision-making is always constrained by convention and by the requirement that judges give reasons for their decisions. These constraints are usefully articulated in the judgment of the Court of Appeal in *Momcilovic* at paragraphs [96]-[104]. This is what the Court said:

As French CJ said in *International Finance Trust Co Limited v New South Wales Crime Commission*:

[T]hose who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely
upon the ordinary sense of the words that Parliament has chosen. To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished.

We would also respectfully adopt what his Honour said in *NAAV v Minister for Immigration* (when a member of the Federal Court), as follows:

In a representative democracy those who are subject to the law, those who invoke it and those who apply it are entitled to expect that it means what it says. That proposition informs the approach of courts to the interpretation of laws in taking as their starting point the ordinary and grammatical sense of the words….

Secondly, as the last passage suggests, a departure of the *Ghaidan* kind from the ‘ordinary’ rules of interpretation would represent a major change in the rules by which our representative democracy functions. The High Court referred to *NAAV* when it said recently in *Zheng v Cai* that:

> [J]udicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. … [T]he preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.’

If the Victorian Parliament had intended to make such a significant change in those rules, its intention to do so would need to have been signalled in the clearest terms. As Lord Millett (in dissent) said in *Ghaidan* ‘any change in a fundamental constitutional principle should be the consequence of deliberate legislative action and not judicial activism, however well meaning.’ …
What is ‘possible’ [under s 32 of the Charter) is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights. That is a powerful presumption, as Gleeson CJ made clear in Plaintiff S157/2002 v The Commonwealth for example:

[C]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by an unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. ... [I]n the absence of express language or necessary implication, even the most general words are taken to be ‘subject to the basic rights of the individual’]

As this passage makes clear, the presumption does not depend for its operation on the existence of any ambiguity in the statutory language.

What is significant about s 32(1), in our view, is that Parliament has embraced and affirmed this presumption, in emphatic terms. It is no longer merely a creature of the common law but is now an expression of the ‘collective will’ of the legislature. Moreover, the rights which the interpretive rule is to promote are those which Parliament itself has declared, in the Charter. This point has been made eloquently by Claudia Geiringer in relation to s 6 of The New Zealand Bill of Rights Act 1990 (NZ), in terms which can be applied equally to s 32(1):

It is entirely consistent with the view that s 6 of the Bill of Rights Act is cut from the same cloth as the common law presumptions to recognise that it nevertheless has a legitimising and galvanising effect. Section 6 provides democratic authorisation to the courts, in relation to the updated list of rights that it codifies, to draw on traditional common law understandings of the role of values and the interpretation process. In doing
so, it might be argued, it provides democratic legitimacy to the techniques traditionally utilised by common law judges even where those techniques might otherwise have been regarded as suspect. [citations omitted]

24. Finally, and most obviously, the concern that the Victorian Charter will impinge on parliamentary sovereignty disregards the fact that, even when the court makes a declaration that legislation is inconsistent with the Charter, the Victorian Parliament can decline to alter the legislation. In these circumstances, it is difficult to understand how it can rationally be said that the Charter permits unelected judges to override the will of parliament and impose their own value judgments, without regard to the rule of law.

25. I hope that these brief comments are of assistance to the Committee.

THE HON JUSTICE MARCIA NEAVE AO