
Submission

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Summary

1. The Charter of Rights changes the constitutional structure of the State by transferring to the judiciary the resolution of issues which should remain with a legislature answerable to the electorate.¹ There are several obscurities about the Charter. The Charter describes some of the rights which it recognises in inspirational or educational terms. It subjects all of the rights it recognises, which include many rights long since recognised by the common law, to an overarching limitation which is itself expressed in inspirational or educational terms. It fails to recognise some important rights. The Charter has the tendency to undermine the administration of justice by putting at risk the reputation of the judiciary for independence and impartiality. Finally, when legislation is enacted to facilitate the destruction of human rights and those of conscience, it is unbecoming for the State to affect, by the existence of the Charter, that it has solicitude for human rights. The Charter of Rights should be repealed. The Charter is not necessary for the protection of fundamental rights and freedoms in Victoria.

Origins of the Charter in International Law

2. Over the last half century or so, human rights instruments may be traced directly or indirectly to the Universal Declaration of Human Rights (1948). Instruments

¹ The present submission refers generally to the experience of Bills of Rights and Conventions of Rights, and assumes that that experience permits us to anticipate how the Charter of Rights will operate. The present enquiry is mandated by s.44 of the Charter. At this time, there has only been one significant decision on its operation, and that decision is on appeal to the High Court. See R. v. Momcilovic [2010] VSCA 50.
such as the European Convention on Human Rights (1950) and the International Convention on Civil and Political Rights (1966) (ICCPR) are designed to give specific legal content to the Universal Declaration.

3. It is important to understand the circumstances in which the Universal Declaration was proclaimed. It was a response to the wholesale destruction of human life and dignity associated not only with the totalitarian regimes, but also, to an extent, with imperial democracies in which the dignity of the individual was subordinated to the needs of the State. In totalitarian regimes, the State had priority; the individual and the family were instruments to its purposes. The Universal Declaration emphatically asserted a reversal of such disposition; it asserted, against the totalitarians, that the individual and the dignity of the individual were central to the life of any community, and that public life policy and public institutions should respond to the needs of the individual human person. Careful provision was made to ensure that the State performed a subsidiary function; that is, public policy and the State existed to give assistance to the individual, and to provide to the individual and the family those things that were needed for their welfare but which they could not provide for themselves. For example, the Universal Declaration and the ICCPR provided for freedom of religion and conscience. In particular, they provided that parents had the right to determine the content of the moral and religious education of their children.

Rights Talk: its strength

4. Human rights are of the first importance in any society which claims to seek the welfare of each of its citizens. However, the meaning of discourse and debate
cast in terms of human rights is not self-evident. We may share an attachment to a human right (e.g. the right to life), yet we disagree about its logic and meaning, about its implications and about its limitations; we disagree as the manner of its enforcement. And, where these disagreements exist, we are agreed on the need to find means for their reasonable resolution. But, once more, we find it difficult to agree on what those means should be.

Despite these difficulties, it has been pointed out that modern “rights talk” serves several beneficial purposes. It emphasizes the independence and equality of every individual human being, the dignity of each person with ‘intelligence initiative freedom and responsibility’, and that the well-being and flourishing of each such individual should be the focus of inter-personal activities, particularly those of groups, be they small (such as the family) or large (such as government and public policy). Secondly, talk in terms of human rights is useful in that it manifests the dissatisfaction with and places limitations upon much utilitarian calculation (the good act (i.e. what we should do) is that which brings the greatest good of the greatest number). Rights talk reminds us that the focus of public policy should be the well-being and flourishing of each individual, and that the interests of the individual human being are not to be sacrificed in favour of ideal states of affairs, present or future. Finally, to the extent that rights talk identifies certain rights by name, it helps give some greater specification than is generally apparent when talk is cast in terms of “justice” and the “common good”; it provides that specification, in part, by identifying particular aspects of the well-being and flourishing of the individual which should be the object of public policy.
Rights Talk: its weaknesses

6. However, rights talk has weaknesses. It is vulnerable to absolutizing positions which remain debateable. More often than not, rights talk attempts to capture the perspective of the beneficiary of some duty existing elsewhere. For example, the right to freedom of religion and conscience has been described as an expression of the entitlement of the citizen not to be coerced, subject to due limits, when “exercising one’s conscience in forming, holding or giving effect in action to one’s believes ‘in matters religious’”. In these cases, the true scope of the right will be understood by a proper understanding of the duty, and, below that, a proper understanding of those aspects of individual welfare and the common good which give rise to the antecedent duty. “Rights” are not themselves basic principles of action; rather, they are conclusions drawn from a chain of reasoning which begins with a proper understanding of what is fundamental to human flourishing and of the requirements of justice, that aspect of moral discourse which informs how we should and should not act towards each other.

7. And, discussion about justice can involve difficult and subtle ideas. Take, for example, the question of teachers who wish to educate children in the belief that same sex sexual relations are a normal, healthy and acceptable alternative to traditional relations between members of the opposite sex. There are at least two issues here. Is what they say true? and should parents be able to withhold their children from what they would teach? Both issues should be debated, and they should be debated by reference to the broadest terms of truth and rationality,
including every aspect of human flourishing, and every question about who
should make decisions about the education of the young and vulnerable.

8. We differ about these things. Because they are not unimportant, we naturally
clamber to the moral high-ground. Frequently, we observe that talk in terms of
human rights is a tactic or strategy for capturing that moral high-ground. Too
often, rights talk is deployed, consciously or unconsciously, as a sophistical
technique to condemn some positions as expressions of irrational hatred, and to
extol other positions as morally unchallengeable, positions all of which are
thoroughly contestable.

9. This sophistical technique has the tendency to corrupt dialogue; it suggests people
have views which are unworthy of citizens; it forces people to defend positions
that do not do justice to the fundamental reasonableness of the views they hold.
They themselves become the issue, rather than the rationality or otherwise of their
views. Intelligent and respectful discussion, so vital for a healthy policy, is cut off
at the pass. And, the problem is made worse when rights talk is cast into legally
enforceable categories, the interpretation and enforcement of which is confined to
an intellectual elite, such as lawyers and judges.

10. When the issue is significant, such as the moral and religious education of
children, it should be able to be debated by everyone who has an interest in it,
and, then, decided by the community along conventional lines. It is undesirable
that the issue should be transferred into a legal environment to be determined by
an elite profession (lawyers) by reference to second order categories, such as the
right to be entitled to “equal and effective protection against discrimination”, a
right to be interpreted by reference not only to ambiguous categories such as “sexual orientation” and “gender identity”, but also to the judgments of “international courts and tribunals” relevant to that right.

The way the law protects human rights

11. Under the constitutional arrangements which existed in the absence of the Charter, means did exist for resolving disputes about human rights; the courts were intimately involved, but Parliament had the final say. No-one would dispute the system was perfect; but, it had the advantage that the resolution of disputes about rights remained subject to the judgment of the community as a whole.

12. Australian courts interpret Acts of Parliament presuming that those Acts (or the powers they confer) do not intend to interfere with fundamental rights or freedoms. Courts will only interpret Acts of Parliament to have the effect of derogating from fundamental rights or freedoms where the words of the legislation permit of no other interpretation. Thus, if Parliament intends to affect fundamental rights or freedoms, it must do so expressly. Should it do so, the community is able to respond at the next election. In this way, those who make decisions to which affect fundamental rights or freedoms are answerable to the electorate.

13. Many examples could be given. A recent example relates to the detention of non-citizens who have no lawful right to remain in Australia. The human rights of such people are affected by government policy; only the heartless would think otherwise. But, there is disagreement in the community as to the scope of the

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2 "Unless such an intention is clearly manifested by unmistakable and unambiguous language"; Singh v. The Commonwealth [2004] HCA 43; (2004) 222 CLR 322 at 335, per Gleeson CJ.
rights of such people while efforts are being made to secure their lawful removal from Australia. At present, Parliament is the body which determines how that disagreement is to be resolved. But, under a bill or a charter of rights, authority for the determination of that question would shift to the courts. The community (in the form of the electorate) has a measure of control over the Parliament; but, it has no corresponding control over the courts.

14. In a lecture entitled “The Need for Agitators – the Risk of Stagnation”\(^4\), former High Court Justice, Michael McHugh QC, put the matter succinctly:

There is one area of law that provides fertile ground for the legal agitator to sow the seeds of legal discontent. It is the continuing failure of this country to have a Bill of Rights. Without a Bill of Rights or a constitutional Convention on Human Rights, the High Court of Australia is not empowered to be as active as the Supreme Court of the United States or the House of Lords in the defence of the fundamental principles of human rights. That a judge may be called upon to reach legal conclusions that are applied with “tragic” consequences was brought home in the High Court’s decision of *Al-Kateb v. Godwin*. There, a majority of Justices – who included myself – held that the investing of judicial power in courts exercising federal jurisdiction did not prohibit the Parliament from legislating to require that “unlawful non-citizens” be detained until they can be deported. *Al-Kateb* highlights that, without a Bill of Rights, the need for the informed and impassioned to agitate the Parliament for legislative reform is heightened. While the power of the judicial arm of government to keep a check on government action that contravenes human rights is limited, the need for those with a legal education, like yourselves, to inform the political debate on issues concerning the legal protection of individual rights is paramount.

“...without a Bill of Rights, the need for the informed and impassioned to agitate the Parliament for legislative reform is heightened.” That must be correct. And, that is what the informed and impassioned should do: agitate. But, it seems that

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3 See *Al Kateb v. Godwin* [2004] HCA 37; 219 CLR 562.

the present disposition is preferable to one in which the “defence of fundamental principles of human right” is left to the courts. As indicated above, we differ on the logic and meaning of “fundamental human rights”; we differ as well on the means appropriate to resolution of our disagreements. It is better that controversial public issues are resolved by the parliament, where any such resolution is subject to democratic judgment. Persons (dis)affected by some disposition of either the legislature or the executive can take their complaint to the courts and secure change by characterizing that disposition as a breach of human rights. The informed and impassioned should not be able to secure from the judiciary what they have failed to secure from the electorate.

**The operation of the Victorian Charter**

15. It is true that the Charter has followed the *Human Rights Act 1998* (UK) rather than the American Bill of Rights in that jurisdiction is not conferred on the courts to invalidate legislation which courts consider contrary to the Charter. Section 36 of the Charter provides that the Supreme Court may make a declaration of inconsistent interpretation. However, such a declaration does not affect the validity, operation or enforcement of the statutory provision in respect of which the declaration was made. Nevertheless, the Charter has worked a considerable change to our system of government. It has introduced a new overarching consideration which must be satisfied if the conduct of most public authorities (other than Parliament) is to be considered lawful. By far, the greater regulation of day to day life is due to subordinate legislation, such as regulations and byelaws, and delegations of discretions to the executive. As is the case in the UK, it
is unlawful now for most public authorities in Victoria to act in the way which is inconsistent with the Charter.

16. Commonly, parliament delegates to the executive (in the shape of some public authority) some particular function: the function may itself be legislative, such as the making of regulations or by-laws; the function may be executive in nature, such as the granting of licences or other permissions; the function may be quasi judicial, such as the revocation of such licences or permissions on the resumption of private property for public purposes. The common law has formulated a sophisticated jurisprudence which is designed to ensure that, when it exercises the powers delegated to it, the executive will adhere to the basic principles of law and act only within the parameters of the relevant delegation. This jurisprudence, conventionally known as “administrative law”, reflects the same presumptions as those which inform the interpretation of legislation generally. For example, courts will presume that parliament does not intend to derogate from fundamental rights and freedoms. So, if parliament confers on some public authority the power to examine someone on oath, courts will not interpret that power as permitting a requirement that a person being examined incriminate himself. If parliament wishes the agency to have that power, it must confer it in unmistakeable terms. Similarly, courts will invalidate any action by the executive where that action is not authorised by the legislation pursuant to which it purports to have been performed. The executive must act within the confines of empowering legislation.

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5 The Crown has no authority to affect our persons or our property greater than that of any other member of the community. To ensure that the action of a public authority is not tortious, it must be justified by common law or by statute.
and, in exercising any discretion, it must confine itself to the considerations made relevant by that legislation.\(^6\)

**The effect of the Charter on existing jurisprudence**

17. The Charter has not affected this jurisprudence; rather, it has enlarged it. Section 38 of the Charter provides that, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a human right. So, although the courts cannot invalidate legislation by reason of incompatibility with the Charter, they can invalidate any action by any public authority by reason of such incompatibility. It is as if each piece of legislation in the Victorian statute book has been re-enacted to incorporate the main provisions of the Charter into its terms. In order to ensure that its conduct is lawful, a public authority must look not only at the relevant empowering legislation, but also at the Charter. And, it is open to the court to declare unlawful any action taken by a public authority to the extent that that action has not been appropriately informed by the provisions of the Charter.\(^7\)

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\(^6\) Judicial recourse to the presumption that parliament does not intend to derogate from fundamental rights and freedoms means that courts already act as custodians of those rights and freedoms. But, under present constitutional arrangements, it remains open to Parliament to authorize action by public authorities which do restrict human rights. It is not uncommon, for example, to find legislation which requires a person to answer the questions of a public authority notwithstanding that those answers may tend to incriminate him.

\(^7\) See s.39. Section 39 provides:

(1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

Section 39 of the Charter is yet to receive an authoritative interpretation.
18. But, even then, a public authority may not know where to look to ensure that its conduct is compatible with a human right. Section 32 of the Charter governs the meaning of the words and phrases in the Charter. Section 32 provides:

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

Section 38 makes it unlawful for a public authority to act in a way "that is incompatible with a human right". But, the meaning and content of a human right provided for in the Charter is to be determined by reference to "(i) international law and the judgments of domestic, foreign and international courts and tribunals relevant to (the) human right." As a result, a Victorian public authority may find that its conduct is held to be unlawful because of the way in which, say, a Canadian court has interpreted some "equality" or "privacy" provision in some Canadian enactment or some English court has compared some UK policy with the European Convention on Human Rights.

Difficulties in applying the Charter

19. Lawyers and judges are accustomed to the tasks of arguing and determining that the conduct of a public authority is invalid because it has not been authorized by any empowering legislation or because what has been done purportedly under the aegis of a particular statute is not in fact authorized by that statute, properly interpreted. These are familiar tasks; they involve examining the powers conferred by a statute against well established common law principles such as the
assumption that people are not to be deprived of their assets or of some
entitlement without being given a fair hearing or that, in exercising a discretion
broadly expressed in a statute, the decision maker will only take into account
considerations made relevant by the statute itself. No doubt, it is a process like
this which is contemplated by the Charter. But, in the case of the Charter, it is
very difficult to anticipate the judicial interpretation and application of some of
the rights expressed in educational or inspirational terms. And, even in the case
of rights long since recognised by the common law, the question of the operation
of s.7(2) arises in every case. Section 7(2) of the Charter provides:

(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.

"... such reasonable limits as can be demonstrably justified in a free and
democratic society". Few of us will deny the importance of such principles. Yet,
though these are the principles which underpin our law, the law has not until now
expressed itself in these terms. We agree on these principles; yet, until now, we
have accepted that they are too inchoate themselves to be enforceable as legal norms. Yet, that is the status conferred on them by the Charter.  

20. The difficulties in interpreting and enforcing a bill or charter of rights is exacerbated by the way in which they are drafted and, then, introduced into a juridical matrix. Bills or charters of rights are expressed in terms of the person who has the right and some particular state of affairs: everyone has a right to life ... a right to privacy etc. However, the protection and enforcement of these rights involves identifying those institutions (such as the State) and persons who must respect that right or who must, in some cases, fulfil it. Having identified that institution or those persons, it becomes necessary to formulate the negative or positive norms of conduct to which those institutions or persons must be subjected to ensure that the rights are protected or fulfilled. In some ways, the formulation of such negative norms has been the work of the common law over the centuries. 

For example, the protection of the right to life has been achieved by the formulation of negative norms of conduct either by the courts or by the parliament; norms such as those that forbid homicide and assaults to the person. Bills and charters of rights require institutions and persons who must respect or

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In R v. Momcilovic [2010] VSCA 50, the Court of Appeal held that, in ascertaining the meaning of a statutory provision, it was necessary to apply s.32(1) of the Charter in conjunction with common law principles and the Interpretation of Legislation Act 1984. The Court rejected an argument that s.32 authorized an interpretation of s.5 of the Drugs, Poisons and Controlled Substances Act 1981 (Vic) (which deemed a person to be in possession of drugs unless that person ‘satisfie[d] the court to the contrary’) as converting a legal onus into an evidential onus. The Court held that s.5 was a substantial infringement of the presumption of innocence contained in s.25(1) of the Charter. In the absence of evidence, the Court was not prepared to find that the infringement could be justified under s.7(2). On the contrary, the Court said (at [146]) “The government party seeking to make good a justification case under s.7(2) will ordinarily be expected to demonstrate, by evidence, how the public interest is served by the rights-infringing provision. The nature and extent of the infringement of rights sought to be justified will usually determine how much evidence needs to be led, and of what kind(s)”.  

fulfil the rights identified to anticipate the negative norms of conduct which will be identified by the courts as necessary for the protection and enforcement of those rights. The judicial task is a large one. In the case of the formulation of negative norms, it is not an unfamiliar task. However, the formulation of positive norms is a less familiar and immeasurably more difficult task. The task of the judiciary has traditionally been to apply settled norms to the facts of a particular dispute. A bill or charter of rights imposes a very significant burden as the judiciary; courts must now undertake the task of discerning and articulating the norms implicit in a bill or charter.

The rights recognised in the Charter

21. Had the language of the Charter followed more closely the rights recognised by our existing law or, for that matter, the rights expressed in the ICCPR (upon which it is based, but from which it freely departs), the change to our jurisprudence would not have been so significant. The Charter may have served the useful purpose of exposing for everyone’s scrutiny the fundamental or constitutional rights and freedoms which the common law courts have recognised and enforced over the years. But that it not what has happened. First, the Charter has subjected clear rights long recognised by the common law to the overarching and inchoate limitation contained in s.7(2). Second, it has cut down some of the other rights contained in the ICCPR, for example the rights of freedom of conscience and religion are detached from associated categories such as the right of parents to ensure the religious and moral education of their children in conformity with their own convictions. Third, the Charter has distorted rights
which are contained in the *Universal Declaration* and in the ICCPR; objective
categories, such as sex, are associated with contentious categories such as “gender
identity”.

22. Take, for example, s.8 of the Charter which provides for “recognition and equality
before the law”. Section 8 provides:

(1) Every person has the right to recognition as a person before the law;

(2) Every person has the right to enjoy his or her human rights without
discrimination;

(3) Every person is equal before the law and is entitled to the equal protection of
the law without discrimination and has the right to equal and effective
protection against discrimination;

(4) Measures taken for the purpose of assisting or advancing persons or groups
of persons disadvantaged because of discrimination do not constitute
discrimination.

There is no equivalent right or set of rights contained in the ICCPR. Rather,

Article 2 of the ICCPR provides:

1. Each State Party to the present Covenant undertakes to respect and to
ensure to all individuals within its territory and subject to its
jurisdiction the rights recognized in the present Covenant, without
distinction of any kind, such as race, colour, sex, language, religion,
political or other opinion, national or social origin, property, birth or
other status.

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23. As is plain, the ICCPR was requiring state parties to agree that, in respect of the
civil and political rights found elsewhere in the covenant, these would be made
available to citizens regardless of their religion, their sex, their colour and so
forth. Section 8 of the Charter does not reflect article 2 of the ICCPR. Rather, it
erects the right to equality as an independent human right, and has detached it
from the subject of the enjoyment and enforcement of the rights provided for
elsewhere in the Charter. And, it is this right to equality or this right “to equal and effective protection against discrimination” which has been used in other jurisdictions to overturn the public policy decided by legislatures or by the government of the day.9

24. In listing the attributes which are to be protected from discrimination, the Charter deepens the obscurity of the “right to equal and effective protection against discrimination”. Following the Universal Declaration, Article 2.1 of the ICCPR (which is extracted in the previous paragraph) lists particular attributes. Section 3 of the Charter differs from the ICCPR. It provides the relevant definition:

discrimination, in relation to a person, means discretion (within the meaning of the Equal Opportunity Act 1995) of the basis of an attribute set out in section 6 of that Act;

Note

Section 6 of the Equal Opportunity Act 1995 lists a number of attributes in respect of which discrimination is prohibited, including age; impairment; political belief or activity; race; religious belief or activity; sex; and sexual orientation.

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9 Section 8 appears to be inspired more by the Fourteenth Amendment to the American Constitution. Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In the United States, the Fourteenth Amendment is analysed in terms of the “Due Process Clause” (no State (shall) deprive any person of life, liberty, or property, without due process of law”) and the “Equal Protection Clause” (no state shall “deny to any person within its jurisdiction equal protection of the laws”). It is the source of most of the controversial decisions in America in relation to the Bill of Rights. It was, for example, the provision relied upon by the federal court in California to overturn “Proposition 8”, the amendment to the Californian constitution which provided that only marriage between a man and a woman is valid or recognised in California. See Perry v. Schwarzenegger 704 F. Supp. 2d 921 (N.D. Cal. 2010).
Selective recognition of human rights

25. The Victorian Charter has been selective in its coverage of human rights. In implementing article 18 of the ICCPR, the Charter recognizes freedom of religion and conscience (s.14). However, the Charter does not recognize article 18.4 of the ICCPR which provides:

The States 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.

Under the Universal Declaration and the ICCPR, schools and teachers were to be extensions of the family, and not agents of the state. In circumstances reminiscent of those against which the Universal Declaration was directed, the Charter refused to recognize the rights of parents to provide for the moral and religious education of their children.

26. The significance of this omission became apparent in the enactment of the Equal Opportunity Act 2010. The amendments to the Equal Opportunity Act last year made it plain that parents were not to have the right to determine who was to be responsible for the moral and religious education of their children. That legislation cut down the general exceptions to and exemptions from the prohibition of discrimination which had existed since the introduction of equal opportunity legislation in Victoria. Particularly, religious bodies lost their broad exemption in respect of determining who should be the teachers employed in their schools. In respect of a particular position, if the school wished to discriminate against either a potential employee or an existing member of staff on the grounds of the person’s religious belief or activity, sex, sexual orientation, lawful sexual
activity, marital status, parental status or gender identity, "(the school) had to be able to show that such attributes were on 'inherent requirement' of the particular position." There is no doubt that the legislation was to be used to restrict the right of schools to make judgments about employees. While it might be accepted (it was argued) that conformity to the religious beliefs of the school may be an inherent requirement of a position involving the teaching of religion, it could not such a requirement for the teaching of, say, mathematics. The consequence was that a school could not refuse to employ a maths teacher on the grounds of his or her sexual orientation or gender identity. While it may be accepted that the private life of any teacher is not an inherent requirement for the teaching of any subject, the problem arises with the ambiguity of terms such as "sexual orientation" and "gender identity". There is a marked difference between how one deports oneself in private, on the one hand, and, on the other, the willingness to promote sexual relations between members of the same sex as an acceptable alternative to marriage; between accepting as given the differences between the sexes and the willingness to promote the idea that sexual identity is a social construct. One would have thought that it was an inherent requirement of every position that the teacher who occupied it, at the very least, did not subvert the moral and religious beliefs of the parents who had sent their children to the school. But, it is unlikely that the legislation would have been interpreted in that way. As a result, schools would have been unable to determine the moral and religious character of the majority of their teachers. Until children become

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10 The legislation has been amended. See ss.18 and 19 of the Equal Opportunity Amendment Act 2011 (No. 26 of 2011).
sufficiently mature to shape their lives authentically in accordance with their understanding of the truth, they are vulnerable. During their vulnerability, they are entitled to be protected. Parents, no more than teachers, have the right to subvert the developing conscience of a child. But parents are better positioned than anybody to ensure that the conscience of a child is not subverted. Yet, the Charter has omitted this special protection for children contained in both the *Universal Declaration* and the ICCPR.

**Abortion**

27. Further, the Victorian Charter has excluded from its operation unborn human beings. The reasons for this are well understood. True, the Charter defines person as “a human being”. But s.48 provides that nothing in the Charter is to affect “any law applicable to abortion or child destruction.” But, one of the very points of enacting human rights legislation is to insist that human rights belong to all human beings in virtue of their humanity; human rights confront us with human beings in virtue of their status as such whether we like them or not, whether we wish to care for them or not and whether or not their presence is an obstacle to our ambitions. In so far as it is always wrong intentionally to take the life of an innocent human being, each innocent human being has the absolute right not to be intentionally killed. The minor premise is that the unborn child is an innocent human being. There are a few who deny the major premise: philosophers, such as Jeffrey Reiman and Peter Singer, who reject the idea of human equality and would have it that a human being has no right to life until it has achieved a margin of independence of its parents. More commonly, to
maintain the right of killing children while unborn, we have devised a battery of reasons for denying the minor premise. We use biological terms, such as "embryo" or medical terms such as "foetus", to erect distinctions where no substantial distinction in radical capacity exists. We make observations about the affiliations of those who assert the truth of the minor premise, as if the truth or falsity of a proposition is dependent, in some way, upon the character of the person who propounds it. However, a Charter of Rights which excludes the most vulnerable from the rights it recognizes or the benefits it confers is a response to power, and not to justice and morality. It is nothing more than an expression of the very same disposition of power which it pretends to transcend.

28. Even if the Charter is not repealed, s.48 should be repealed. It may once have been a de facto transitional provision. But, now that the Abortion Law Reform Act 2008 has become a part of our law, s.48 should not have a continuing influence.

29. The Charter of Rights has been ineffective in protecting rights of conscience. Its existence was no obstacle to the introduction of a draconian abolition of rights of conscientious objection. Section 8 of the Abortion Law Reform Act 2008 compels registered medical practitioners and nurses, in certain circumstances, to perform or assist in the performance of abortions notwithstanding that he or she has a conscientious objection to doing so.

Rule by elites

30. Judges have no special competence when it comes to the interpretation of some of the rights contained in the Charter. Judges are perfectly familiar with rights such as the right not to be deprived of property "other than in accordance with law"
(s.20) or the right not to be deprived of liberty "except on grounds, and in accordance with procedures, established by law" (s.21(3)); or the right of a "charged with a criminal offence ... to be presumed innocent until proved guilty according to law" (s.25(1)); their experience and training make them well placed to expound their meaning and see to their protection and enforcement. But, the same cannot be said when it comes to "right to equal and effective protection against discrimination" (s.8(3)), or "the right ... not to have .... privacy .... unlawfully or arbitrarily interfered with" (s.13(a)).

31. As everyone who has followed the matter over the last few decades knows, courts have used rights such as the right to equality and the right to privacy to make significant changes to social and public policy. Examples abound; only a few need be mentioned. In 2010, courts in Florida decided that a state statute which made same sex couples ineligible to adopt was unconstitutional on the ground that the statute violated the equal protection of such persons' rights which, it was said, were guaranteed by the State Constitution. In Massachusetts, it is against the law to operate an adoption agency without a licence. Judicial decisions in that state have had the consequence that the state will not make a licence available to an agency if it does not agree to place children in a non-discriminatory way with same-sex couples. In 2008, a Federal Court of Appeals in Massachusetts held that a public school could teach children that same sex sexual relations are morally good despite the objections of parents who disagree. In May 2008, the Supreme Court of California held that all California counties were required to issue marriage licences to same sex couples. In November 2008, the people of
California voted in favour of a constitutional amendment to provide that only marriage between a man and a woman was valid or recognized in California thereby overturning the judicial decisions in favour of same sex marriage. In August 2010, a federal judge struck down the constitutional amendment on the ground that it violated both the due process and equal protection rights contained in the 14th Amendment to the US Constitution. (The ruling is on appeal.)

32. In the United Kingdom, it is an offence, under s.2(1) of the Suicide Act 1961, to assist a person to commit suicide. Under s.2(4), the Director of Public Prosecutions has a discretion whether to give or withhold consent to a prosecution. In R (Purdy) v. Director of Public Prosecutions [2009] UKHL 45; 3 WLR 403, the House of Lords decided that the right to respect for private life contained in article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedom, which had been incorporated into domestic law by the Human Rights Act 1998, required the DPP to promulgate an offence-specific policy identifying the facts and circumstances he would take into account in deciding whether to prosecute persons who assisted persons who are "terminally ill or severely or incurably disabled" to travel to a country where assisted suicide is lawful. The Court held that the DPP was to publish a policy which would inform would-be offenders as to the likelihood of their being prosecuted in order that they could decide whether to commit that offence. It has been pointed out that this decision was made at the very time that Parliament had rejected a proposal to amend s.2 of the Suicide Act 1961 (UK) so as to permit

\[11\] See note 9 above.
people assist others to commit suicide in the very circumstances under
consideration in Purdy.\(^\text{12}\)

33. As already indicated, all rights in the Charter are subject to s.7(2). So, even rights
long recognised by the common law will now fall to be interpreted by reference to
"such reasonable limits as can be demonstrably justified in a free and democratic
society based on ...etc".

Prejudice to the Administration of Justice

34. In so far as its interpretation and enforcement falls to the judiciary, the existence
of the Charter has the tendency to prejudice the institutions established under the
constitution for the administration of justice. Generally speaking, the competence
of judges is to apply a settled body of law to the facts of the case before it: to
expound the law in the context of resolving individual disputes. The peace and
good order of our community depends in large part on the willingness of citizens
to submit their disputes to the courts and to abide by decisions of the courts. That
willingness depends upon the reputation of judges as being both independent and
impartial. That reputation, and the constitutional function it serves, should not
be prejudiced by bestowing on courts another function, one which is essentially
political. As a class, judges have no competence to expound these issues over and
above that of other members of the community. But, when they do so, the courts
are drawn into controversy.

35. There is much in the Charter which courts are well able to interpret. For example,
the property rights contained in s.20 and the right to liberty in s.21 are simply

\(^{12}\) Finnis, The Lords' Eerie Swansong: A Note on R (Purdy) v. Director of Public Prosecutions,
codifications of common law rights long since recognised by the courts. And, there is no institution better able to enforce them than the courts. (Though, it must be added, a Charter was not necessary either to their recognition or enforcement.). That is not the case with the right such as the “right to equal and effective protection against discrimination” in s.8(3) (given the definition of “discrimination”) or the “right to privacy” in s.13. Further, s.7(2) of the Charter provides for human rights being “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 etc ...”. Given the drafting of the overarching limitation in s.7(2), the scope of those rights long recognised by the common law has become ambiguous.

36. It is inevitable that questions of public controversy will be framed as issues of “human rights” to be determined by the courts under the Charter. This has been the experience of those jurisdictions which have human rights legislation. And, it would be irresponsible of lawyers, on behalf of their clients, not to explore the possibilities presented by and take advantage of the Charter.

37. Judges are trained to apply settled law to the facts of a particular case. No doubt, courts are capable of making wise judgments on the meaning of clauses such as these. But, when it comes to interpreting the broad quasi inspirational terms in the Charter, there is little in legal training or judicial experience which confers on judges any particular expertise over and above that of other members of the community. Judgment in these controversial areas is likely to reflect the sense of
right or wrong of the particular judge, and not some particular expertise in interpreting statutes or applying legal principle.

38. Once it becomes plain that questions of policy are being determined by judges, the reputation of judges for independence and impartiality will be put at risk. Citizens aggrieved by some public policy can now frame their grievances as issues of “human rights” and seek to have them resolved in the courts, rather than in parliament. Pressure will follow to ensure that the “right” judges are appointed. Few doubt that any tendency to appoint judges who might be thought to be favourable to the policies of the government will be intensified. There is something unsatisfactory in a government striving to perpetuate its influence on public policy after its own demise by appointments to the judiciary. One set of grievances is replaced by another as the formation of public policy moves out of the reach of the electorate. And, the new set of grievances is laid at the feet of the judiciary.

39. What is rarely recognised is why this is undesirable. We take for granted the institution for the administration of justice. A moment’s reflection will make obvious how unusual, from a historical perspective, is the peace and order of the society in which we live. We are no less prone to fall into dispute than are other members of other societies and of previous societies. However, we have the means for ready resolution of our disputes; we do not rely upon self-help; our disputes are settled. The feuds, which can become blood feuds in other societies, are largely absent from our society. The reason for this is our confidence in the principles for the administration of justice provided under our Constitution. We
are content to have our disputes settled in the courts; and, as a rule, we are content with what courts do. Lawyers know that there is a body of jurisprudence, comprising statutes, rules of courts and precedents, which are designed to ensure that the person who loses litigation nonetheless leaves prepared to abide by the decision of the court and not to continue with disputes after they have been resolved in the court. It is a fundamental feature of our system of justice that judgment is not given until the losing party can be satisfied that he or she has had a proper opportunity to have his or her case heard by a competent, independent and impartial judge. Courts will readily set aside judgments given against a party merely because that party has failed to comply with some procedural requirement of the court. Courts are reluctant to order judgments where there has been no trial; summary judgment will only be ordered where a case or a defence is obviously hopeless. Courts are loath to strike out a case despite a plaintiff’s being dilatory in prosecuting it. But, above all else, the success of our system for the quietening of disputes is the reputation of the judiciary for independence and impartiality. Nothing should be done to jeopardize that reputation. Undoubtedly, special considerations must apply to an ultimate court of appeal such as the High Court of Australia. But, as a rule, imposing on a court the task of deciding what, for example, can be “justified in a free and democratic society etc.” requires the court itself to settle, as law, the very things which should remain controversial.

This is not to suggest that Parliament will necessarily protect human rights from unjust interference. On the contrary, despite its obligation to protect and advance the common good, Parliament has shown itself as perfectly capable of destroying
human rights. But, when it does so, its judgment (unlike that of the judges) can be considered by the electorate.

30 June 2011.