4th of July 2011

Mr Edward O’Donohue MLC
Chairman
Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Scrutiny of Acts and Regulations Committee
- 6 JUL 2011

Dear Mr O’Donohue,

Submission to the Scrutiny of Acts and Regulations Committee

This submission supports repeal of the Charter of Human Rights and Responsibilities Act 2006 (VIC) (Charter). The Charter is a law that:

(1) treats rights selectively,
(2) produces uncertainty in Victorian law,
(3) encourages a “lawyer’s picnic” approach to litigation, and
(4) unwisely allows the indiscriminate intrusion of foreign law into an Australian jurisdiction.

The Charter does not improve the protection of human rights but instead damages the integrity of Victoria’s laws and judiciary.

(1) Charter treats rights selectively

The Charter is not a comprehensive bill of rights but is, instead, a compilation of “rights” enacted by the Victorian Parliament. The Charter’s selectivity can be seen by comparing it to the International Covenant on Civil and Political Rights (ICCPR)1. For example, a prominent right included in both the Charter (s.17(1)) and the ICCPR (Art.23(1)) is the right to family life: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Similarly, the Charter (s.14) and the ICCPR (Art.18) also includes a right to freedom of conscience. However the Charter does not respect, as the ICCPR (Art.18(4)) does, the rights of parents to ensure the religious and moral education of children:2

“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.”

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1 International Covenant on Civil and Political Rights, done at New York, 16 December 1966.
2 Article 18(4)
No explanation is provided as to why the Charter does not expressly recognise the liberty of parents to ensure the religious and moral education of their children. This selection of rights suggests a secular agenda that may accept the family unit but rejects the parental role in transmitting religious and moral values to children. Similarly, while both the ICCPR (Art.22) and the Charter (s.16(2)) assert the right to form and join trade unions, there is no Charter right to not be compelled to join a trade union, which indicates that union rights to form are more important than an individual’s rights to choose.

The most notorious example of the Charter’s selectivity of rights is with respect to abortion and conscience protections. It is true that the Charter formally includes both a right to freedom of conscience (s.14(1)), as well as a right to life in s.9. However, in the case of abortion, neither of these asserted rights is of any legal effect. The Charter states plainly in s.48 its own Orwellian feebleness whereby “Nothing in this Charter affects any law applicable to abortion or child destruction”. Thus the Charter limits itself to protecting the right to conscience and the right to life except at the point where such protections might actually have some effect.

The Charter’s risible claim to protecting the most fundamental of human rights, and s.48’s true purpose, is revealed by examination of the conscience-denying provisions of the Abortion Law Reform Act 2008 (VIC) (ALRA). The same Victorian Parliament that enacted the Charter also subsequently legislated ALRA, which by s.8 denies freedom of conscience to medical professionals who object to abortion and instead mandates their complicity in the procurement of an abortion. What would once have been an ethical question for individual medical professionals is now a statutory mandate to participate in the abortion process. Medical professionals, particularly faithful Christians, now enjoy less freedom of conscience than before the Charter and ALRA. The abortion mandate is an assault on the historic protections afforded to conscience; it is a scandal that the very Charter that citizens would reasonably expect to protect such fundamental rights as conscience and life does no such thing, despite the Charter’s aspirations as set out in the preamble and s.1(2). It is unsurprising, then, that Father Frank Brennan SJ highlighted this as a clear failing of the Charter, as well as a clear reflection of the Charter’s selective approach to human rights. I adopt the observations of Australia’s most eminent political observer, Mr Paul Kelly, in this regard:3

“Brennan’s conclusion is that Victoria’s rights charter “failed spectacularly” to defend a core human right when it conflicted with the progressive-Left political agenda on abortion law and bioethics. He nails the issue: Victoria’s law is not primarily about human rights. It is “a device for the delivery of a soft-Left sectarian agenda” and it will be discarded whenever “the rights articulated do not comply with that agenda”.

The Charter’s inclusion of some rights and its exclusion of other rights entitles a conclusion that far from being any true bill of rights, the Charter privileges some rights and denies others. In sum, the Charter reflects less the rights that Victorians (and Australians) all supposedly share and agree on, and instead enacts the preferred “rights” of the secular, trade union and Darwinian Left.

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(2) Charter makes Victorian laws uncertain

The Charter has introduced uncertainty into the law in Victoria. Section 32(1) of the Charter requires that "... all statutory provisions must be interpreted in a way that is compatible with human rights". As applied in R v Secretary to the Department of Justice, Nettle JA posited that s.32(1) directed Victorian courts to adopt the approach of British courts with regard to the Human Rights Act 1998 (UK), whereby statutory provisions should be read in a way that departs from Parliament's clear intention if the statute conflicts with Charter rights (according, of course, to that particular judge's reading of those rights). Such an interpretive approach to resolving conflicts between the Charter and other legislation was, Nettle JA held, to be preferred on grounds of "clarity and simplicity". However, there is nothing clear or simple about Charter rights, nor about how best to interpret them.

Noting Nettle JA's position is not to criticise that judge or, indeed, any judge; every conscientious judge will perform his or her duty but will, inevitably, like any citizen, interpret an abstract phrase such as "human rights" in idiosyncratic terms. When done by a judge, however, the result is statutory interpretation(s) that will, progressively, undo the predictability of the rule of law. It would be unrealistic to expect otherwise. In the equitable jurisdiction, judges have long been required to ensure that "the plastic remedies of the chancery are moulded to the needs of justice" in individual cases between disputatious litigants. In what will become the Charter jurisdiction, however, judges will be required to 'mould' legislation - the text of which had been approved by a democratically elected Parliament - to what that judge considers the needs of human rights in Victoria. What the full extent of the judicial concept of human rights is cannot be known but the spectre of judicial 'moulding' must now haunt all Victorian legislation. As a result, the meaning and effect of all legislation is itself uncertain and no lawyer can definitively advise his or her client on a legal question that may involve the Charter. As Justice Scalia of the Supreme Court of the United States has written, "Judimentary justice requires that those subject to the law must have the means of knowing what it prescribes." Such an element of rudimentary justice cannot be achieved given that the meaning and effect of a Victorian law is made entirely subject to a judge's understanding of both s.32(1) and whatever is meant by the phrase "compatible with human rights".

The approach to statutory interpretation exemplified in R v Secretary to the Department of Justice, if followed in Victoria, will have the following probable consequences:

1. Existing Australian precedent as to the construction of legislation may no longer apply because the Charter irrevocably alters the meaning of legislation,

2. Victorian courts may be required to depart from comity with courts of non-Charter Australian jurisdictions, as Victorian legislation is now subject to different principles of interpretation under the Charter, and

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1 R v Secretary to the Department of Justice [2008] VSCA 265 (18 December 2008)
2 R v Secretary to the Department of Justice [2008] VSCA 265 at [105] ff, particularly at [114]-[115].
3 R v Secretary to the Department of Justice [2008] VSCA 265 at [116].
4 Forbush v Forbush (1929) 167 NE 428 at p.429 per Cardozo J.
(3) Parliamentary intention in enacting pre-Charter legislation must be viewed as having changed as a result of the introduction of the Charter: see s.(1)(2)(b) and s.32(1).9

Entrenching uncertainty as to the meaning and effect of otherwise valid legislation detracts from a key principle of the rule of law, which is that law should, as far as possible, be predictable and understandable by citizens.

(3) The Charter creates a “lawyer’s picnic”

One advocate for the Charter recently argued that:

"An argument put frequently before the charter’s adoption was that it would result in a lawyers’ picnic. The statistics have proved otherwise. In fact, many fewer cases have come to court than expected. This is partly because lawyers have been slow to get abreast of charter law."10

Even if true, it would be most unrealistic to expect such a subdued state of affairs to continue.

First, lawyers are charged professionally to advise and represent their clients, using every legal remedy that is ethically available, and the Charter now offers a new arsenal of legal weapons. Lawyers will only increase their toil so as to "get abreast of charter law". It is disingenuous of Charter advocates to defend the Charter on the basis that lawyers are yet to commence widespread invocation of its provisions. It is sufficient to observe that it would defeat the whole purpose of the Charter were it to be ignored by lawyers advising clients engaged in litigation. It can thus only be expected that Charter-driven litigation will increase in the years ahead.

Second, the legal profession’s own professional representatives have expressly argued for more Charter litigation. For example, the Victorian Bar Council’s submission to this review expressly argues for the vigorous exercise of intervention in Charter cases by the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission, which, by its nature, necessitates the involvement of more lawyers:11

"[21] The intervention function is particularly critical in the early development of Charter jurisprudence because, in the absence of relevant Victorian authorities, it is often necessary to consider the approach that has been taken to similar human rights issues in comparable jurisdictions. That necessity was envisaged in s32(2) of the Charter. However, the identification of relevant comparative materials can require both time and expertise, and the presence of interveners can help to ensure that the Court - and the parties - are made aware of all relevant material in circumstances where the parties may not have the time, funding or expertise to do so.

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9 See the observations of Lord Woolf CJ in Poplar Housing and Regeneration Community Association Ltd v Donovan [2002] QB 48 at p.72(75).
10 Spencer Zivck "Charter gives protection to the rights we all share" The Age, 17 June 2011.
11 Victorian Bar, Submission at [21].12.
Interveners have played a major role in most of the major cases that have been decided concerning the operation of the Charter. It is common for both the Attorney-General and the VEOHRC to intervene, frequently (although not invariably) in support of opposing parties.”

Again, it should be expected that such Victorian Government interventions will continue and become more common, which will necessitate responses by litigants, which, in turn, will only increase the demand for public lawyers to advise and appear in Victorian courts.

The same Victorian Bar Council submission even advocates that a “pool of funds” be set aside to pay counsel to participate in such litigation:

“in order to ensure there is a more sustainable and stable means of obtaining access to the rights promised by the Charter in litigation where there is a serious Charter issue to be heard and determined. Whilst the Bar expects pro bono representation by barristers to continue to play an important part in Charter litigation, to assume its continued availability is unwise and may undermine the efficacy of the Charter.”

The experience of the Australian Capital Territory (ACT) is instructive here. The report on the first five years of operation of the ACT’s Human Rights Act 2004 urged a more assertive role for judges, if only to make the Human Rights Act’s impact felt:

“If the courts are too timid in their approach to [section] 30, the HRA may have little impact on the quality and application of laws from a human rights standpoint, especially if the courts are also reticent to issue declarations of incompatibility.”

There are no reasons to expect Victorian judges to not also be urged to adopt – and to, sometimes, give in to temptation to engage in – a more activist course, an inevitable result of a Charter that will itself be increasingly invoked by lawyers appearing in Victorian courts. The experience of bills and charters of rights in the United States, Canada and the United Kingdom, is that this is, indeed, the inevitable course. The phenomenon of the “Lawyer’s Picnic” will grow only worse and ever more costly.

(4)- Charter unwisely permits indiscriminate foreign influences on Australian law

The Charter unwisely facilitates the indiscriminate intrusion of foreign law and legal concepts into the Victorian legal system. It does this by s.32(2), which treats as equally worthy of consideration these various sources of laws: “... international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right”. The Charter states no limitation on what hierarchy of foreign and international courts’ jurisprudence may be relevantly considered. The Charter does not even state a preference for the persuasiveness of laws and judgements of Australian jurisdictions, as well as those decisions of kindred legal systems regularly relied on in Australian courts, such as the United Kingdom, Canada, New Zealand and the United States. Indeed, it is not clear from s.32(2) what (if

11 Victorian Bar, Submission at [80]. One can only assume the “pool” for human rights lawyers to waste in would be filled by the Victorian taxpayer.

12 Victorian Bar, Submission at [79]-[80].

any) legal basis could be advanced to prefer a British interpretation of human rights to, say, the views expressed by Saudi, Iranian or Chinese judges. The only threshold test imposed by s.32 is "... relevant to a human right". The Charter risks not only the importation of foreign legal ideas wholly unsuited to Victoria but, as well, implicitly legislates legal indifferntsim, whereby Australian and other common law traditions are treated as but one of many legal cultures, no better than any other legal regime, be it Roman law or even Shariah law. Such a blind equality of legal systems is patently absurd.

In \textit{Sabet v Medical Practitioners Board}^{14}, Hollingworth J, hearing the challenge by a doctor to the Medical Practitioners Board's decision to suspend his registration, was obliged to consider (as a result of a Charter argument) the following foreign laws:
- the New Zealand \textit{Bill of Rights} Act 1990,
- the Canadian \textit{Charter of Rights and Freedoms},
- the Hong Kong \textit{Bill of Rights},
- the ICCPR,
- the European Convention, and
- the \textit{Human Rights Act} 1998 (UK).

There is no reason why the court in \textit{Sabet}, pursuant to s.32(2), could not have been further enlightened by the human rights law of any foreign court that could meet the test of "relevance to a human right". The legislative recklessness reflected by s.32(2) risks undermining Australia's traditional conceptions of human rights, by the influence of laws repugnant to our Judeo-Christian, common law tradition. This is a most unwise innovation.

Not only does the Charter require Victorian courts in certain circumstances to re-interpret legislation in a manner that Parliament may not have intended, it permits the influence of decisions (of varying quality) made by foreign judges in jurisdictions of varying independence, legitimacy and integrity. This will require Victorian judges to unilaterally select which foreign judgements on human rights should be followed, as opposed to following Australian and common law precedent. The difficulties posed by the use in Victorian courts of the decisions of judges in jurisdictions with very different historical and political experiences to that of Australia, were politely if firmly summarised by Kaye J in \textit{WBM}:^{15}

"In light of that provision [section 32(2) of the Charter, allowing the court to consider decisions of foreign and international courts in interpreting a statutory provision], a number of decisions of European and international courts were brought to my attention, as well as opinions of the United Nations Human Rights Committee. The decisions, which were drawn to my attention, were interesting and helpful. However, I apprehend that some care must be taken in relying on and following those decisions, literally and in their entirety. First, I note that while the terms of the Charter are drawn from international treaties, nevertheless they are not necessarily the same as a number of the provisions, which were the subject of the decisions and opinions to which I was referred. Secondly, the constitutional structures of the countries, in which those decisions were made, are not necessarily the same as the constitutional structure of this State or this nation. In particular, a number of those countries do not have the strict separation of judicial powers, which is a cornerstone of our constitution. This is particularly so in the case of the United Nations Human Rights..."

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Committee. That Committee does not perform the same judicial role, which is performed by the courts of this state. In particular, it is not the independent judicial arm of a parliamentary democracy, the other arms of which are the legislature and the executive. Further, it is fair to observe that the majority of the members of that Committee do not come from countries, which have the same system of democracy as ours, or indeed any system of representative democracy at all. The opinions of that Committee, to which I was referred, involve the expressions by the Committee of value judgments in a manner and to an extent which is at odds with the traditional judicial function of the courts of this State and this nation.”

[emphasis added]

Justice Kaye’s concerns serve as a stark warning of the perils of permitting the indiscriminate use of foreign law – and it cannot be assumed that the Victorian judiciary will always be composed of judges of the soundness of Kaye J. It was not long ago that the State of Victoria, as well as the rest of Australia, abolished appeals to the Privy Council, in part relying on the proposition that Australian law should not be determined by a foreign jurisdiction17. The Charter undermines that proposition by permitting Victorian courts to be potentially influenced by foreign law when judges come to determine the operation of legislation made validly by Victoria’s democratic, legislative process. It is wrong in principle and dangerous in practice.

Conclusion

In the same year that British settlement of Australia commenced, the great American constitutional lawyer, Alexander Hamilton, wrote in respect of the separate role of the judicial power:18

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them ....
> It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts ...  

The Charter is an attempt to, in part, confer new powers on judges, which will only, over time, undermine the judiciary. Judges are conscripted by the Charter’s operation into enforcing a divisive ‘human rights’ agenda, the inevitable result of which will be, as has happened in the United States, for judges to, over time, increasingly become a part of the political process. The extent of the damage the Charter will do to citizens’ perceptions of both the rule of law and the independence and disinterestedness of judges, is difficult to predict but, as judges are increasingly required to decide divisive social issues on essentially political grounds, such damage is certain.

Since 1901, the Australian constitutional system, including its demarcation of separate judicial and legislative powers, has enabled our country to enjoy the rule of law, national stability and prosperity

17 Notwithstanding that the Privy Council is expressly contemplated by s. 74 of the Commonwealth of Australian Constitution.
14 Federalist No. 78, 14 June 1788
to a degree that is almost unique in the history of the world. This Australian constitutional system deliberately leaves the power to determine major societal questions to elected legislators and not to unelected judges. This constitutional order is not to be tampered with on a well-intentioned whim or for the sake of legal novelty: it is particularly not to be destabilised by politicians and special interest lawyers, willing to spoil our Australian constitutional rule of law so as to impose a new, hegemonic ‘rule by lawyers’. Above all, the judiciary should not be perverted from its constitutionally allotted task of legal umpire into becoming this new class of super-legislator. The Charter is, in short, an attempt to undo in Victoria the essential separations of powers, duties and customs that were established by the British common law over hundreds of years, and implemented by the Australian constitutional system.

The Charter should be repealed.

Yours very faithfully & respectfully,

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