Mr Edward O’Donohue MLC  
Chairman  
Scrutiny of Acts and Regulations Committee  
Parliament of Victoria  
Spring Street  
Melbourne VIC 3000. 

By Email 

Dear Mr O’Donohue, 

Inquiry into the Charter of Human Rights and Responsibilities 

I refer to the above Inquiry, and to my telephone discussion with Mr Simon Dinsbergs of the Committee secretariat of the 8th instant. 

May I begin by explaining that I only became aware of your Committee’s Inquiry at the end of last week, and apologise for the obvious Queensland parochialism in not being aware of it sooner. For much of the last nine years I have been engaged in writing a book on human rights theory, which has been informed by my time as Chairman of the Senate Regulations & Ordinances Committee in the 1990s, and also time served on the Senate Standing Committee on Legal & Constitutional Affairs during the same period. 

While my book is still to be published in whole, portions of it have been published overseas, and the essential thrust of the book has been finalised. If I may be so immodest, I believe there are insights which I can offer from the manuscript, that might assist your Committee in its deliberations. Accordingly, I have attached a brief submission, which I would request the Committee accept notwithstanding the closing of submissions. 

I would be happy to expand on the submission, or to answer any questions from your committee, either in person or in writing. 

Yours sincerely, 

William G. O’Chee 

William “Bill” O’Chee 

Brisbane, this 9th August, 2011. 

Encl.
SUBMISSION TO THE SCRUTINY OF ACTS AND REGULATIONS COMMITTEE
PARLIAMENT OF VICTORIA

INQUIRY INTO THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

Introduction

In opening, I can only note that support for any Bill of Rights (or a charter of Human Rights and Responsibilities), has been a divisive issue in Australian politics for a long time. This statement is so obvious as to seem almost trite, but it masks a deeper truth. Much, but not all of the fear of any such document revolves around which rights will be included or excluded, and the relationship between the rights which are recognised.

It is not my intention to express an opinion as to which rights should or should not be included because I believe there is a more significant threshold issue which requires consideration. For reasons I shall demonstrate, the recognition of rights is less important than creating a framework for addressing conflicts of rights. Such a framework should be so clear as to obviate the need for recourse to the courts in most cases.

The following outlines how and why a set of rules for resolving conflicts of rights must be adopted by the Parliament of Victoria if the existing Charter of Human Rights and Responsibilities is to protect the rights of Victorians in a fair and effective manner.

Principles Underlying all Rights

At the start, it is appropriate to provide a working definition of what is a right, at least in so far as this submission is concerned. In speaking of rights, I shall use the term to refer to a legally enforceable entitlement to some portion of the good, that is, the material and social benefits accruing to members of a society.

Entitlement to participate in the good of society is a principle underlying all rights, and although it is unfashionable in some circles to talk about what is good, I make no apology for doing so in this submission.

Moreover, I believe it is the responsibility of the state to protect an individual’s entitlement to that good. I can put it not better than Aristotle did, in Book 1 Chapter 1 of his Politics, when he said:

"Every state is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good. But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good."

Thus, properly crafted, a Charter of Rights should have an important role to play in discharging the obligations of the state to protecting the legitimate rights of its citizens.

It should also be noted, however, that rights are often confused with expectations. All rights are legitimate expectations, but not all expectations are rights. For example, I might expect to be
treated with respect when entering a shop or a government department, but this expectation is seldom a legally enforceable entitlement.

Politically, it is arguable that both the Left and the Right of Australian politics have long seen rights and responsibilities largely in ideological terms. This has sometimes resulted in a failure to see the importance of a rights framework as the foundation for a properly functioning liberal democracy.

The Left has often seen the creation of rights as a means of advancing a particular social or political agenda. This is achieved through deeming what could better be described as expectations as rights, and then legislating for them accordingly.

At the other end of the political spectrum, the Right has often viewed rights and responsibilities as a social contract. This has serious dangers. It tends to make rights conditional on responsibilities instead of being the precursors of responsibilities. There has also sometimes been little conceptual relationship between the rights and claimed responsibilities in question.

Both sides are wrong in these respects.

Rights - the most fundamental rights at least - accrue to people because they are members of a society, not because of who they are or what they do. It is on this basis, and this alone, that we can say that all people should have equal political and legal rights irrespective of ability or status.

In a philosophical sense, these fundamental rights must accrue on the basis of mutual assumption. That is, rights are not determined by each person bargaining what legally enforceable entitlements they should or should not have. Instead, it is more apt to imagine a general discussion in which it is asked, “Should this or that be a legal entitlement?” to which the consensus would reply, “of course!”

A good starting point is to presume that society should be ordered so as to give people as much liberty as is possible.

Another important point to recognise is that rights exist less for the benefit of the rich and powerful, than for the poor and weak. The rich and powerful generally have ready access to good lawyers and others to assist them in enforcing their interests. This does not apply to the poor and weak who, in the face of the increasing cost of justice in the last twenty years, comprise increasing portions of the community.

If individual rights can be put at risk, the question must be asked, what are the sources of such risk? Individual rights can be put at risk either by act of an organ of the state, or else by the actions of some other individual (or a corporation).

In the case of private threats to individual rights, the threat actually arises from some claim to the exercise of another, inconsistent right, by another party. Thus, the protection of rights in private law depends less on declaring the existence of rights, than on establishing a clear system for resolving conflicts of rights.

Where individual rights are put in jeopardy by the actions of the state, the principles for resolving conflicts of rights between individuals remain relevant. One reason for this is that public authorities often effectively act on behalf of individuals, even when exercising state authority. This is frequently the case where administrative decision makers are concerned, especially when they
are required to determine between the claims of two individuals. Even when public authorities act in their own right, the principles for resolving private conflicts of rights can be enlightening in establishing the proper extent of their powers.

To protect the poor and weak, it follows that the rules for resolving conflicts of rights must be so self-evident, and the legal enforcement of those rights so certain, that violating them would be pointless.

While lawyers are enamored of the belief that rights are legal creations which belong to the realm of lawyers, rights in fact belong to people, and arise by the process of mutual assumption which underpins their participation in society.

From my experience and research, I believe it is possible to describe a hierarchy of rights, and rules for resolving conflicts of rights, which make this possible.

**Extent of Rights and Conflicts of Rights under the Charter**

Part 3 of the Charter establishes the scope for the application of human rights in Victoria. This seems suitably clear within the intent of the legislation, and I do not believe it needs comment per se.

Part 2 of the Charter sets out a list of rights which it describes as “human rights.” These include, *inter alia*, the right to life, freedom of movement, freedom of assembly, peaceful assembly and freedom of association, and others. Many of these rights are, however, qualified in their enumeration.

For example, the right to property, as set out in section 20 of the Charter is couched in terms that, “a person must not be deprived of his or her property other than in accordance with law.” In terms of protecting individual property from exaction by state legislation, this provision would appear to be of little value.

In fairness, the existing Charter goes further than many similar documents in that it does not merely declare rights, but attempts to set out the basis on which those rights might be restricted. This is dealt with principally in section 7 of the Charter. In particular, section 7(2) sets out what may be “relevant factors” in determining the “limits” of rights, these being:

(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.

While I find little to disagree with these as *descriptors* of how rights might be limited, my criticism is that they do little to explain the *principles* governing the extent and limitations of rights themselves.

One criticism is that it presumes that all of the rights prescribed may be subject to limitation in appropriate circumstances. It therefore appears to preclude the possibility that some rights may be inviolable.
Another flaw is that it implicitly treats all of the rights covered by the Charter as being of equal importance, with conflicts between the exercise of these rights essentially being decided on an ad hoc basis.

Deciding conflicts of rights “on their merits”, while seemingly attractive, imports subjectivity and uncertainty into the enforcement of rights. This in turn erodes the value of those rights to those for who recourse to the legal system is costly or potentially out of reach. The enjoyment of one’s rights should only rarely and in extreme circumstances dependent upon access to a lawyer.

It is important to note that as more rights are declared to be included in the Charter, the greater the potential for the exercise of purported rights to come into conflict. For example, including the International Covenant on Economic, Social and Cultural Rights would add the right to work, to social security, and rights in relation to families, among others. It would seem strange for all of these rights to be of equal importance with the right to not have one’s life taken, or the right not to be tortured.

It is submitted that a clearer means of resolving conflicts of rights must be included in the Charter to eliminate existing uncertainty, and that this must definitely occur before any additional rights could be added to those covered under the Charter.

A Hierarchy of Rights

As has been hinted above, it is possible that not all of the rights prescribed in the Charter might be of equal importance. Specifically, it may be possible to define a hierarchy of rights which classifies any potential right into one of two or more different classes.

If we leave consideration of the Charter to one side briefly, and consider rights in general, we know intuitively that not all rights are equal. We have already observed that the right to social security would not seem to be of the same rank as the right to due and fair process before the law, for example. But if there is a hierarchy of rights, how is it to be discerned?

At the beginning I stated that rights were a legally enforceable entitlement to some portion of the good, which is that bundle of material and social benefits that accrue to an individual by virtue of their membership of society. The distribution of those goods is described by Prof John Finnis as conforming to either distributive justice or commutative justice.

Distributive justice is an individual’s right to participate in the common stock of society, those things which are bought, or sold, or dispensed by the state, such as health care, education, and so forth. Commutative justice is an individual’s right to participate in the indivisible common good of society, such as peace, happiness, security and the like.

Leaving aside questions of what is divinely or morally good, "the good" is concerned solely with the human condition, and most specifically individual and collective happiness. Notwithstanding there may be varying views about what we think to be good, we can agree that each of us seeks to achieve happiness in life.

In this sense, “the good” - the public or general good - is that set of conditions which best promotes or makes possible the pursuit of individual happiness. Within this, there are also those particular objects of individual happiness, which I term as “goods.”

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It behoves us to ask, therefore, if there is anything which can be considered to be universally good? There is, and it is indeed possible to posit a test for whether something is universally good. The test is composed of two elements:

(i) is this something which, in the highest altruism, I would want for all of my fellow citizens; and,
(ii) can the enjoyment of this good by one person ever disadvantage another person?

So, for example, the enjoyment of a long and healthy life is something which I would not only wish for myself, but in the highest altruism, I would want for everybody. I can also discern that the enjoyment by me or anyone else of such a life in no way disadvantages others. On this basis we can know this to be universally good.

There are also other things which we might generally agree to be good, but which are not strictly necessary, or the extent to which they are necessary is very small, and hence their desirability is overwhelmingly subjective.

An example of this type of good might be seen in human companionship. There is no doubting that the company of our fellow human beings can be enormously beneficial, but people vary greatly in their need for companionship, and some people even eschew it entirely. While the overwhelming majority of the population need the company of others, history is replete with stories of rare individuals who did not.

This creates another class of goods; those things which are basically good.

While they may be enjoyed by nearly all, the absence of necessity is what distinguishes things which are basically good from those which are universally good. The basic goods are, however, often recognised as important even by those for whom they might have only marginal importance. Beyond companionship, freedom of expression, freedom to work and play, knowledge and relaxation might all be considered basic goods.

Finally, there is a further category of things whose enjoyment people may individually consider to be good, even though others might consider them unimportant, or not necessary at all. We might describe these perhaps as things which are individually good. An example of this is art. There is no doubting the great joy that art brings to many people of differing backgrounds, but there are also people who may go their entire lives without ever feeling the urge to enter an art gallery.

The fact that some people dismiss the value of art in no way diminishes the immense satisfaction it brings to others. While expenditure by society on art is arguably not as important as spending on basic health care, this does not mean that it cannot be an important contributor to an individual’s ability to live a meaningful life.

There are many goods which fall into the same category as art. Sport, wealth, travel, sensuality, and entertainment are but a few which spring to mind.

But how does this relate to rights? If a right is a legally enforceable entitlement to some portion of the good, then the higher the good in question, the higher must be its concomitant right.
Since a hierarchy of rights requires there be a pre-eminent class of rights, it follows that these should relate to a person’s entitlement to those things which are universally good, and therefore in the highest class of goods. Earlier we said that the right not to have one’s life taken was something which was universally good. It is also the most important, because without life we are incapable of enjoying any other rights.

Indeed, we can go further and argue that if there are such things as an inviolable rights - and society’s promises to the individual suggest there should - the right not to have one’s life taken must be one of them.

There may also be other inviolable rights, and it is consistent with the principle of allowing people the maximum possible liberty that they be recognised. One feature of a class of inviolable rights, however, is that they can never come into conflict with each other, for if they do, one must yield, and it is no longer inviolable.

Without labouring the point, a careful analysis would suggest that the possible class of inviolable rights is limited to:

(a) The right not to have one’s life taken, nor to be compelled to sacrifice one’s life;
(b) The right to due and equal process before the law with one’s fellow citizens, and indeed with the state;
(c) The right to define one’s own identity, which includes the right to determine the defining characteristics of one’s inner personality, the relationship to one’s God, one’s sexuality, and also the right to one’s body and genetic code.

All of these rights correspond to things which are universally good. Moreover, any other potential right would seem to run the risk of clashing with them, so the class of inviolable rights would appear thus defined.

There is a very real question about whether the right to one’s labour (which Locke says spring’s from the sanctity of one’s body) should also be an inviolable right. This would appear inconsistent with the necessary evil of taxation, and there is no convincing explanation of how the two can co-exist.

It may be argued that freedom from civil and military conscription might qualify in a narrower sense as an inviolable right. In the Charter however, the freedom from forced labour expressly excludes the obligations of a person who is in detention or under a court order, and so this would appear to be a moot point.

Below this class of inviolable rights there exists a further class of rights which are often expressed as “freedoms”, such as the freedom of association, freedom of speech, freedom of movement, freedom of assembly, freedom from discrimination, and so on. These rights largely correspond to things which are universally good, but are could potentially come into conflict with the one or more inviolable rights, or with another similar freedom.

For example, the right to freedom of speech, freedom of movement, and freedom of association could come into conflict if one group of people wants to hold a meeting, and another wants to picket that meeting. Or the freedom to participate in public life could come into conflict with freedom of speech. Because of these potential conflicts it is necessary identify the limits of these freedoms.
These freedoms may be characterised by the fact they relate to an individual's participation in the common good of society. Their other defining characteristic would appear to be that they are not subject to any positive obligations, but only negative obligations, that is, not to abuse the freedom, or to do harm to another.

Finally, there is a further class of rights which are perhaps best expressed as permissions or entitlements. They generally relate to participation in the common stock of society, such as healthcare, education, the right to drive a car, or to drive a speedboat, and so on. These rights are those which society may choose to ration in such measure as the majority sees fit (subject always to an individual's inviolable rights and freedoms), or which come with both positive and negative obligations. Thus the right to be admitted into a public university may be rationed according to public finances; is subject to positive obligations, such as meeting the required pass marks and attending lectures; and is also negative obligations such as not breaking the university statutes.

These three classes of rights complete the hierarchy of rights.

**Resolving Conflicts of Rights**

Having described the hierarchy of rights, it becomes a relatively simple matter to resolve conflicts of rights. This can be achieved by adhering to a number of simple rules, which are explained below.

**Rule of Primacy**

Very simply, when two rights of different classes come into conflict, the higher right must always prevail. This maintains, and gives effect to the hierarchy of rights, and ultimately to the search for the highest good to which Aristotle referred.

Within a given class, conflicts of rights are resolved in accordance with the rules which follow this.

**Acceptance of Natural Consequences**

Rights are not consequence free. Rights, as legally enforceable entitlements, exist so as to allow the claimant to enjoy the consequence of exercising the right, not the right itself. A person should therefore accept all of the natural consequences of exercising their rights. For example, a person who avails themselves of the right to drink alcohol, and who injures another when they drive home drunk, should not be allowed to choose between the natural consequences of their actions (i.e. enjoy getting drunk but be excused responsibility for their drunkenness), nor be relieved by the state of the consequences.

A person must bear the benefits and burdens of exercising a right when they come into conflict with the rights of another.

**Priority of Commutative Justice**

When two rights in the same class conflict, and one gives effect to commutative justice, it must take priority over a right giving effect to distributive justice. The reason is that the common good is essentially indivisible, whereas the common stock is rationed and limited. To subordinate the
common good to an allocation of the common stock could therefore have wide ranging ramifications in excess of those considered in the individual case.

Priority of Passively Enjoyed Rights

When two rights in the same class come into conflict, a right which is passively enjoyed must always prevail over a right which is actively enjoyed. Again, consider where one group of people picket a meeting in furtherance of their freedom of speech, but in so doing seek to prevent others attending that meeting and enjoying the freedom of association. The people attending the meeting, should have priority because they do not seek to interfere with anyone else's rights, whereas the picketers do. This rule is a corollary of the negative obligation not to abuse a right or cause harm to others.

There is also a practical reason why this rule must be observed. If the opposite was true, and we gave priority to actively enjoyed rights instead, the law would encourage people to interfere with the rights of others, and society would be characterised by conflict and not co-existence. A peaceful society requires that this be so.

Submissions

In conclusion, allow me to make the following submissions:

1. The effective protection of rights requires rules to resolve conflicts of rights which are so clear as to largely eliminate the need to litigate them. The currently vagueness of section 7 seems insufficient in this regard.
2. The Charter be amended to give effect to a hierarchy of rights by grouping rights under the charter into categories.
3. The Charter should incorporate a clearer set of rules for resolving conflicts of rights. Ideally, this should follow the scheme outlined above. If, however, a hierarchy of rights in not given effect, the Charter should specifically include the Acceptance of Natural Consequences, Priority of Commutative Justice, and Priority of Passively Enjoyed Rights as guiding principles for resolving conflicts of rights, and the limits of an individual's rights vis-a-vis the state.
4. Before any additional rights are added to those listed in the Charter, consideration should be given to their potential to come into conflict with other, existing rights.