Mr Edward O'Donohue MLC  
Chairperson  
Scrutiny of Acts and Regulations Committee  
Parliament House,  
Spring Street  
East Melbourne Vic 3002

2 June 2011

Dear Mr O'Donohue

Re invitation to make a written submission to the inquiry and review of the  
Charter of Human Rights and Responsibilities Act 2006

Thank you for your letter dated 11 May 2011 extending an invitation to make a  
written submission in relation to the Charter of Human Rights and  
Responsibilities Act 2006 ("the Charter"). I note that there are 7 questions  
based on the terms of reference. My response is limited to the questions that  
relate to my experience with the Charter in carrying out the functions set out in  
the Public Prosecutions Act 1994. Consequently, I have no comment in relation  
to questions 1–4, 5(a), 5(b), 5(e) and 7.

Question 5 – What have been the effects of the Charter on –  
(c) the provision of services, and the performance of other functions, by public  
authorities.

There is some debate as to whether the Director of Public Prosecutions and/or  
the Office of Crown Prosecutor are "public authorities" as defined in s.4 of the  
Charter and the Public Administration Act 2004. This issue was raised by the  
High Court in Momcilovic and is yet to be determined by the Court. The  
significance of this issue is that if the DPP and or a Crown Prosecutor are "public  
authorities" then s.38 of the Charter applies. That provision would require the

1 Momcilovic v R [M134 of 2010]. See for example the transcript of the High Court  
hearing- Momcilovic v R [2011] HCATrans 015 at page 32 and following. There are also  
other references throughout the 3-day hearing in which submissions were made in  
relation to this issue.
Director or a Crown Prosecutor, when deciding to sign an indictment and/or to prosecute, to give proper consideration to the human rights set out in Part 2 of the Charter. The questions set out by the Court in *Momcilovic* demonstrate the complexities and difficulties that the DPP or Crown Prosecutor would encounter in applying s.38 of the Charter when signing an indictment and/or prosecuting matters in which there are several possible offences. This would result in a significant increase in complexity of the proceedings and the time required to perform the statutory functions established by the *Public Prosecutions Act 1994*. It would likely require the allocation of additional resources to the Office of Public Prosecutions.

Question 5 – What have been the effects of the Charter on –
(d) litigation and the roles and functioning of courts and tribunals.

Refer to my response to question 6 below.

Question 6 – What have been the overall benefits and costs of the Charter?

**Benefits** – In my experience, in criminal cases in which Charter issues have been raised, the Charter seems to have provided very limited benefit to accused persons. This may be the result of the common law and other statutory provisions already providing extensive protections for the rights of the accused. For example, in *Williams* application for adjournment was made in reliance upon s.25 (2)(d) of the Charter. It was put that the right to “legal assistance” chosen by an accused equated to a right to counsel of choice. An application for adjournment for a 6-month period was made on the basis that the counsel of choice would be unavailable for that period of time. Although King J found that the Charter did not apply as a result of the transitional provisions, her Honour noted [at 71] that the application would have been refused even if the Charter did apply. Similarly, in *Momcilovic* although the Court of Appeal found that the right to the presumption of innocence in s.25 (1) of the Charter had been infringed, it was held that the relevant section could not be re-interpreted

4 *R v Momcilovic* [2010] 25 VR 436. As noted above, this matter is currently before the High Court – *Momcilovic v R* M134 of 2010.
to make it comply with the Charter and, instead, a declaration of inconsistency per s.36 of the Charter was made.

Costs – Raising the Charter in criminal litigation has invariably added to the complexity and cost of the proceedings; it has also caused delay in the conduct of criminal trials. Although at this stage there have only been a small number of criminal trials which have involved the use of the Charter, there has been an increase in the complexity and time taken to deal with those matters. It may be expected that consistent with the existing trend of increased reliance on the Charter, this will add a significant burden in terms of delay, with consequent impact upon the resources of the OPP and the courts.

To illustrate the impact one only needs to consider the effect of the interpretive provision in s.32 of the Charter. It was held by the Court of Appeal in Mumcilovic\(^5\) that s.32 “forms part of the interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question”. This involves the court ascertaining “the meaning of the relevant provision by applying s.32(1) of the Charter in conjunction with common law principles of statutory interpretation and the Interpretation of Legislation Act 1984”.\(^6\) This has the effect that all legislative provisions which had been considered prior to the Charter now need to be re-interpreted in light of s.32 of the Charter where a human right is engaged. Not only will this add to the complexity and time taken to litigate such matters, it may also undermine the benefits to be derived from uniform legislation (eg, the recently introduced Evidence Act 2008 (Vic)) as divergent interpretations may be given in Victoria based upon s.32 of the Charter.

An example of a current matter which has involved considerable delay as a result of the Charter is set out below. I have not named the matter as it is still before the Court of Appeal and the judgment may be restricted when delivered. Although it cannot be said that this sort of delay occurs regularly as a result of the Charter, it is important to highlight the complexity and delays which flow and the impact upon the administration of justice.

\(^5\) R v Mumcilovic [2010] 25 VR 436, 446 [35].
\(^6\) Ibid.
Current Example of Delay arising from the Charter -

- 16–21 February 2008 – Date of alleged offence – 16 February 2008: 21 February 2008 the complainant records a conversation between herself and the accused. In short, it is alleged that the accused told the complainant (his ex-girlfriend) that if she did not have sex with him, he would send naked photographs of her (taken with consent during the relationship) to her friends and neighbours. He allegedly handed her a disc containing the photographs during this meeting. The complainant went to the police the following day. The offence alleged is one of attempting to procure an act of sexual penetration by threats or intimidation (the offence of attempting to commit and indictable offence is s.321M Crimes Act 1958 and the substantive offence is s.57(1) Crimes Act 1958).
- 19 March 2009 – accused committed for trial.
- 22 January 2010 – Further Directions Hearing.
- 25 January 2010 – Notice filed and served by the accused pursuant to s.35 Charter of Human Rights & Responsibilities Act 2006 (“the Charter”) relating to the lawfulness and admissibility of the recorded conversation between the complainant and the accused.
- 19 February 2010 – Directions Hearing – Trial date of 22 February 2010 vacated due to the Charter issue being raised by the accused.
- 28 June 2010 – Directions Hearing.
- 6 August 2010 – Directions Hearing.
- 6 –10 September 2010 – Pre-trial argument – 5-day pre-trial argument, primarily in relation to the admissibility of the evidence of the recorded conversation in light of the Charter issue. Matter adjourned to May 2011 for trial. The trial judge reserved his decision with the ruling to be provided at a later date.

• 2 May - 4 May 2011 – Trial. His Honour handed down his ruling (66 pages in length). His Honour ruled that, in light of the Charter, the recorded conversation was unlawful but that the evidence was admissible pursuant to the discretion in s.138 of the Evidence Act 2008. The accused then made application for certification for an interlocutory appeal to the Court of Appeal pursuant to s.295 (2) of the Criminal Procedure Act 2009.

• 4 May 2011 – Application for certification for an interlocutory appeal granted. Trial adjourned pending decision by the Court of Appeal.

• 19 May 2011 – Interlocutory appeal commenced before 2 justices of the Court of Appeal (Maxwell P and Harper JA). The matter was adjourned part-heard to 31 May.

• 31 May 2011 – Interlocutory appeal continued. Oral submissions concluded except for those in reply from the accused and HREOC. Matter adjourned. The accused and HREOC were to provide written replies within 21 days. There was an indication from the court that another justice may be added to the bench due to the complexity of the matter, with the third member to proceed on the basis of the materials and the transcript of argument. The court indicated that in light of the complexity of the matter, judgment would not be handed down for some months. The trial has been adjourned pending judgment by the Court of Appeal.

Yours faithfully,

Jeremy Rapke