Submission to
the Scrutiny of Acts and Regulations Committee’s Inquiry into
the Charter of Human Rights and Responsibilities Act 2006 (Vic)

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I. Introduction

1. One of the fundamental aims of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter) is to ensure that legislation, the interpretation of legislation, and the conduct of public authorities are 'compatible with human rights'. Unfortunately, the Charter does not itself make clear what it is for something to be 'compatible with human rights'. This unclarity impedes the usefulness of the Charter in protecting and promoting human rights.

2. My aim in this submission is to draw the attention of the Scrutiny of Acts and Regulations Committee (SARC) to this problem and to recommend some simple amendments to help clarify the meaning of the Charter in this respect.

3. I make this submission to SARC in my capacity as a lecturer in the School of Law at La Trobe University. I am currently on leave of absence from La Trobe University while working in the Department of Justice (Victoria) in the Criminal Law Review unit. However, the views expressed in this submission are my own personal views and do not represent the views of any other person or organisation. Moreover, none of my comments below draws upon my work in the Department of Justice.

4. I must acknowledge here that limited time has meant that I have not been able to base my comments here on extensive research into the relevant and expansive literature in the field.

II. The problem of the meaning of 'compatible with human rights'

5. In a number of key provisions, the Charter refers to the notion of something being compatible (or incompatible) with human rights: s 28 (statements of compatibility in respect of Bills); s 30 (SARC to report on Bills that are incompatible with human rights); s 32 (legislation to be interpreted in a way that is compatible with human rights); s 36 (declaration of inconsistent interpretation); and s 38 (public authorities' conduct unlawful if incompatible with a human right).

6. Despite the notion of ‘human rights compatibility’ being so important to the Charter, the Charter does not itself explain what it is for something (such as a statutory provision or a public authority’s conduct) to be compatible (or incompatible or inconsistent) with human rights (or, indeed, a human right). This gap in the Charter means that users of the Charter, including the courts and public authorities, have had little authoritative guidance as to how they are to comply with the Charter. It would not be enough to say that this is a
topic that has been the subject of case law in other jurisdictions or extended academic commentary. The Charter itself should make this important point clearer and should not require its users to be conversant with the international jurisprudence of human rights.

*Human rights can conflict*

7. Part of the problem with the notion that something must be ‘compatible with human rights’ is that human rights are not, taken collectively, compatible between themselves. That is to say, human rights can sometimes conflict with each other. This means, in turn, that it is far from clear what it might mean for something (such as a statutory provision or an act by a public authority) to be ‘compatible’ with a group of things which are not always themselves compatible with each other.

8. A certain speculative view about rights might have it that all human rights are indeed compatible with each other, such that they form a consistent and unified body of rules that never conflict with or contradict each other. Indeed, some might even wish to say that all human rights entail or mutually support each other, such that to have one human right one must also have all the other human rights. If that were so, then it would indeed be a reasonably straightforward matter as to whether a given statutory provision or act by a public authority is compatible with human rights: human rights will form a single body of rules, against which the statutory provision or act is stood so as to see whether or not it is consistent with that body of rules.

9. Unfortunately, however, human rights do not constitute a single, perfectly consistent body of non-conflicting rules. Of course, many (maybe even most) human rights are consistent with many other human rights on most occasions, and many will no doubt be supportive of certain other human rights. However, it is an important truth about human rights — and one that is very widely recognised — that human rights can themselves sometimes conflict with each other.

10. A simple example is that of freedom of expression and the right to security of the person. An unlimited right to freedom of expression would allow the making of death threats, which would amount to a breach of the right to security of the person. As virtually everyone will accept, it is entirely legitimate to protect the right to security of the person by limiting freedom of expression through prohibiting the making of death threats. (The Charter’s s 15(3) indeed recognises that such limits on the right to freedom of expression are acceptable.)

*Resolving conflicts between rights*

11. In cases of conflict between rights (or, indeed, between rights and other, non-rights-based values), there needs to be a way or ways to resolve the conflict. How such conflicts are resolved is a key part of (and test of) any reasonably comprehensive account of human rights. As Professor James Griffin puts it in his important recent book *On Human Rights*, “[t]here is no better way to force thought about human rights to a deeper level than to try to say something about how to resolve conflicts involving them” (Oxford University Press, 2008, p 57).
12. Resolving rights conflicts will usually be by a process of mutually compromising and adjusting the scope of the conflicting rights to the point where the conflict ceases or is reduced to a tolerable level. In the case of some rights, it may be that they are so fundamental that they may never be limited or compromised. Where such 'absolute' rights conflict with other rights or values, then the conflict is resolved by the non-absolute rights or values giving way.

13. The Charter's s 7 is itself one such approach to dealing with conflicts between and with human rights. It allows human rights to be subject 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' (with various such factors then identified). Section 7 thus recognises that human rights can conflict and that many human rights may sometimes need to be adjusted, compromised and limited in order to protect and promote other rights and values which outweigh them in certain contexts.

14. Section 7 is a key part of the Charter and fundamentally shapes what it means for something to be 'compatible with human rights', and yet it is not sufficiently integrated into Charter as a whole. This will be discussed further below.

Is a limit on a right compatible with that right?

15. In the case of the prohibition on death threats, it is clear enough the individual's right to freely express him or herself needs to be limited by the rights of others to feel secure and free from the threat of being killed. Such a limit on the right to freedom of expression is clearly reasonable and demonstrably justified in a free and democratic society.

16. Do we then say that the prohibition on death threats, as a clear limit on the right to freedom of expression, is also incompatible (or inconsistent) with the right to freedom of expression? Some might wish to say that the prohibition on death threats, because it is justified, is therefore compatible (or consistent) with the right to freedom of expression. This approach would seem to make the notion of 'reasonable limits' an inherent part of each human right, so that every right inherently extends only so far as is reasonable in each case.

17. I would argue that this loads too much into the meaning of each right, and that it is conceptually neater to allow that any limit on a right is in fact incompatible or inconsistent with that right. The fact that the limit is justified does not make it not a limit, nor does it make the limit something which is in fact compatible or consistent with the right in its own terms. The limitation on that right has been justified on other grounds (i.e. with reference to rights or values other than the right that has been limited). This means, then, that the limitation on that right (as eminently justified and reasonable as it is) is in fact incompatible with the right that is being limited. The limitation remains justified, but that justification does not create compatibility with the limited right. To think so would be to mask the original conflict or to hark back to the idea that human rights never really conflict.
18. It is better, I would argue, to let the scope of a right extend as far as the natural meaning of the words allow, then see what conflicts emerge, and then work out what balancing and compromise is appropriate in each case of conflict.

19. A simple analogy might bring this point out more clearly: a surgeon amputates a patient’s leg below the knee because gangrene has infected a wound in the foot. Without the amputation the person would die. The amputation is surely justified, but the fact remains that the patient’s leg has been ‘limited’ by the surgeon. The justification for that limitation does not mean that the leg has not really been limited. It is clearly not an inherent feature of legs that they are limited in advance by any future amputation it may be prudent to perform. Similarly, the scope of a right is what it is in its terms and is not inherently limited by the as yet unknown conflicts and compromises that may in future see its scope limited in practice in particular situations.

20. From a practical perspective perhaps not much depends on the approach here so long as everyone is clear on the approach they are taking. Confusion on this front, however, could lead to fundamental differences when it comes to judging whether a statutory provision is in fact ‘incompatible’ with ‘a human right’.

*Replace ‘compatible with human rights’ with ‘compatible with the Charter’*

21. In the light of the above considerations, then, it can be seen that the Charter’s standard phrase ‘compatible with human rights’ cannot mean simply that human rights constitute a single body of consistent rules with which statutes and public authorities’ conduct must be consistent.

22. Instead, the Charter must be read as meaning that statutes and conduct must be compatible, not with ‘human rights’ simpliciter, but rather with human rights as subject to any reasonable limits in accordance with s 7.

23. Unfortunately, to read the Charter in this way would appear to strain against the current text of the Charter itself or, at least, to supply words that are not there and are not strictly implied either. The courts may be prepared to do so, but the better solution would be to amend the text of the Charter so that the better approach is also the plain meaning of the text.

24. It could be argued that amendment is not necessary because the meaning of ‘human rights’ in the Charter already effectively includes the clause ‘as subject to any reasonable limits in accordance with s 7’. The Charter’s s 3 defines ‘human rights’ as ‘the civil and political rights set out in Part 2’. Part 2 then lists a number of rights. However, Part 2 also includes s 7, so it could be argued that the meaning of ‘human rights’ in the Charter includes a reference to s 7 and that such a reference to s 7 will incorporate the notion of rights-as-subject-to-reasonable-limits into the meaning of ‘human rights’.

25. However, such an argument seems to draw too long a bow and is clearly trying to paper over a gap in the drafting. In any case, it is too arcane and legalistic for an Act which is meant to be used by a wide range of people. The notion of compatibility with human
rights is so central to the Charter that clarifying its basic meaning should not require expert legal advice.

26. It is recommended, then, that the Charter be amended so as to bring the notion of reasonable limits more clearly into play. In particular, it will be simplest to replace the phrase ‘compatible with human rights’ with the more generic phrase ‘compatible with the Charter’ and then define that generic phrase more particularly as a matter of either not imposing limits on any human right or imposing only reasonable and justified limits on human rights. (See Recommendations below for more detail.)

III. The problem of mismatches between sections 32, 36 and 38

27. A separate though related problem with the Charter is that there are mismatches in the way certain sections are phrased. Some sections refer to compatibility (or incompatibility) ‘with human rights’ (plural) while others refer to compatibility (or incompatibility) ‘with a human right’ (singular). As discussed above, there is potentially a significant difference in the meaning of these two forms of phrasing.

28. Section 32(1) refers to interpreting statutory provisions compatibly ‘with human rights’, while section 36(2) refers to statutory provisions that ‘cannot be interpreted consistently with a human right’. If we take ‘human rights’ (plural) to refer to the collection of mutually adjusted and limited rights (post-application of s 7), then this is something quite different to ‘a human right’ (singular) if this is taken as referring to a human right standing on its own, prior to any limitation according to s 7.

29. Thus, the prohibition on death threats, though it is compatible with human rights (taken as adjusted post-application of s 7), could well be said to be inconsistent (or incompatible) with a human right (namely, the right to freedom of expression). One could only deny the latter claim by saying that each right carries the equivalent of s 7 with it. But, as argued above, this is not the better approach. In any case, even if that were an acceptable approach, there seems to be no reason why sections 32 and 36 should differ in their language here.

30. Section 36 (concerning declarations of inconsistent interpretation) is meant to work very closely with s 32 (the requirement to interpret legislation in a way that is compatible with human rights). In effect, s 36 allows the court to make a declaration when it is unable to give effect to s 32. Given that s 36 is meant to be so closely connected to s 32, it is regrettable that the language of 36 is at variance with that of s 32 in relation to a key point.

31. It may also be noted that s 36 uses the term ‘inconsistent’, while s 32 uses the term ‘compatible’. As there does not seem to be much difference between consistency and compatibility, this would not seem to be a significant difference. Nonetheless, there seems to be nothing to be positively gained in retaining such divergence in terminology and so it is recommended that the divergent sections be made consistent and the phrase ‘compatible with the Charter’ (and appropriate variants thereof) be used.
32. Section 38 (concerning the conduct of public authorities) refers to acting ‘in a way that is incompatible with a human right’ and to failing ‘to give proper consideration to a relevant human right’. Here there is use of the singular (as in s 36) and use of the term ‘incompatible’ (as opposed to ‘inconsistent’) (as in s 32).

33. Again, such divergence in terminology risks unnecessary confusion and there seems to be nothing to be gained by such divergence. It is, therefore, also recommended that the language of s 38 be made amended and the phrase ‘incompatible with the Charter’ be used.

IV. Recommendations

34. The Charter should be amended so that the phrase ‘compatible with human rights’ (and like phrases) is replaced with the phrase ‘compatible with the Charter’. By way of illustration, the key parts of sections 28, 30, 32, 36 and 38 should be amended to read as follows:

- Section 28(3)(a): ‘... the Bill is compatible with the Charter ...’
- Section 28(3)(b): ‘... any part of the Bill is incompatible with the Charter ...’
- Section 30: ‘... whether the Bill is incompatible with the Charter.’
- Section 32(1): ‘... must be interpreted in a way that is compatible with the Charter.’
- Section 36(2): ‘... cannot be interpreted in a way that is compatible with the Charter, ...’
- Section 36(3): ‘... considering making a declaration of incompatible interpretation, ...’
- Section 38(1): ‘... to act in a way that is incompatible with the Charter or, in making a decision, to fail to give proper consideration to the Charter.’

35. The phrase ‘compatible with the Charter’ should then be defined as follows: ‘A Bill, legislation, a statutory provision or conduct of a public authority is compatible with the Charter if either (i) it imposes no limit on any human right, or (ii) it imposes a limit on a human right but that limit is reasonable and demonstrably justified in accordance with section 7 of the Charter’.

36. The phrase ‘incompatible with the Charter’ should be defined as follows: ‘A Bill, legislation, a statutory provision or conduct of a public authority is incompatible with the Charter if it imposes a limit on a human right and that limit is not reasonable and demonstrably justified in accordance with section 7 of the Charter’.

37. I thank SARC for the opportunity to make this submission on the Charter.