SUBMISSION TO THE VICTORIAN PARLIAMENT’S SCRUTINY OF ACTS AND REGULATIONS COMMITTEE IN RELATION TO THE

INQUIRY INTO THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

I. Introduction

1. The Charter of Human Rights and Responsibilities (‘the Charter’) was introduced by the Charter of Human Rights and Responsibilities Act 2006. The purpose of that Act is stated to be “…to protect and promote human rights” (s. 1(2)).

2. Section 13 of the Charter contains a right to privacy, which states that “a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.” The term ‘privacy’ is not defined in the Charter, however, it is intended that the right be interpreted consistently with the Information Privacy Act 2000 and the Health Records Act 2001 (s. 5).

3. The right to privacy protected by the Charter is broader than the privacy protected by the Information Privacy Act. The Information Privacy Act protects information privacy, which is the privacy of recorded personal information. The right to privacy contained in the Charter includes the protection of personal information but also encompasses bodily, territorial, communications and locational privacy.

4. All the rights contained in the Charter, including privacy, can lawfully be limited but only insofar as the limitation can be justified by consideration of all relevant factors. These include: the nature of the right; the importance of the purpose for limiting the right; and the importance that society places on protecting human rights. The right to privacy is not an absolute right and it will often need to be balanced against other rights and interests. A person’s right to privacy can also be interfered with, provided the interference is both lawful (allowed for by the law) and not arbitrary. The United Nations Human Rights Committee has interpreted the term ‘not arbitrary’ to mean reasonable in the particular circumstances.1

5. The right to privacy under the Information Privacy Act is also limited. Section 5 of the Information Privacy Act provides that the right to privacy must be balanced with the public interest in the free flow of information and section 6(1) of the Information Privacy Act specifically allows an individual’s privacy to be interfered with where another piece of legislation allows for such interference. For this reason, the right to privacy under the

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1 United Nation Human Rights Committee, General Comment No. 16, para 3-4.
Charter is stronger than the right to privacy protected by the Information Privacy Act. Just because a breach of privacy is lawful does not mean that it will be compatible with the Charter unless it also passes the test of "reasonableness".

6. Thus, both in its broader focus and its stronger nature, the Charter right significantly adds to privacy protections under Victorian law.

7. As is outlined below, the presence of this Charter provision has led to an increased focus on privacy in the drafting and enactment of legislation and by public authorities in their decision making and administrative activities. While it does not, in my experience, impose an onerous burden on either Parliament or public authorities, it has increased the protection of the privacy of all Victorians.

II. Matters referred to in section 44(2) of the Charter

(a) Additional rights

8. Section 44(2) of the Charter requires this review to inquire into, inter alia, whether "additional human rights should be included as human rights under this Charter, including but not limited to, rights under: (i) the International Covenant on Economic, Social and Cultural Rights; and (ii) the Convention on the Rights of the Child; and (iii) the Convention on the Elimination of All Forms of Discrimination against Women."

9. While the International Covenant on Economic, Social and Cultural Rights does not expressly contain a right to privacy, the right to an adequate standard of living in Article 11 contains an implicit right to privacy, in that the right to adequate housing is considered to include "the right to live somewhere in security, peace and dignity." It has been interpreted as requiring "adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost."

10. The inclusion of this right in the Charter would arguably significantly extend the existing right to privacy in s.13, as while the existing provision protects against unlawful or arbitrary interference with the individual's privacy and home, it does not impose any obligations regarding the adequacy or otherwise of the privacy of the person's home in the first place. The Convention provision would arguably provide a positive right to live somewhere with adequate privacy.

11. The Convention on the Rights of the Child includes an express right to privacy, in Article 16(1): "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and

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2 United Nations High Commissioner for Human Rights, The right to adequate housing (Art.11 (1)): 13/12/1991; CESCGR General comment 4 (General Comments).

3 Ibid.
reputation” and 16(2): “The child has the right to the protection of the law against such interference or attacks.”

12. However, due to the extreme similarity to the wording of s.13 of the Charter and the fact that the right to privacy contained therein is not age limited, it is arguable that this provision of the Convention on the Rights of the Child would add little, if anything, to the existing Charter right. It might, however, make it clearer that the existing right to privacy in the Charter does, in fact, apply to children.

13. The Convention on the Elimination of All Forms of Discrimination against Women does not contain any provisions concerning the right to privacy.

(b) Further compliance provisions

14. Some benefit could be obtained from the inclusion of further compliance provisions in the Charter. Provision for regular random audits of public authorities to determine the level of Charter compliance could be very useful in terms of further turning the attention of such public authorities to Charter rights, including the right to privacy.

15. Section 58(g) of the Information Privacy Act gives the Privacy Commissioner the function “to examine the practice of an organisation with respect to personal information maintained by that organisation for the purpose of ascertaining whether or not the information is maintained according to the Information Privacy Principles or any applicable Code of Practice.”

16. In my experience, this has proved to be a very useful function in focusing attention on a particular privacy issue, either across a number of different organisations or within a specific organisation. In the same way, providing a regulatory function of auditing Charter compliance could strengthen the existing Charter provisions.

17. Similarly, extending the range of remedies under the Charter to enable individuals to complain to the Victorian Equal Opportunity and Human Rights Commission where a public authority has breached a Charter right could prove a useful adjunct.

18. In my experience, the regime set up under Part 5 of the Information Privacy Act, whereby the Privacy Commissioner can accept and attempt to conciliate complaints of interferences with privacy, and if conciliation is inappropriate or unsuccessful, matters can be referred to the Victorian Civil and Administrative Tribunal for determination, is a useful model. It has proved a practical and flexible way to provide individuals with redress for breaches of their rights, without imposing an unreasonable burden on public authorities.

19. Implementing such a regime under the Charter would usefully complement the Information Privacy Act regime, in that it would provide redress for interferences with bodily, territorial, communications and locational privacy, as well as the protections offered to information privacy by the Information Privacy Act.

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III. The effect of the Charter

(a) Development and drafting of statutory provisions:

20. The requirement in s.28 of the Charter that all new Bills introduced into the Victorian Parliament must be accompanied by a Statement of Compatibility has led to a marked increase in the attention and consideration paid to the right to privacy when developing and drafting legislation.

21. This has also led to a significant increase in the number of public sector organisations seeking to consult with the Privacy Commissioner when developing legislative proposals and drafting legislation. This has a significant benefit in potentially avoiding undue interferences with the privacy rights of Victorians, and assists the Privacy Commissioner’s function under s.58(n) to examine and assess any proposed legislation for adverse effects on the privacy of individuals.

(b) The consideration of statutory provisions by Parliament

22. Even where the potential interference with privacy represented by a particular draft Bill’s provisions are not modified or amended during development or drafting as a result of consultation, the fact that a Statement of Compatibility or an override declaration under s.31 of the Charter must accompany each Bill improves the transparency and effectiveness of the legislative process. It allows privacy impacts to be more fully considered and debated by the Parliament.

23. Additionally, the role given to the Scrutiny of Acts and Regulations Committee (SARC) by s.30 of the Charter to consider any Bill introduced into Parliament and report whether the Bill is incompatible with human rights is a valuable addition to the legislative process. It allows human rights issues, including those concerning privacy, to be more fully considered by Parliament and provides an opportunity for interested stakeholders, including the Privacy Commissioner, to make submissions on the human rights and privacy impacts of particular Bills.

24. Given SARC’s more general and quite onerous duties in scrutinising legislation and statutory rules, this function could be further strengthened by the establishment of a specialised Human Rights Committee of the Victorian Parliament, charged solely with scrutinising the human rights impacts of Bills and Regulations. A similar proposal is in the process of being implemented, with bipartisan support, at the Commonwealth level (however, in the absence of a Charter, the proposed committee will examine legislation as against Australia’s stated international human rights obligations).5

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(c) The provision of services and the performance of other functions by public authorities

25. Section 38 of the Charter requires public authorities not to act in a way that is incompatible with a human right (including the right to privacy) or, in making a decision, to fail to give proper consideration to a relevant human right, including privacy. This has significantly improved the policy and administrative processes of public authorities.

26. This requirement has ensured that the human rights of those individuals in Victoria are central consideration in the process of developing policies, projects and service delivery.

27. This has led to a marked increase in public sector organisations seeking to consult and obtain advice from the Privacy Commissioner when developing and implementing new projects, policy proposals or models for service delivery. This not only better protects privacy rights, it also helps to prevent problems and potential costs to the public purse which may be caused by later, avoidable interferences with privacy under the Information Privacy Act.

d) Litigation and the roles and functioning of courts and tribunals

28. While the Charter does not create any new cause of action, the Charter does provide that where there is an existing cause of action outside of the Charter, unlawfulness under the Charter may constitute an additional ground for the action (s.39).

29. This has led to the Charter right to privacy being cited or argued in a relatively small number of cases before various courts and tribunals. This office has been able to identify 27 matters where the right to privacy has been raised, as at 2 May 2011.6

30. In six of the matters, the Charter right to privacy was raised and considered, but the case was decided on other grounds. In another six of these matters, the Charter right was raised, considered and the right was found to be engaged, but the limitation placed on the right was held to be acceptable and justified under the Charter. In five of the matters, the

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Charter right to privacy was raised but it was considered not relevant, not engaged, or not inconsistent and the application of the Charter was rejected. In a separate four matters, the Charter right was raised and considered and it was found to be engaged, but the action complained of was not inconsistent with the Charter. In another four, the Charter was raised considered and upheld: the matter was either decided on the grounds of the Charter or the Charter reinforced the finding on other grounds.

31. There has not been a huge number of matters in which the Charter right to privacy has been raised. Significantly, even where the Charter right is found to be engaged, this is not necessarily determinative of the matter, but merely one of the elements to be considered by the court or tribunal. However, in at least four matters, the existence of the Charter has provided some redress or strengthened an existing remedy.

32. This appears to indicate that the Charter is being used by courts and tribunals and those appearing before them in the way anticipated: carefully and judiciously. It would appear that only where a contravention of the Charter causes real and significant injustice that it determines the outcome.

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