25 July 2011

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

By email: charter.review@parliament.vic.gov.au

Dear Mr O’Donohue


Thank you for the opportunity to present to the review inquiry examining the Charter of Human Rights and Responsibilities Act 2006.

During the course of your inquiry, I was asked about a submission made by the former Director of Public Prosecutions, Jeremy Rapke QC dated 2 June 2011. I have now had opportunity to review Mr Rapke’s submission in which he expressed concerns about delays caused by the Charter in criminal cases. He highlighted his concerns with a singular case example, in which the conduct of the defence for a legally aided person, is being undertaken by a staff practitioner.

I submit the following:

1. The Charter is not the primary reason for the delay in this case example;

2. The example is an isolated one;

3. Unacceptable delays to criminal cases are caused by multiple factors; and

4. The Charter has been used to ameliorate delays caused by prosecution conduct.

1. The Charter is not the primary reason for the delays in the case example

The point of law in this case exists irrespective of the Charter. The Charter is an ancillary and supportive argument, but it is not the primary basis on which the legality of the evidence obtained in that case was challenged. When examined in that light, the impact that the Charter had on the time which this point is taking to resolve is negligible. The pre-trial argument would still have been necessary. The time which the trial judge took to deliver a comprehensive judgment on an important point of law would still have been required. The interlocutory appeals process would still have been available. The time necessary for the Court of Appeal to properly consider the case
would still have been required. The only delay properly attributable to the Charter in this case example is the time taken to notify the Victorian Equal Opportunity and Human Rights Commission and the Attorney General to allow them to intervene.

2. The example is an isolated one

The two cases highlighted in the Director’s submission (i.e. the case example referred to above and the Momcilovic decision) are isolated examples of significant time being taken to resolve Charter related questions. It is inevitable with a new piece of legislation such as the Charter that occasional cases will arise where complex points of law are raised and need to be determined. The existence of these two cases does not say anything unique about the impact that the Charter has had on delays in criminal proceedings when compared to any other piece of new legislation.

3. Unacceptable delays to criminal cases are caused by multiple factors

Delays are caused by a number of factors. They include more complex laws which place pressure on trial lengths, difficulties in allocating appropriate resources to circuit courts, inefficient practices by both prosecution and defence practitioners and the need to deal with a large quantity of new legislation. This legislation includes the Criminal Procedure Act 2009 and the Evidence Act 2008. Understood against that context, the Charter has not, in our view, contributed in any meaningful way to delays in criminal jury trials in Victoria.

4. The Charter has been used to ameliorate delays caused by prosecution conduct

In contrast to the case cited by Mr Rapke QC, we draw your attention to a different case where the Charter was used as a delay reduction tool.

The Charter protects the right to trial without unreasonable delay. Although the right is framed for the benefit of accused people, trial without unreasonable delay also benefits victims of crime, witnesses, the police and the community more generally. It highlights the critical importance of ensuring criminal jury trials are managed in a timely way and not unreasonably delayed. And incentivises good practice.

A client was charged on 13 January 2007 with armed robbery. He was not committed for trial until 4 June 2008 as a result of crown applications to adjourn the committal hearing to join an alleged co-offender. The first conference on 19 August 2008 was adjourned to 18 November 2008 because there were no depositions and no presentment.

On 18 October 2008 the accused made a comprehensive submission to the DPP asking for the case to be discontinued because the evidence on which it was based was extremely weak.

Over the course of the next 19 months the crown failed repeatedly to respond in any way to this request for the case to be discontinued. During that time there were 12 court events and three judges who urged the Crown to finalise its position.

The court was advised on a regular basis that the application was “being considered”.

On 24 May 2010 we applied for a stay of the proceedings based on section 25(2)(c) of the Charter because of the breach of the right to be tried without unreasonable delay as a
direct consequence of the crown's conduct. At that stage the accused had been facing the charge for three years and four months without resolution.

It was only as a result of the application for a stay being filed, the matter being listed before a judge for argument, that the crown finally resolved its position and discontinued the proceedings.

This case highlights the way in which the Charter can be used to ensure that prosecutorial agencies make their best endeavours, within their available resources, to prosecute cases in a diligent fashion.

**Does the Charter add to existing common law protections?**

The Committee rightly highlighted the common law protections of human rights in Victoria and Australia developed over many years. The question that followed is whether the Charter adds anything to those rights.

As you will know, principles developed through the common law on a case by case basis over centuries is often difficult to locate and therefore hard to understand and access by anyone other than those who legally trained. Victoria has a rich modern history of consolidating common law principles and processes into legislation. This does not challenge the validity of the common law protections but ensures that they are articulated in a simple and accessible way. This is precisely the role that the Charter plays. A legislative declaration of rights that have existed in the morass of the common law for centuries is a positive development. As the above example about unreasonable delay highlights, the Charter has also added further positive developments to our criminal justice system.

I trust that these additional submissions will assist your committee.

Yours faithfully

Bevan Warner
Managing Director

cc. The Honourable Robert Clark MP, Attorney General of Victoria