



Submission to the Victorian
Parliament's Scrutiny of
Acts and Regulations
Committee on the Occasion of
the Quadrennial Review of
the *Victorian Charter of
Human Rights and
Responsibilities*

June 2011

THE IPA

The **Institute of Public Affairs** (IPA) is an independent, Melbourne-based non-profit public policy think tank that is dedicated to preserving and strengthening the foundations of economic and political freedom. And it is with a view to those founding principles that the IPA harbours profound concerns about the *Victorian Charter of Human Rights and Responsibilities*.

GENERAL STATEMENT OF CONCERN

The IPA believes that the laws governing Victoria should be written by the people who are answerable to the Victorian people at the ballot box. Like Thomas Jefferson, the IPA holds the view that "governments are instituted among Men, deriving their just powers from the consent of the governed."

But the *Victorian Charter of Human Rights and Responsibilities* transfers power from the Victoria's elected parliamentary representatives to unelected judges who are beholden to no one but themselves. The added authority invested in the judiciary by the *Charter* provide an easy temptation for judges to become an active participant in the business of legislation that should be the sole purview of parliament.

The *Charter* empowers the Supreme Court to declare a law "incompatible with human rights". And while Parliament may override such a declaration of incompatibility, the intervention by unelected judges into the business of our elected legislature distorts the political dynamic of our state. It offends against the separation of powers principle that is a foundation stone of modern democracy.

SPECIFIC CONCERNS - NATURAL RIGHTS AND RESPONSIBILITIES OMITTED BY THE CHARTER

ALL RIGHTS, NO RESPONSIBILITIES

Despite being entitled the *Charter of Human Rights and Responsibilities Act*, the *Charter* focuses solely on rights and does not mention a single responsibility, *per se*.

NO EXPLICIT RECOGNITION TO AN UNALIENABLE RIGHT TO PRIVATE PROPERTY

Since first being articulated in John Locke's *Second Treatise of Civil Government*, the right to private property has always been one of the central pillars of the democratic compact between citizens and their government.¹

Yet property rights merit only a one and a half line mention in the *Charter*. And even then, there is no explicit statement of an unalienable right to property ownership. Property rights are only mentioned in the context of compensation in the event that the Government desires to acquire private property through eminent domain. By contrast, of the 20 separate rights codified in the *Charter*, seven pertain to accused criminals. The rights of those charged with criminal offences run to 139 lines in the *Charter*.

FLAWED RESPECT FOR FREEDOM OF CONSCIENCE

Freedom of Parental Conscience in Education

The *Charter* mentions freedom of conscience, but it is silent on the right to educate one's own children in accordance with one's own moral precepts and religious views - a right specified in the

¹ John Locke, *Second Treatise of Civil Government*, Chapter 9

International Covenant on Civil and Political Rights²
on which the *Charter* is largely based.

Freedom of Conscience in Trade Union Membership

The *Charter* similarly guarantees to a right to trade union membership, but says nothing about an individual's right not to join a trade union.

Freedom of Association - the "Travel Sisters" business

The Travel Sisters travel agency sought an exemption from VCAT under the *Equal Opportunity Act* to run a single sex travel service on the grounds that some women felt uncomfortable going on trips with groups of men. The application was denied by VCAT on the grounds that the *Charter* mandated VCAT to impose a "very stringent test" on s83 of the *Equal Opportunity Act 1995* governing exemptions. This impinges on the right to freedom of association that is a cornerstone of our individual rights as free Australians.

SPECIFIC CONCERNS - RELIANCE ON FOREIGN JURISPRUDENCE

s 32(2) of the *Charter* states:

International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

This is one of the most objectionable sections of the *Charter*. We live under a system of Victorian laws enacted by a Victorian Parliament chosen by the Victorian people.

But the *Charter* essentially invites the use of cherry picked foreign judicial rulings that reflect philosophies, mores and values that are alien to our

² Article 18(4)

system of common law.

In the case of *WBM* [2010], Kay J of the Victorian Supreme Court wrote:

In light of that provision [s 32 (2) of the Charter], a number of decisions of European and international courts were brought to my attention, as well as opinions of the United Nations Human Rights Committee. The decisions, which were drawn to my attention, were interesting and helpful.³

In *Sabet v Medical Practitioners Board* [2008], Hollingworth J of the Victorian Supreme Court cites a long list of foreign precedents and international treaties that he considers relevant to his ruling.⁴

It should be an issue of considerable concern when the highest court in Victoria seeks inspiration and guidance from judicial rulings of foreign courts that reflect foreign laws and foreign judicial precedents.

Until 1986, it the highest appellate jurisdiction court open to Australian citizens was the Privy Council in London. That year, the enactment of the Australia Act - with support of all parties - ended that extra-national avenue of appeal

On the topic of appeals to the Privy Council, Gough Whitlam declared:

It is entirely anomalous and archaic for Australian citizens to litigate their differences in another country before judges appointed by the government of that other country.⁵

Former Hawke government finance minister Peter Walsh made a similar observation about those desirous of subordinating Australian national sovereignty to the will of the so-called 'international community':

³ *Wbm V Chief Commissioner Of Police* [2010] Vsc 219 (28 MAY 2010) at para 49

⁴ *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 (12 September 2008) at paras 151 to 175

⁵ Senator Rod Kemp, *International Tribunals and the Attack on Australian Democracy* (Samuel Griffith Society 1994)

I am not and never have been a monarchist, but find it ironic that so many contemporary Australians determined to protect us from the non-existent threat of English tyranny, fall over each other in a scramble to surrender Australian sovereignty to a ragtag and bobtail of unrepresentative United Nations committees accountable to nobody.⁶

In a High Court ruling invalidating a Queensland state law to enable direct appeals to the Privy Council, Murphy J wrote:

The establishment by an Australian State of a relationship with another country under which a governmental organ (judicial or otherwise) of that country is to advise the State on the questions and matters referred to in the Act, is quite inconsistent with the integrity of Australia as an independent sovereign nation in the world community. It is not within the legislative competence of the Parliament of any State to compromise or attempt to compromise Australian sovereignty and independence.⁷

Yet compromising both Australian and Victorian autonomy and independence is precisely what the *Charter* does by invoking the use of foreign judicial precedent.

CRIME & PUNISHMENT

Crime Victims' Rights

The *Charter* goes into great detail stipulating rights for the criminally accused, there is no mention of any rights for victims of crime. Similarly, the *Charter* is silent on the issue of the rights of the law abiding populace to be free from the predations of criminals.

SPECIFIC CONCERNS - SELF DETERMINATION

The Terms of Reference published by the Victorian Parliament's Scrutiny of Bills and Acts Committee for its quadrennial review of the *Victorian Charter of Human*

⁶ *ibid*

⁷ *ibid*

Rights and Responsibilities asks whether self-determination should be included in any future versions of the *Charter*. The IPA stance on this question is an unequivocal no.

The *Oxford Dictionary* defines self-determination as: "the process by which a country determines its own statehood and forms its own government."⁸ The *Macquarie Dictionary* definition reads:

1) determination by oneself or itself, without outside influence; 2) the determining by a people or nationality of the form of a government it shall have, without reference to the wishes of any other nation.⁹

This, by definition, would involve the secession of some portion of Victorian territory to create a newly sovereign and separate political unit.

In the view of the IPA, this is a political can of worms that should not be opened.

SPECIFIC CONCERNS - STATEMENTS OF COMPATIBILITY

The *Charter* requires that a "Statement of Compatibility" must be prepared for every new piece of legislation that "engages" a right under the *Charter*. Significant time and resources are dedicated to producing such statements. Many of them cover issues that add very little to serious debate on issues of rights, e.g.:

- whether a prohibition on the possession of implements to engage in identity theft infringes the right to freedom of expression (*Crimes Amendment (Identity Crime) Bill 2009*)
- whether requiring persons who serve on town planning committees to disclose their interests on a register

⁸ <http://oxforddictionaries.com/definition/self-determination>

⁹ *Macquarie Concise Dictionary (Revised Third Edition 2005)* p 1090

- of interests infringes their right to privacy and reputation (*Planning Legislation Amendment Bill 2009*)
- whether granting or extending a lease over Crown land to a person to run a kiosk or other facility infringes the right to freedom of movement by preventing other citizens moving freely over that piece of Crown land (*Crown Land Amendment (Leases and Licences) Bill 2009*)
 - whether banning graffiti is a justifiable limitation of the freedom of expression of graffiti 'artists' (*Graffiti Prevention Bill 2007*)
 - whether the ability of a fire safety inspector to evacuate licensed venues that are a serious fire hazard is a justifiable limitation on freedom of movement (amendments to the *Liquor Control Reform Act 1998* made by the *Justice Legislation Further Amendment Bill 2010*)
 - whether police powers to seize ice pipes for sale in retail shops is a justified limitation of property rights of ice pipe retailers (amendments to the *Drugs, Poisons and Controlled Substances Act 1981* made by the *Justice Legislation Further Amendment Bill 2010*. The Statement of Compatibility re-assures readers that "*If an ice pipe is seized, it must be returned within three months*".)

SPECIFIC CONCERNS - THE OVERT POLITICISATION OF VEORHC

The *Charter* invests the Victorian Equal Opportunity and Human Rights Commission with the statutory power to:

do all things that are necessary or convenient to be done for or in connection with the performance of its functions under this Charter.¹⁰

These "things" include the power to:

¹⁰ op cit Charter, s 42

intervene in, and may be joined as a party to, any proceeding before any court or tribunal in which a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter.

If the Commission intervenes in a proceeding under this section, then, for the purpose of the institution and prosecution of an appeal from an order made in that proceeding, the Commission may be taken to be a party to the proceeding.¹¹

In light of these statutory powers, it is highly desirable that VEOHRC should refrain from actions, interventions or statements that might be construed as ideologically or politically partisan. But the record shows that the Commission has repeatedly injected itself into contentious and explicitly political controversies.

The Northern Territory Intervention

In 2008, the Commission Chairman Dr Szoke publicly criticised the NT intervention, and expressed her disappointment that a national Charter of Rights was not in place that could have undermined it:

Participation is a human right that must be embedded in the processes of policy development, service delivery and evaluation.

Participation is the key to reducing experiences of victimisation, empowering people and making them less vulnerable to the vagaries of decision-making that have characterised the government's approach to the Intervention ...

If a national Human Rights Charter was in place, similar to the Victorian Charter of Human Rights, then a whole range of human rights, including participation, would be protected as law.

Most importantly, a national Human Rights Charter would provide a thorough method to consider the possible impact of proposed legislation on human rights before the legislation was finalised.¹²

Commentary on the Northern Territory intervention is clearly outside the scope of the VEOHRC's powers,

¹¹ *ibid* section s 40

¹² Letter to the Editor - Northern Territory Intervention, 28 October 2008

which are limited to matters relating to human rights and the *Charter* in Victoria.¹³ It should also be noted that the process to develop the Charter of Rights decided to expressly exclude certain so-called indigenous rights from the Charter.

David Hicks

VEOHRC has strongly supported David Hicks on *Charter* grounds, despite the fact that he has no known links with Victoria. In 2007 the Commission stated:

In relation to David Hicks' continuing incarceration she said the Commission is disturbed that fundamental human rights have not been observed; the right to liberty, the right to humane treatment when deprived of liberty, the right to a fair hearing, rights in a criminal proceeding, and the application of retrospective criminal laws. "The Victorian Charter of Human Rights and Responsibilities is a law that protects Victorians from the human rights abuses that David Hicks has been subjected to."¹⁴

Custodial prisoners seeking IVF treatment

In 2010 a 45 year-old female prisoner argued that the *Charter* gave her a right to government-subsidised IVF treatment whilst in prison. The Victorian Supreme Court found that to not provide such treatment was in breach of the right under the Charter that "All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity."¹⁵ The former government argued unsuccessfully against this "right". VEOHRC intervened to argue in favour.

Convicted drug dealers

In 2010 in the *Momcilovic* case the Victorian Court of Appeal upheld the argument of a convicted drug

¹³ Section 41 of the *Charter of Rights and Responsibilities Act 2006*

¹⁴ "Human Rights Conference highlights importance of Charter" Media Release, 26 February 2007

¹⁵ *Castles v Department of Justice* [2010] VSC 310:
<http://www.austlii.edu.au/au/cases/vic/VSC/2010/310.html>

dealer that Section 5 of the *Drugs, Poisons and Controlled Substances Act 1981 (Vic)* was inconsistent with the *Charter*.¹⁶ This section of the Act imposed a 'reverse onus' on persons found in possession of illegal drugs to prove they were not in possession. The drug dealer argued this was inconsistent with the right to be presumed innocent under the *Charter*. VEOHRC intervened in the case to argue that section 5 of the Act should be re-interpreted in a manner that favoured the rights of the accused.

The "Travel Sisters" Case

The Travel Sisters travel agency sought an exemption from VCAT under the *Equal Opportunity Act 1995 (Vic)* to run a single sex travel service on the grounds that some women felt uncomfortable going on trips with groups of men. The exemption was denied. VEOHRC intervened in the case against Travel Sisters, arguing that:

the Tribunal should not grant the exemption unless satisfied firstly that there was a demonstrable need for female-only services of this nature based on safety, security or other compelling considerations and secondly that there was persuasive evidence that the exclusion of males from the service would in fact secure the objectives of providing a safe and secure travel environment for females.¹⁷

CONCLUSION

The *Victorian Charter of Human Rights and Responsibilities* is a flawed document that undermines the principle of accountability to the people that is a foundation stone of our democracy. The Charter empowers unelected judges at the expense of an elected parliament

¹⁶ R v Momcilovic [2010] VSCA 50
<http://www.austlii.edu.au/au/cases/vic/VSCA/2010/50.html>

• ¹⁷ *Travel Sisters (Anti-Discrimination Exemption)* [2009] VCAT 2427 at para 22

that is answerable to the Victorian people. It invites undue interference by the judiciary into matters that are the purview of the parliament. It invokes foreign jurisprudence from foreign lands that represent principles alien to our common law legal system. It ignores some of our most fundamental natural rights while bestowing unwarranted power on others. The end result is a warping of our political system that endangers our rights as free Victorians.

For these reasons the Institute of Public Affairs considers the *Victorian Charter of Human Rights and Responsibilities* to be a document that is flawed beyond salvation and is worthy only of complete repeal.