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LIBERTY VICTORIA

SUBMISSION TO REVIEW OF THE

VICTORIAN CHARTER OF RIGHTS AND RESPONSIBILITIES

Part 1 – Human Rights, Context and History

1.1 Introduction

1. The present review of the Victorian Charter of Rights and Responsibilities 2006 (The Charter) takes place against the background of the international, historical development of such instruments that has gathered pace ever since the conclusion of the Second World War. It is important, therefore, briefly to situate the present legislation and its review within that historical context.
2. In response to the genocidal atrocities of the Second World War, the world united to take steps to ensure, as far as possible, that no such crimes against humanity would ever again be committed. The United Nations Charter was adopted in 1945. It contained in its fundamental purposes a commitment to 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.¹ The United Nations General Assembly was convened and soon afterwards agreed that a Commission on Human Rights should be established, consisting of representatives of all member states, to draft a declaration of the human rights to which the world body and the global community would adhere. After exhaustive discussions and negotiations, the Committee, chaired by Eleanor Roosevelt, recommended the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. The Declaration was endorsed without dissent by the member states of the UN, even though the member states brought to the negotiating table radically different political and social philosophies. This measure of agreement was, by any account, an extraordinary achievement. It is for that reason, that the UDHR has become the

¹ UN Charter, Article 1(3).

foundation stone upon which every succeeding international and national human rights instrument has been constructed.

3. The UDHR is a Declaration. This means that it has no binding force. Consequently, in succeeding years, the UN General Assembly worked assiduously to develop two, parallel international human rights treaties to which the nations of the world would commit themselves. These were the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The two treaties were finalized in 1966. These two treaties are now accepted by more than 150 nations and were ratified by Australia in 1976. With the creation of the UDHR and its two constituent treaties, the world is now endowed with an International Bill of Rights against which the legitimacy of any government will be measured.
4. Once international agreement was reached on the content of human rights, the necessary consequence was that such rights must be incorporated into a system which secures their effectiveness through appropriate mechanisms and procedures. In national systems the relationship between rights and their enforceability should be straightforward. According to the old English adage, where there is a remedy there is a right. That proposition is equally true in reverse. Where there is a right, there must be a remedy. To speak of a right, without being able to point to a remedy for the enforcement of that right, makes no sense.
5. For this reason, nations which have ratified the ICCPR and the ICESCR, have since their ratification all taken steps to incorporate the terms of these treaties into domestic law. Most in the West have included a statement of human rights, and mechanisms for their enforcement, in their Constitutions. Fewer, but nevertheless a significant number, have given their human rights commitment a statutory foundation.
6. Globally, the commitment of nations to recognize and protect human rights rapidly gathered force following the adoption of the two Covenants. In the first place, the conventions combating discrimination were developed. These were the International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979). Other treaty instruments of great significance are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT 1984) and the Convention on the Rights of the Child (CRC, 1989). The most recent products of the human rights standard setting activity of the UN are the Convention on the Rights of Persons with Disabilities (CRPD, 2006) and the International Convention for the Protection of All Persons from Enforced Disappearance (CPPED, 2006). Together with the two Covenants, these conventions form the constituent elements of the global system of human rights protection.

7. The establishment of this international treaty regime has been complemented by the adoption of several regional human rights treaties and agreements. Unsurprisingly, following the barbarism of the Nazi regime, it was in Europe that the first regional human rights instrument was adopted. The European Convention on Human Rights (ECHR) was signed in 1950. Its provisions were based largely on the UDHR and came together with strong enforcement provisions that bound the 47 nations of Europe to meet common human rights standards. The European Court of Human Rights was established as the final arbiter of human rights disputes across the region. Many years after the adoption of the Convention, Europe's leadership realized that human rights protection could not properly be given effect if economic and social rights were treated as entitlements of lesser importance. Consequently, the Council of Europe established a regime that would place economic and social rights, too, under European supervision. This was achieved with the adoption of the European Social Charter in 1961. Initially, the enforcement mechanisms under the Charter were weak. They have been progressively strengthened ever since.
8. The European example has been followed by the adoption of two other important regional human rights treaties. The first is the American Convention on Human Rights binding the nations of Latin America. The Convention was adopted in 1969 and its content strongly resembled that in both the ECHR and the UDHR. As in Europe, the initial convention was later supplemented by a Protocol that sought to strengthen protection for economic and social rights. The second is the African Charter of Human and Peoples' Rights of 1981. The African Charter is novel in that it sets forth not only classical liberal rights but also a limited number of economic and social rights such as the right to work, the right to health, and the right to education. Until recently, the Asian region has lagged in relation to the adoption of regional human rights protection. However, in 2007, the Association of South-East-Asian Nations (ASEAN) adopted a new constitution. In that constitution, the organization committed itself to strengthen democracy, enhance good governance and the rule of law and to protect and promote human rights and fundamental freedoms. As part of that commitment, the organization has established the ASEAN Intergovernmental Commission on Human Rights 2010. The powers of the Commission are weak but nevertheless its establishment is a considerable advance.
9. Taken together the rights recognized and elaborated in the different international instruments seek to protect people from fear – principally through the protection of civil and political rights – and from want – principally through the recognition and protection of economic and social rights. Additionally they aim to provide protection against discrimination. Such resolute action against discrimination corresponds to the inherent logic of the human rights idea in accordance with which every human being must be treated on an equal footing with every other

without prejudice as to their inherent characteristics such as race, sex, ethnic or social origin, age, sexual orientation, disability and other similar matters.

10. In line with these historical developments and international treaty commitments, every Western nation has incorporated the recognized and accepted, civil and political rights, into domestic law. This incorporation has taken the form either of a constitutional charter or rights or a statutory charter the terms of which reflect the provisions of the International Bill of Rights. There is only one exception. Australia has not. Nevertheless, recently, two Charters have been adopted at State and Territory level. The first was the ACT Charter, adopted in 2004 and the second was the Victorian Charter of Rights and Responsibilities in 2006. Comprehensive inquiries have been undertaken in Tasmania and Western Australia to determine whether or not those States should follow Victoria in adopting a rights charter in legislation. Both inquiries recommended that step. The report of the Western Australian inquiry, chaired by the former Liberal Party Minister, the Hon. Fred Chaney, was particularly impressive. Pursuant to that legislation, the Charter is now under review by the Parliamentary Scrutiny of Acts and Regulations Committee. (SARC).

1.2 What are Human Rights?

11. It is against this historical background that the present review is being conducted. Before moving to the specific questions asked by the Committee in relation to the review, Liberty believes it important to understand why, exactly, human rights are important. Without some understanding of the philosophy of human rights it is difficult to come to grips with questions as to how they might best be defined and protected.
12. At some sixty years distance from the adoption of the UDHR, it is not realized as forcefully as it once was how crucial peoples' experience of the pathologies and collective madneses of Nazism during the Second World War were in determining the content of the rights set down in the Declaration and, consequently, in influencing the essential content of every human rights instrument that has been drafted ever since. Because that experience was so formative, it is worth spending a moment more to reflect on it here.²
13. The Declaration acknowledges its roots in genocidal terror in its Preamble. It recites as its rationale that contempt for human rights results in 'barbarous acts which have outraged the conscience of mankind'. For that reason if 'man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and

² On the drafting of the Universal Declaration of Human Rights see Glendon M. (2002), *Eleanor Roosevelt and the Drafting of the Universal Declaration of Human Rights*;

oppression' human rights must be protected by 'the rule of law'. The member states of the United Nations affirmed their faith in human rights and in the dignity and worth of the human person. They established the Declaration as a common standard of achievement for all nations and peoples. Every nation, from that point onwards, was to ensure progressively that people's fundamental human rights would obtain universal and effective recognition.

14. Although framed positively, the Declaration's most important provisions are a direct reaction to Nazism's most negative and pathological beliefs and behaviours. The following examples make the point more clearly. Article 1 provides that 'all human beings are born free and equal in dignity and rights' and that 'they are endowed with reason and conscience'. It is a direct reaction to and repudiation of Nazism's propagation of racial superiority and, therefore, people's fundamental inequality. It announces dignity and reason as those qualities of human being most worthy of universal respect and protection. This too is a response to Nazism's drastic assertion that some peoples may be considered as less than human.
15. Article 2 entitles everyone to rights 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other state'. The provision is a powerful rebuke to the fascist idea of a 'master race'.
16. Article 3 guarantees to everyone a right 'to life, liberty and security of the person'. A report on the Nazi war crimes trials prepared for the UN Human Rights Commission reported on 'the policy that was in existence in Germany by the summer of 1940, under which all aged, insane and incurable people, "useless eaters" were transferred to special institutions where they were killed'. Life was cheap to the Nazi regime and only some were deserving of it. It was on the foundation of this view that the seeds of the 'final solution' were sown.
17. Article 5 is a straightforward repudiation of the use of torture and cruel, inhuman and degrading treatment. There were many forms of such treatment practiced during the Second World War but none, perhaps, was as infamous as that of medical experimentation on human beings conducted without their consent and with utter disregard for their physical and psychological well-being. The War Crimes report listed many forms of such experimentation including 'the sterilization of women, anatomical research, the inducement of disease including typhoid, surgical castration, heart injections and experiments on children.'
18. Article 10 provides that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. It takes into account and forbids the replication of Nazism's so-called 'courts', tribunals packed with party ideologues and military apparatchiks established not to hear and determine a criminal case but rather to punish or exterminate certain 'criminal types'.

19. Articles 19's guarantee of freedom of expression and Article 20's guarantee of freedom of political assembly were referable to Hitler's destruction of the Reichstag and his subsequent decrees forbidding campaign rallies, permitting the arrest of opponents at will and the annulment of almost all the basic rights that had previously been guaranteed by the German Constitution.
20. These examples are sufficient to illustrate the general point. *This is that human beings are capable of behaving terribly to one another; that governments may act appallingly to their peoples; and that, for all the reasons emerging from the account above, people require robust legal protection - not only from the periodic explosion of extreme pathologies but also from the many, more minor but nevertheless serious assaults upon human dignity that governments and other powerful institutions may inflict- not least in times of great stress.*

1.3 Ethics and Human Rights

21. As is evident, the UDHR was born in the wake of the dreadful, negative experiences of war. It should not be thought, however, that this is the sole source of their acceptance and adoption. Harking back to Aquinas and his successors, it is clear too that the idea that we all possess fundamental human rights and are entitled to exercise them has a strong and positive foundation in political and moral philosophy. Several theories of rights have been developed within this tradition. Perhaps the most influential is one which founds human rights in the idea of human dignity or personhood. It is worth exploring this ethical argument in a little more detail.
22. The idea that all people have certain inalienable rights was profoundly influential in the drafting of the *Declaration of the Rights of Man* in eighteenth century France and the *Declaration of Independence* in America. The French declaration averred that 'the aim of all political association is the conservation of the natural and inalienable rights of man. These rights are: liberty, security and resistance to oppression.' In a formulation just as famous, the drafters of the American declaration stated that 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness'.
23. Neither of these declarations, however, goes on to explain why exactly we should consider such rights to be inalienable. The best response to this question seems to be that that absent such rights, something or some-things essential to our idea of ourselves as human would be lost. So, what is it to be human and what would be lost if we were deprived of the rights that, in a fundamental way, contribute to making us so?

24. In a recent book, the Oxford philosopher, James Griffin sets down the bones of an answer to the question.³ Griffin argues that what marks us out as human beings is our capacity for reflection and action. Our status as human depends on the capability we have to deliberate, assess, choose and act in ways that will advance our notion of a life well-lived. Human rights, then, are a form of protection of what it is to be human. - of our capacity to act consciously and deliberately in the formulation of our life's journey. Griffin calls this the protection of our 'personhood'. He explains the connection between our 'personhood' and the human rights essential to protect it in the following way.
25. If we take the capacity to reflect and then act as central to our status as human, then our capabilities in this respect are worthy of special protection. First, we must protect ourselves from domination or control by others – whether other people or institutions. If we do not, then our ability to determine our life's course is destroyed. Second, we must protect ourselves from ignorance and poverty. If we do not, then we will have neither the minimum education nor the minimum resources we require to act in pursuit of our life's goals. Third, we need protection against being blocked by others. Without that protection, other people or other institutions may deprive us arbitrarily of our liberty - the absolute precondition for the exercise of choice about our lives. Translating all this into human rights terms, Griffin writes:
- “Out of our notion of personhood we can generate most of the convention list of human rights. We have a right to life (without it, personhood is impossible), to security of the person (for the same reason), to a voice in political decision (a key exercise of autonomy), to free expression, to assembly and to a free press (without them the exercise of autonomy would be hollow), to worship (a key exercise of what one takes to be the point of life). It also generates, I should say (though this is hotly disputed), a positive freedom: namely, a right to basic education and minimum provision needed for existence as a person – something more, that is, than physical survival). It also generates a right not to be tortured, because, among its several evils, torture destroys one's capacity to decide and to stick to a decision. And so on”.
26. A different but complementary way of looking at this is to say that without human rights we are open to injury. This means more than just experiencing physical or psychological damage, although these are immensely significant. It also embraces something deeper – injury to our sense of ourselves as human or, in other words, to our identity or dignity as members of human society. But what does that mean?
27. It means, as the discussion about Nazi atrocities above illustrates clearly, that at the extreme we may be stripped of our humanity by being treated as less than

³ Griffin J. (2007), *On Human Rights*, Oxford: Oxford University Press.

human and even as a thing - as an object of no value. The injury to our sense of who we are provoked by this dehumanization of this kind will be profound as the many testaments of Holocaust survivors have made plain. We do not need to go to the extreme, however, to get a sense of the injury that may be inflicted even in more commonly experienced situations.

28. So, for example, if you were imprisoned without trial, or following a trial that was unfair, you would legitimately experience both anger and a kind of existential pain. You would rightly experience the arbitrariness and restriction as profoundly unjust.
29. Or, to take a more contemporary example, if the community to which you belong were subjected to massive government intervention, on a racially discriminatory basis, then no matter how well intentioned the interveners may be, you might exclaim legitimately that you were being hurt and degraded at some very fundamental level. Something of the feeling of this was captured vividly, recently by Peter Yu, the Chair of the Inquiry into the Northern Territory intervention when he explained that:

“The key issue for us in the Northern Territory was this feeling of anger and hurt and frustration. The communities felt ‘what’s happened to us, why are we so repugnant to the rest of the nation. We thought we were Australians and yet we’ve had this done to us, what have we done to deserve this? Why are we being subjected to these punitive and coercive measures, measures based on racial differentiation.”⁴

30. More generally, we might say that our human dignity will be injured if any one of the following claims is denied:
 - a claim to have a life
 - a claim to lead one’s life
 - a claim against severely cruel or degrading treatment
 - a claim against severely unfair treatment⁵
31. In contrast, the observance of these claims will act as a guarantee that any and every person may live a life that is at least minimally decent and self- directed – a life tolerably free from assaults on human dignity. Here again, these claims in their turn may found the human rights now commonly recognized in most major international human rights treaties.

⁴ Peter Yu, quoted in *The Age*, 29 October 2008.

⁵ This categorization is taken from Nagel T. (2006), *Making Sense of Human Rights*.

32. The claim to life, for example, founds the right to life, liberty and security of the person. The claim to lead one's life founds the rights to thought, conscience, religion and belief; to freedom of expression, assembly, association and movement; and to participate democratically in political affairs. The claim against severely cruel treatment founds the prohibitions on torture, slavery and medical treatment and experimentation without consent. The claim against severely unfair treatment founds the right to fair trial; freedom from arbitrary detention; and the social rights to health, education and welfare amongst others.

33. The Canadian author, Michael Ignatieff captures the essence of the argument well in his recent Harvard lectures:

“In this argument, the ground we share may actually be quite limited: not much more than the basic intuition that what is pain and humiliation for you is bound to be pain and humiliation for me. But this is already something. In such a future, shared among equals, rights are not the universal credo of a global society, not a secular religion, but something much more limited and yet just as valuable: the shared vocabulary from which our arguments can begin, the bare human minimum from which different ideas of human flourishing can take root”.⁶

34. Here, then, we have the fundamentals of the argument for strong human rights protections. Looked at from one perspective, these protections are absolutely necessary as one form of guarantee against the kinds of terrible behaviour in which peoples and governments may engage when captured by extremist ideology or collective panic. Looked at from another, human rights protections are absolutely necessary to place a floor under our existence as decent, reasoned, reflective and active human beings.

35. In both cases, what is being protected is something essential, that is, human dignity or personhood. What is being encouraged is reasoned deliberation about them and their meaning for behaviour and fulfilment in a decent society. For that reason, the protections in question must of necessity be strong. In this arena, perhaps more than any other, flimsy barricades have proven and will prove of precious little use.

⁶ Ignatieff M. (2001), *Human Rights as Politics and Idolatry*, Princeton: Princeton University Press, p.95.

Part 2 - Which Additional Rights?

1. In this section of the submission Liberty considers whether there should be additional human rights included in the Charter. In this respect we deal first with the desirability of including economic, social and cultural rights (ESC rights). Next we consider indigenous rights. Finally we suggest the inclusion of individual human rights initially excluded from consideration at the time of the Charter's commencement.

2.1 Economic and Social Rights

2. Within the provisions of the International Covenant on Economic, Social and Cultural Rights, ESC rights consist among others of the right to work; the right to enjoy just and favourable conditions of work; the right to social security and social insurance; the right of the family to protection and assistance, the right to an adequate standard of living, the right to education, the right to the highest attainable standard of physical and mental health, and the right to cultural life and benefits of scientific progress.
3. This group of rights is considered to be essentially humanitarian and aimed at providing human beings with a right to those basic subsistence needs that make life liveable in dignity, because no dignity can be said to be inherent in a jobless, hungry, sick, homeless, illiterate and impoverished human being. So, by their nature, ESC rights imply a commitment to social integration, solidarity and equality that are indispensable for an individual's dignity and the free development of their personality. As Professor Henry Shue has observed, 'ESC rights are very important basic rights...no one can fully, if at all, enjoy any right that is supposedly protected by society if he or she lacks the essentials for a reasonably healthy life.'⁷
4. It is in this sense, that human rights are properly described as interdependent and indivisible. Once that is accepted, there is no reason in principle to exclude ESC rights from inclusion in domestic human rights legislation.
5. It is frequently objected, however, that ESC rights are cast in such general terms that they cannot effectively be claimed in the way that civil and political rights, such as those no included in the Victorian Charter can be. It can be conceded that there is some vagueness and generality in ESC rights. However, since 1989, the United Nations Committee on Economic, Social and Cultural Rights has provided considerable conceptual clarity and elaboration of the nature and scope of these rights. This elaboration is contained in the detailed General Comments provided by the Committee. In addition, the Constitutional Court of South Africa has very successfully interpreted and applied ESC rights in a diverse array of social

⁷ Shue H. (1979) *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, pp.24-25.

circumstances. That jurisprudence has been cautious and has tended to focus upon the establishment of minimum standards of health, education, housing and social security rather than attempting to dictate broader social policy.⁸

6. A second argument commonly deployed against the inclusion of ESC rights is that such rights are inherently non-justiciable. The argument here is that courts cannot adjudicate on ESC rights because they involve policy decisions that fall within the functions of the legislature and executive rather than that of the judiciary and that the courts cannot take over policy making from governments in relation to ESC rights. This argument mistakes the courts' functions in interpreting and applying such rights. The role of the courts is not to make economic and social policy. That is clearly the province of government. Instead the courts' role, as with civil and political rights, is to ensure the consistency of legislation with human rights standards. This is the approach taken by the South African Constitutional Court.⁹ It is an approach which is consistent with the proper exercise of judicial power, necessarily requires the courts' to provide governments with a margin of appreciation in the making of economic and social policy choices, and ensures that the courts' will intervene in the determination of economic and social policy only as a last resort. In South Africa, the claims that have been entertained, therefore, have been those that demonstrate that government policies have irrationally failed to address an issue of urgency and magnitude.
7. The classification of ESC rights as non-justiciable would be arbitrary. As the UN ESCR Committee has observed:

“It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competencies of the different branches of government must be respected, it must be acknowledged that courts are generally already involved in a considerable range of matters that have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition beyond the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society”.

⁸ See further, Langford M. (2008) 'The Justiciability of Social Rights': From Practice to Theory' in Langford M. (Ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*.

⁹ See in particular: *Soobramoney v Minister of Health, Kwazulu Natal*, 1997 (12) BCLR 1696; *The Government of the Republic of South Africa and Others v Grootboom*, 2000 (3) BCLR 277 ©.

8. It is further important to note that the ICESCR requires only that ESC rights be realized progressively. The Covenant recognizes explicitly, therefore, that the implementation of such rights is subject to resource constraints. Appropriately the standards are not absolute but relative, giving due weight to governmental capacity or present lack of capacity to execute its human rights obligations in this respect. In the Model Human Rights Act attached to this submission, a statutory provision encapsulating this modest approach to the enforcement of ESC rights is set down by way of example. It is reproduced here:

Interpretation of economic and social rights

“...it is acknowledged that these human rights are subject to progressive realisation and that their realisation may be limited by the financial resources available to government. Accordingly, in any proceeding under this Act that raises the application and operation of these human rights, a court must consider all the relevant circumstances of the particular case including –

1. the nature of the benefit or detriment likely to accrue or be suffered by any person concerned; and
2. the financial circumstances and estimated amount of expenditure required to be made by a public authority to act in a manner compatible with human rights

before determining that the provisions of any law or that the acts or conduct of a public authority are incompatible with the Act”.

9. Quite apart from these general arguments, there are a number of more specific, Australian considerations that should be borne in mind when considering whether ESC rights should be included in Victoria’s Charter. In summary these are as follows:

- The National Human Rights Consultation Committee concluded that ‘for most Australians the main concern is the realization of primary economic and social rights, such as the rights to education, housing, and the highest attainable standard of health’. When given the opportunity to rank the human rights important to them, Australians who responded to the Consultation Committee’s survey research consistently rated economic and social rights as amongst their top ten priorities. In a Tasmanian survey conducted in 1998 for example, the priority order was the right to fair trial, to education, to health, to public safety, to work, to free speech, to an adequate standard of living, to not be discriminated against, and to vote.¹⁰ Recent survey work by Professor Mike

¹⁰ University of Tasmania, Centre for Citizenship and Education, 1998. *Preliminary Results of Citizenship in Australia, National Survey*.

Salvaris of RMIT has made it even clearer that Australians value economic and social rights equally with civil and political rights.

- ESC rights are those with most relevance and meaning to the most vulnerable and disadvantaged in the Victorian community. Rights to education, health and housing, for example, are those which would do most to ensure that all Victorians, including in particular those in poverty, are accorded the basic standards of living fundamental to leading a life of minimal dignity.
- The inclusion of the principal ESC rights in the Charter will have a substantially beneficial effect upon policy making within Victorian Government departments and agencies. As with civil and political rights, the sensitization of policy making to economic and social rights concerns will make Victorian Government public servants acutely aware of the minimum standards required of the delivery of economic and social services and improve governmental policy and service delivery outcomes. Further, the development of policy by reference to enunciated human rights criteria is likely to make governmental policy making more transparent and hence accountable.

10. Liberty recognizes, however, that the inclusion of economic and social rights may be a long step for the Committee to take. For this reason, we recommend that only the most fundamental of such rights be included in the first instance. As in the attached Model Bill, the rights included might reasonably be limited to:

- the right to education
- the right to the highest attainable standard of physical and mental health
- the right to housing
- the right to an adequate standard of living and
- the right to work.

2.2 Indigenous Rights

11. As the original owners of the lands upon which Victorians now reside, the State's indigenous population occupies an historically central place in the Victoria's cultural life. In recognition of that, Liberty recommends that a provision be included in the Charter of Rights and Responsibilities which embodies and respects indigenous people's culture and traditions. Such a provision would be one that encapsulates the right of indigenous people to a measure of self-determination. The Model Human Rights Act attached, contains such a provision, which was adopted after extensive consultation with indigenous community leaders. This provision, appropriately adapted, would be a meaningful and respectful addition to the existing rights catalogue. It reads as follows:

The rights of indigenous peoples

1. Indigenous peoples have the collective right to live in freedom, peace and security and to full guarantees against genocide or any other act of violence.
2. Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.
3. Indigenous peoples have the right to practise and revitalize their spiritual and cultural traditions, customs and ceremonies.
4. These rights may not be exercised in a manner inconsistent with any of the human rights set down in this Act.

2.3 Further Civil and Political Rights

12. At the time that the Charter was adopted, some civil and political rights contained in International Covenant on Civil and Political Rights were purposefully excluded. While those exclusions may then have been appropriate as an expression of initial political caution, the positive experience of the Charter since the makes the continuation of such an excess of caution unnecessary. The Attorney-General of Victoria, the Hon. Robert Clark, has in several speeches related to the Charter expressed his view that it does not adequately reflect the rights contained in the Covenant. Liberty agrees. We therefore recommends the addition of the following human rights in the Charter in order to draw the international instrument and State legislation more closely into line.
13. The ICCPR contains a provision in Article 20 that outlaws the advocacy of national, racial or religious hatred that constitutes an incitement to discrimination, hostility or violence. There appears to be no good reason for continuing the exclusion of this prohibition. The public policy case for its inclusion is unarguable. In so far as the right to freedom of expression may appear to contradict it, it is plain that the freedom must necessarily be constrained where not to do so may engender hostility or violence against one or another minority group There has already been an altogether ugly increase in discrimination and hostility towards people of the Islamic faith and of Middle-Eastern origin in Australia. The rise of such sentiment is regrettable, undesirable, provocative and dangerous. Its most extreme forms, those which are reasonably likely to promote active disharmony, dissension and conflict, should plainly be deterred by law. The inclusion of a Charter injunction that such behaviour shall be legally prohibited is self-evidently appropriate. Victoria does have a similar prohibition the *Racial and Religious Tolerance Act (2001)*. Its terms largely reflect those of the ICCPR prohibition. There is no reason why the two should not co-exist, however, and the Charter provision has the additional beneficial effect of providing a standard against which

all other legislation with respect to national, racial or religious tolerance should be assessed.

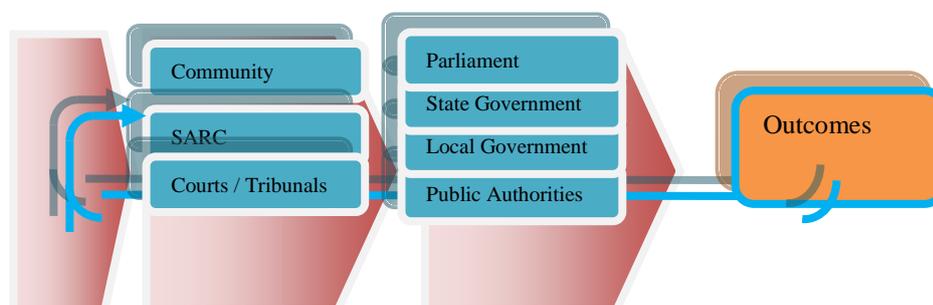
14. The Charter contains a provision prohibiting arbitrary arrest or detention. However, the ICCPR's additional clause 9(5) that provides that victims of unlawful arrest or detention shall have an enforceable claim for compensation when arbitrarily treated has been excluded. Plainly, when embodied in domestic law, this provision will have budgetary implications. That cost, however, will be far outweighed by the just restitution accorded to individuals who are improperly dealt with by law enforcement officials and by the substantial deterrent effect that such a compensation provision will have upon law enforcement bodies themselves.
15. For reasons that are not clear, Article 24(2) of the ICCPR was excluded from the Charter. This Article provides that every child shall be registered immediately after birth and shall have a name. Recent research undertaken with respect to birth registration by Dr Paula Gerber of Monash University has conclusively demonstrated that significant obstacles lie in the way of the birth registration of children born in indigenous families and other families that are significantly economically and socially disadvantaged. The result is that many such children are not registered. That in turn, results in them being further disadvantaged in later life as the requirement to produce evidence of birth registration in the form of a certificate lies at the heart of obtaining a host of core governmental services including social security, employment, medical benefits, education, drivers' and other licences, and passports. Liberty regrets the exclusion of this provision at the Charter's commencement and recommends strongly that it now be inserted.
16. Strangely, no provision was included in the Charter which identifies those rights which must be considered absolute and therefore incapable of limitation within the terms of s.7. Most comparable human rights instruments internationally and nationally specify certain rights from which there can be no derogation. This is because any derogation would represent such an attack on human dignity and personhood as to be morally unacceptable. For this reason, and for the purposes of consistency with the ICCPR, Liberty recommends that the following rights should be non-derogable:
 - The right to life
 - Freedom from torture and cruel or degrading treatment
 - Freedom from forced work
 - The right to humane treatment for detainees
 - The freedom of thought, conscience, religion and belief
 - The right to fair trial
 - The right to appeal to higher courts in criminal proceedings
 - The right not to be prosecuted under retrospective laws.

17. The Charter contains a general override provision in s.31. This provision allows the government to remove legislation from the operation of the Charter in advance and to declare that existing legislation should not be subject to its standards. There is no justification for such a provision if human rights protection is to be taken seriously and not just be symbolic. There is no necessity for such a provision, given that the final decision as to whether legislation that has been declared by a Court to be incompatible with a Charter right remains finally with the Parliament. We recommend therefore that the general override provision be removed.

Part 3 – Operation and Effect of the Charter

3.1 Introduction

1. The following paragraphs deal with the role of the Charter:
- (a) when a Bill is being drafted;
 - (b) when a Bill is moving through the Parliament;
 - (c) when a departmental policy is being developed; and
 - (d) within the broader Victorian community;
 - (e) within the Victorian court system.
2. It should be noted that there is a degree of artificiality in adopting an approach that deals with each of these steps detachedly. This is because the drafting of a new Bill may be the result of any number of influences including a judicial pronouncement or an executive report, all of which may have been precipitated in part by the Charter. By way of example, the amendments to the *Public Health and Well Being Act 2008* were precipitated in part by the case of *Kracke v Mental Health Review Board*.¹¹ This circularity is at the core of the dialogue model excellently described by VEOHRC in the following diagram.



¹¹ *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646

3. For this reason it is difficult to consider properly the effect of the Charter by reference to separate political or legal actions alone without a general consideration as to the effect of the entire regime working in the interrelated manner foundational to its design.

3.2 The Creation of a Statute

4. The creation of a statute engages not only the MP who presents the Bill to the Parliament but potentially any part of the government and/or the wider community who is involved or consulted prior to the Bill being drafted. This pre-existing dialogue is strengthened by the Charter. The annual Victorian Equal Opportunity and Human Rights Commission (VEOHRC) Charter reports show that within the Executive and the Parliament there is a positive trend of increased understanding and use of the Charter at all stages of the legislative cycle. The Colmar Brunton research commissioned by VEOHRC showed that:

“On balance the Charter was perceived to have contributed to greater transparency and dialogue in law making.”¹²

5. Further, both the Colmar Brunton research and the VEOHRC reports make it clear that the executive branch considers human rights closely both when consulting with Members of Parliament about the drafting of new Bills and when executing the will of Parliament after a Bill has become an Act. This seamless engagement with human rights issues is testament to the culture of analysis and consideration that the Charter demands. In 2008 the Victorian Privacy Commissioner embodied this new Victorian political paradigm when stating:

“The Charter’s presence and the requirement for a statement of compatibility places a spotlight on privacy and encourages the public sector, when developing and amending legislation, to turn its mind to the broader privacy rights as well as information privacy protected by the IPA (*Information Privacy Act 2000*). This in turn encourages the sector to consult with the Office of the Victorian Privacy Commissioner on privacy impacts at an earlier phase in the legislative process.”¹³

¹² Victorian Equal Opportunity and Human Rights Commission, *Talking Rights – 2010 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2011) 13.

¹³ Victorian Equal Opportunity and Human Rights Commission, *Emerging Change - 2008 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2009) 30.

6. The Office of Gaming and Racing reiterated the above sentiment in 2010 stating:

“The introduction of the Charter has resulted in a greater awareness of the need to consider the potential impact of legislative changes on individuals’ rights.”¹⁴
7. From the time a problem is identified in the community to the time the problem is cured through legislative action, human rights play an important role in ensuring that those who are empowered to make laws are privately and publicly considering the impact of those laws on individual, and often vulnerable, citizens. This protection begins with the analysis and considerations given to a Bill before it is presented to the Parliament for debate.

3.3 Legislative Drafting

8. The drafting of a new Bill is not a task undertaken for mere enjoyment. A new Bill will contain in it an attempt to cure some previously identified problem within society. Often a legislative cure can have unintended consequences. The Charter minimises the risk of such unintended consequences, leading to better more refined legislation and more nuanced policy outcomes for Victorians. This is because the Charter demands detailed consideration of the effect of legislation, measured against transparent and ethical standards, in a way previously unknown in Victoria. The evidence below shows that the Charter informs both the identification of social problems and their correction with clarity and sensitivity.
9. Legislative drafting is a confidential process, and for that reason evidence of the Charter’s role in the drafting stage is limited. However, the Colmar Brunton research suggests that the Charter is often used effectively during the drafting process.
10. The Department of Justice stated:

“The public are unlikely to be aware of the extensive discussion that surrounds consideration of policy proposals and the fact that often Bills are reworked following discussions between policy officers, resulting in outcomes that are more Charter compliant while still achieving the policy objective.”¹⁵

¹⁴ Victorian Equal Opportunity and Human Rights Commission, *Talking Rights – 2010 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2011) 35.

¹⁵ Ibid.

11. Similarly the Department of Transport stated in relation to the development of the *Transport Integration Act 2010*:

“[T]he development of legislation that incorporates objectives of equity, access, affordability and social inclusion will assist in ensuring the protection of the rights outlined in the Charter.”¹⁶
12. Further, in developing the *Public Health and Well Being Act 2008* the Charter paved the way for a policy that appreciates “the human rights principles underpinning the public health approach.”¹⁷
13. It goes without saying that when a person is subject to an involuntary medical regime, that person is in a vulnerable position and particular care must be taken. The Charter ensures that where a person’s liberty must be limited, that limitation is both proportionate and reasonable.¹⁸
14. Proportionality and reasonableness are key concepts in the determination of whether or not a human right has been infringed upon by a legislative provision. A decision that is reasonable and proportionate to a circumstance is likely to be a fair decision. Fairness is a fundamental characteristic of the Victorian way of life. This key characteristic and the values that attach to it were entrenched in the words of the *Public Health and Well Being Act 2008* at the drafting stage in the most reliable way open to modern governments, through the use of human rights concepts and language.
15. The *Traditional Owner Settlement Act 2010* (Vic) similarly protected human rights at its core. The *Traditional Owner Settlement Act* at s 9 imports the language of human rights by reference to the deep, cultural connection between Aboriginal Victorians and the land over which they hold title. It did so by reference to the cultural rights of Aboriginal Victorians, reflecting the *UN Declaration on the Rights of Indigenous People*, as enacted in s 19(2) of the Charter.
16. That both the *Public Health and Well Being Act* and the *Traditional Owner Settlement Act* of themselves imported these concepts as benchmark considerations when decisions about the shape and content of legislation were made provides evidence as to the effectiveness of the Charter in promoting consideration of rights through the entire legislative cycle.

¹⁶ Ibid, 19.

¹⁷ Ibid, 35.

¹⁸ *Public Health and Well Being Act 2008* (Vic), s9

3.4 Parliamentary Scrutiny

17. It goes without saying that the scrutiny of new laws by parliamentary representatives is a cornerstone of any functioning democracy. To that end the Charter shifts the Victorian democratic engine up a gear. Victoria leads the nation in terms of providing the peoples' representatives with locally relevant political machinery through which to engage in pre-legislative scrutiny. When undertaken effectively, the statement of compatibility, the extended role of SARC and the parliamentary debate that both of those mechanisms encourage provides for more informed and principle debate in Parliament. The VEOHRC had this to say of the parliamentary contribution to the consideration of human rights issues in 2010:

“In general, members of Parliament have tabled well drafted statements of compatibility... During the year, SARC maintained its vital scrutiny of all Bills presented in Parliament and there continued to be vigorous exchanges of views between SARC, ministers and members of Parliament tabling legislation. Parliamentary debates continued to contribute to meaningful analysis of human rights issues triggered by Bills. Reference was often made to international jurisprudence in addressing whether and how legislative provisions may limit human rights.”¹⁹

18. This level of scrutiny, the strength of the parliamentary magnifying glass, is unique to Victoria. In no other State does a Parliament devote equivalent resources and time to the consideration of its citizens' rights .
19. By way of example it is instructive to compare the parliamentary processes that led to the enactment of uniform evidence laws in Victoria and Tasmania. This comparison is useful in that it shows marked differences in political openness and accountability between the two parliaments when considering the passage of essentially similar law. In Tasmania, where no human rights law exists, the second reading speech was short, did not deal with many of the important changes proposed for evidence law and was peppered with tangential references as to the cost savings for business and government that the new Act might deliver.²⁰ The introduction of the Evidence Bill in the Victorian Parliament was an entirely different story. The second reading speech was focussed on people and the effect of the new law on the legal process generally. For example, cl 13 of the proposed Bill was drafted to ensure that as many people as possible could give evidence “with the particular difficulties faced by children and people with intellectual disabilities firmly in mind.”²¹ This concern for the human rights of people who

¹⁹ Victorian Equal Opportunity and Human Rights Commission, *Talking Rights a Compilation Report – Resource Materials to Accompany the 2010 Report on the Operation of the Charter of Human Rights and Responsibilities* (2011) 13.

²⁰ Tasmania, *Parliamentary Debates*, House of Assembly, 2 October 2001, 28 (Dr Patmore)

²¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2008, 2643 (Rob Hulls, Attorney-General)

would otherwise struggle under the traditional rules of evidence was highlighted in the statement of compatibility that accompanied the Bill which stated:

“The test for competence under cl 13 is considerably more inclusive than the existing test. By focussing on the capacity of individuals to understand and answer questions, rather than the existence of a disability, cl 13 gives effect to the rights of persons with disability to recognition and equality before the law.”²²

20. Cost savings for business and government were mentioned in the second reading speech²³ but they did not sit at the top of the hierarchy of considerations. The Victorian Parliament demonstrated that it could deliberate publicly and in detail with the stakeholders it represents about the human rights implications of complex legislation.

3.5 Parliamentary Scrutiny – Room for Improvement

21. Liberty Victoria submits that parliamentary performance could be improved further. We concur with the view of VEOHRC that increasing the availability of exposure drafts, with sufficient time for organisations and individuals to comment, would enhance the dialogue that the Charter promotes. This is especially the case where a Bill has directly affects the human rights specified in the Charter.

3.6 Statements of Compatibility

22. Statements of compatibility are an important part of the Victorian human rights dialogue. They are the springboard from which a vibrant parliamentary and community discussion about human rights can be launched. In this respect the work of the Parliament is tremendously important because Members of Parliament are often the first to formally hear of, and publically analyze, any Bill that limits human rights. In that analysis and debate the statement of compatibility is powerful because it requires a position be taken. When taken in good faith, that position is not a mere opinion based on the subjective perceptions of the Minister who makes it, but a position as to the actual and practical effect of law from a principled standpoint.
23. In relation to the *Summary Offences and Control of Weapons Amendments Bill*, for example, there can be no doubt that the statement of compatibility that accompanied the Bill encouraged parliamentary consideration flowing to a broader

²² Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2008, 2628 (Rob Hulls, Attorney-General)

²³ *Ibid*, 2635 (Rob Hulls, Attorney-General)

community discussion. This broader community discussion was manifest in the focus of opinion pieces and letters to the editor published at the time.²⁴ Whilst the Act as it stands provides police with powers that are unlikely to be utilized arbitrarily, there can be little doubt that the Statement of Compatibility was central to rights focussed debate, in both the Parliament and the broader community. As the Department of Justice noted, as quoted in the 2010 VEOHRC report:

“The Charter helped frame the discussion within government in the development of the Bill and required that Government publicly explain its reasoning for departing from rights in this context. In this way the Charter has had an impact in increasing government transparency and accountability.”²⁵

3.7 Statements of Compatibility – Room for Improvement

24. The drafting of a statement of compatibility requires the MP to consider any human rights engagement by reference to the s7 “reasonable and necessary” test. Liberty Victoria shares the concerns of VEOHRC that “[t]here is not always sufficient justification provided in statements of compatibility to meet the criteria of reasonableness and proportionality such as to support the necessity of limitations on rights.”²⁶

3.8 The Scrutiny of Acts and Regulations Committee (SARC)

25. For the obvious reasons a detailed analysis and explanation of the role of SARC is not necessary. However, a few observations as to the Committee’s performance in relation to the Charter may be helpful. First and foremost, SARC has the capacity to encourage informed parliamentary and public debate. As noted by the 2010 VEOHRC Compilation Report, SARC plays an important role in alerting the Parliament and the public to human rights issues in Bills.²⁷ By way of example the SARC report of 2009, in relation to the operation of the *Equal Opportunity Act*, sparked parliamentary debate and broader community. SARC’s role under the Charter facilitates increased political transparency and accountability. In a statement with which Liberty agrees, VEOHRC said of SARC:

²⁴ See for example Tom Reilly, “Police to Have Power to Strip Search at Random”, *The Age* (Melbourne), 29 November 2009, 3; Alice De Jonge, “Powers Breach Rights in Charter”, *The Age* (Melbourne), 14 December 2009.

²⁵ Victorian Equal Opportunity and Human Rights Commission, *Talking Rights – 2010 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2011) 44.

²⁶ Victorian Equal Opportunity and Human Rights Commission, *Talking Rights a Compilation Report – Resource Materials to Accompany the 2010 Report on the Operation of the Charter of Human Rights and Responsibilities* (2011), 85.

²⁷ *Ibid*, 83.

“[This process has continued to support informed debate and, as publicly reported processes are recorded by Hansard, help to inform the public about the Victorian Parliament’s deliberations.”²⁸

26. It is easy to forget how important political mechanisms like the parliamentary committee systems are, because the product of their work may often seem intangible. Nevertheless, in this instance, there can be little doubt that the SARC process can make parliamentary deliberation more effective and assist the general public in understanding the foundations of legislation and in holding the people’s representatives to account for their decisions.

3.9 SARC – Room for Improvement

27. On at least one occasion a Bill that dealt with serious human rights implications, the *Sentencing Amendment Bill 2010* (Vic), was not considered adequately by SARC before being passed. Given SARC’s important role in advancing parliamentary and community debate on human rights issues, Liberty Victoria submits that all Bills that may impact upon human rights should be considered and reported upon by the committee and that no such Bill should proceed to final consideration without SARC’s analysis and recommendations being made available to the parliament and the public.

3.10 The Charter and Departmental Policy Development

28. As the committee will be aware, the Charter requires public authorities to comply with enumerated human rights. This requirement has had a profound effect on the development of policies and the delivery of services in Victoria. The 2010 VEOHRC report stated that “[w]here used well the Charter prevents breaches of rights by taking human rights into consideration at the front end of the work of government.”²⁹ Later in the report the same sentiment was reiterated. “There is also evidence that the Charter is being used by government agencies to identify potential human rights concerns in advance... a welcome development... precisely the outcome the Charter was designed to achieve.”³⁰
29. The Charter has reformed Victorian governmental culture for the better. The Colmar Brunton research reveals that the Charter has “been a catalyst for positive change in this area (the culture of government).”³¹ The majority of people who participated in the Colmar Brunton study agreed that the Charter had a positive

²⁸ Victorian Equal Opportunity and Human Rights Commission, *Talking Rights – 2010 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2011) 43.

²⁹ *Ibid*, 8.

³⁰ *Ibid*, 32

³¹ Victorian Equal Opportunity and Human Rights Commission, *Talking Rights – 2010 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2011) 15.

impact on policy making by public authorities.³² Given that the Charter demands consideration of human rights before government action is taken, this result is entirely unsurprising and proves the argument that legally enforceable obligations in relation to human rights are the surest way to protect them. It further demonstrates true progress in the development of Victoria's democracy. Human rights decisions are made for the benefit of people, in this case citizens of Victoria. Now more than ever, Victorian government agencies are obliged to have the full diversity of Victorian citizenry at the forefront of their minds when making important decisions. The Charter is a law that demands and secures this heightened awareness.

30. Examples of broad policy development that has been affected by this cultural change are numerous. The following examples are pertinent:
- The Office of the Public Advocate reported that “[t]hose regimes which impact on the freedoms of people with disabilities have increasingly been required to ensure the protection of core human rights, and to be implemented in the least restrictive manner possible.”³³
 - The Office of the Child Safety reports that government agencies are “increasingly examining issues relating to children through a human rights lens.”³⁴
 - The Victorian Government in association with Vic Sports, Vic Health and VEOHRC developed a new Code of Conduct for Community Sports that focuses on the removal of barriers preventing certain demographics in the community from participation and developing their full potential.³⁵
 - The Victorian Multicultural Policy (All of Us) was created and informed by a commitment to human rights principles. Enhanced participation and equality before the law are Charter values that underpin the policy.³⁶
 - In response to the outcome of Charter related litigation, the Office of Housing “has developed a new briefing note to assist staff when making recommendations in relation to proceedings before VCAT.” The briefing note provides guidance on how staff may make decisions, including ensuring that

³² Ibid.

³³ Victorian Equal Opportunity and Human Rights Commission, *Talking Rights – 2010 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2011) 41.

³⁴ Ibid, 38.

³⁵ Department of Planning and Community Development, *Victorian Code of Conduct for Community Sport*, (5 November 2010), Department of Planning and Community Development, <http://www.dpcd.vic.gov.au/sport/inclusive-sport/code-of-conduct>

³⁶ The Victorian Multicultural Commission, *All of Us*, (4 April 2011), The Victorian Multicultural Commission, <http://www.multicultural.vic.gov.au/images/stories/pdf/MulticulturalPolicy09-res.pdf>

staff consider human rights, whether rights limitation is reasonable and necessary and whether a less restrictive alternative is available.”³⁷

- The Department of Health “reports that the incorporation of human rights considerations in the development of policy relating to restrictive interventions has led to more robust policy that supports reducing restrictive interventions and a proportionate response to prevailing risk.”³⁸
- Similarly the Office of the Health Services Commissioner stated “If complaints are dealt with effectively in accordance with the spirit of the Charter, they can provide an opportunity for healing and improvements in the quality of care for everyone. Respecting a patient’s human rights is a way of making health care more patient centred as well as improving safety and quality.”³⁹
- The Department of Planning and Community Development has released guidelines designed to assist local councils to ensure that human rights are considered as part of ordinary council work.⁴⁰

31. Whilst the above examples demonstrate how the Charter is being used at the front end of government work in the development of policies that promote good decision making, the delivery of specific services to the community is where the Charter connects with Victorian citizens. To that end the Charter has proven itself to be a valuable tool in the resolution of disputes between public authorities and members of the community and their representatives.

32. The VEOHRC Charter reports of the last four years are filled with evidence of government activity influenced for the better by Charter rights.⁴¹ Due to the large number of individual circumstances in which the Charter has been used not all could be included in this submission. The following have been selected as good examples of Charter advocacy, proving that the Charter has been, and continues to be, an effective instrument in ensuring that the human rights of Victorians are protected.

- A disabled man from Whittlesea had concerns that a council policy that required questions put to council to be written excluded people who could not

³⁷ Victorian Equal Opportunity and Human Rights Commission, *Talking Rights – 2010 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2011) 41.

³⁸ *Ibid*, 24.

³⁹ *Ibid*, 30.

⁴⁰ Department of Planning and Community Development, *Local Laws Guidelines Project Page*, (29 Oct 2010), Department of Planning and Community Development, http://www.dpcd.vic.gov.au/_data/assets/pdf_file/0009/37980/Local_Laws_Overview.pdf

⁴¹ See for example Victorian Equal Opportunity and Human Rights Commission, *Emerging Change - 2008 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2009) 24 – 28, 32 – 34; Victorian Equal Opportunity and Human Rights Commission, *Making Progress - 2009 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2009) 25 – 32, 61 – 67; Victorian Equal Opportunity and Human Rights Commission, *Talking Rights – 2010 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2011) 32 - 43

write from engaging with their elected councillors. Further the man, due to his own disability was unable to access council meetings. Upon raising his Charter concerns the council moved to provide him with services so as to attend and participate in council meetings.⁴² Further, it appears that the council has since made telephone typewriter services and sign language interpreters available to ensure full participation is possible for Whittlesea residents who live with a hindrance.⁴³

- A young Victorian man had been evicted from his mother's public housing after her death. He developed depression and his business failed. He was homeless for a period until he moved in with his partner with whom he lived on a non-permanent basis for a number of years. He then moved in with her permanently. After her sudden death in the following year he was told to leave the residence which was public housing. This decision was appealed by the Homeless Person's Legal Clinic on Charter grounds. The stress he was under induced a psychotic breakdown and he was involuntarily detained in a hospital. He recovered and was released where upon the Homeless Person's Legal Clinic was able to negotiate with the Office of Housing to have him moved to a smaller unit, making the larger accommodation he was living in available for another family in need.⁴⁴
- The Charter was influential in relation to the decision of the City of Greater Bendigo to reject calls from traders for a "move on and stay away" law that would have had the effect of denying marginalised groups from accessing public places.⁴⁵
- DHS sought to limit the liberties of some disabled Victorians who were already subject to restrictive orders. Some of those people believed that they should not be encumbered by further restrictions. They challenged the decision on Charter grounds. The decision of DHS to change its policy was reversed as a result of pre-trial mediation.⁴⁶
- A boy with Aspergers Syndrome was not afforded government services because the illness was not recognised as a neurological impairment under the *Disability Act 2006* (Vic). Preparation for litigation on the matter led to the

⁴² Victorian Equal Opportunity and Human Rights Commission, *Talking Rights – 2010 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2011) 17.

⁴³ City of Whittlesea, *Disability and Carer Support*, City of Whittlesea, <http://www.whittlesea.vic.gov.au/community-services-and-health/disability-services/disability-and-carer-support>

⁴⁴ Victorian Equal Opportunity and Human Rights Commission, *Talking Rights – 2010 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2011) 23.

⁴⁵ Victorian Equal Opportunity and Human Rights Commission, *Emerging Change - 2008 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2009) 52.

⁴⁶ *David Byrnes and others (matters under the Disability Act)* VCAT reference G 41324 (2009)

former government altering including the illness in the regime and allowing all Victorians who suffer under the syndrome to request disability assistance.⁴⁷

33. From these instances, it should be clear that at the very least the Charter has become an effective tool in the resolution of problems between vulnerable citizens and public authorities. They are taken from a pool of publicly known case studies. There are, however, many more circumstances in which the Charter has quietly supported and protected the rights of Victorians without fanfare or attention.⁴⁸ As one Victorian put it: “What’s good about the Charter is that you don’t have to go all the way to court to get a policy change... we’ve seen policy changes in disability, and housing, and homelessness, and health, that have been enormously helpful and didn’t get near a court, and that’s a good thing.”⁴⁹

3.11 Policy Development – Room for Improvement

34. The Colmar Brunton research indicates that there are performance disparities between different government departments on human rights issues. For instance it was noted that many employees in the Department of Treasury and Finance had trouble relating the Charter to their work.⁵⁰ Employees of Vic Roads also expressed difficulty in identifying where the Charter would alter the culture of the organisation.⁵¹
35. Liberty Victoria submits that in government departments that have less contact with citizens on a day to day basis, further analysis and training is required to identify areas where human rights may be engaged.

3.12 The Charter in the Community

36. On at least a modest level a change in the attitudes of Victorians to advancing and protecting human rights is attributable to the Charter. The Colmar Brunton research suggests that the Charter is a catalysing agent in creating a community dialogue about human rights.⁵² Public awareness projects and education are crucial to a broader community appreciation of human rights which, in turn, helps Victorians to identify where their human rights are being engaged.

⁴⁷ Melanie Schlieger, *Disability Advocates Achieve Assistance for Victorians with Autism*, (Jan 2009) Human Rights Law Centre, http://www.hrlc.org.au/files/R9KSI37L01/HRLRC_Bulletin_1_09.pdf; Minister for Community Services, “Disability Assistance for Victorians with Autism” (Media Release, 13 December 2008) <http://archive.premier.vic.gov.au/newsroom/5678.html>

⁴⁸ For example, see the SARC Charter Review submission of Evelyn Tadros.

⁴⁹ Victorian Equal Opportunity and Human Rights Commission, *Talking Rights – 2010 Report on the Operation of the Charter of Human Rights and Responsibilities*, (2011) 16.

⁵⁰ *Ibid*, 27.

⁵¹ *Ibid*.

⁵² *Ibid*, 15.

3.13 The Charter in the Community – Room for Improvement

37. The challenge in educating the broader community about human rights appears to be one of resources. In the last four years VEOHRC has executed some excellent community programs that have engaged thousands of Victorians in human rights education and training. From school children through to the elderly the VEOHRC has been able to make human rights dialogue accessible no matter what the background or experience of the participants.⁵³ However, it appears that VEOHRC in its role as a promoter of human rights education is constrained by insufficient resources.
38. The stories of rights vindication above show that the Charter, when engaged, provides protection of a kind nowhere else on the statute books. However, that protection requires affirmative action on the part of the citizen whose rights are in question. To protect their rights Victorians need to understand the human rights framework that exists. To that end Liberty submits that resources to the VEOHRC should be greatly increased to ensure that no Victorian fails to proactively protect their human rights for want of knowing how to.

The Charter in the Victorian Court System

3.14 The Charter’s Interpretative Obligation – s.32.

39. The Charter’s interpretative obligation, contained in s.32 of the Act is one of its most important provisions. The provision is a direct descendant of the ‘principle of legality’ developed previously as a presumption of statutory construction. This principle holds that that fundamental common law rights are not to be read as overridden by general or ambiguous statutory words. The classic formulation is that of Gleeson CJ:

“Courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by an unmistakable and unambiguous language. General words will rarely be sufficient for that purpose...In the absence of express language or necessary implication, even the most general words are to be taken to be ‘subject to the basic rights of the individual’.”⁵⁴

40. Now, and similarly, s.32(1) of the Charter instructs the courts to interpret all statutes in a manner that is compatible with human rights, in so far as it is possible to do so – consistently with their purpose.

⁵³ See for example the “Everyday People, Everyday Rights” programs run in both the City of Hume and the City of Yarra. See also the “Human Rights are Aussie Rules” children’s program run by the Eastern Community Legal Centre.

⁵⁴ *Plaintiff S157/2002 v The Commonwealth*, (2003) 211 CLR 476, 492.

41. This interpretative obligation has important implications. The principal one is that Victorian legislation must now be interpreted in accordance with the high standards set down in the Charter. The meaning of legislation must be reconciled, as far as possible, with the human rights criteria specified there. As Lord Hoffman, in considering the UK Human Rights Act, put the matter in a passage cited with approval by the Court of Appeal in *Momcilovic*.⁵⁵

“Just as the principle of legality meant that statutes were construed against the background of human rights subsisting at common law, so now, s.3 of the Human Rights Act requires them to be construed against the background of Convention rights. There is a strong presumption that Parliament did not intend a statute to mean something that would be incompatible with those rights.”⁵⁶

42. While that comparison is apt, it is worth pointing to at least two significant differences between the operation of the principle of legality and the Charter comparator.
43. The first is that whereas the principle of legality comes into play only where there is statutory ambiguity, the Charter’s interpretative obligation applies to all statutory provisions. This is regardless of the existence of any ambiguity.
44. Secondly, the principle of legality is enlivened only in relation to a limited range of common law constitutional rights of which the prohibition of torture and arbitrary deprivation of liberty are the cardinal examples. S.32(1) is much wider in that it requires the courts interpret, compare and apply every relevant right contained in the Charter.
45. Consequently, as Claudia Geiringer observed in a recent article concerning the equivalent New Zealand provision:⁵⁷

“Section 6 provides democratic authorization to the courts, in relation to the updated list of rights that it codifies, to draw on traditional common law understandings of the role of values and the interpretation process. In doing so...it provides democratic legitimacy to the techniques traditionally used by common law judges (that is in relation to the role of values and ambit of interpretation)...”⁵⁸

46. The presumption against interference with fundamental rights has now become, as the Court of Appeal put it in *Momcilovic*, an expression of the collective will of the parliament.

⁵⁵ *R v Momcilovic* [2010] VSCA 50

⁵⁶ *R (Wilkinson) v Inland Revenue Commissioners*, [2005] 1WLR 1718, 1723

⁵⁷ Geiringer, C. The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*, (2008) 6 *New Zealand Journal of Public and International Law* 58.

⁵⁸ *Ibid* at p.89.

47. It might be thought that this will require the courts of Victoria to travel far more widely in adapting the meaning of legislation than has ever been the case previously. No doubt, the Victorian Charter has ushered in a new requirement to reconcile legislation with human rights standards. But the judicial task is still limited. This matching, or reconciliation, can and should occur 'only in so far as it is possible' to effect it.⁵⁹
48. That then leads to a consideration of what it is that is possible and permissible. In this respect, the Court of Appeal's decision in *Momcilovic* makes a significant contribution.
49. In *Momcilovic*, the Court of Appeal distinguished the Charter's interpretative obligation from that contained in the UK Human Rights Act. It concluded that the Charter's obligation provided less scope for judicial re-interpretation than its British counterpart. This is because unlike the UK's interpretative obligation, s.32(1) provides that legislation should be interpreted so far as it is possible to do so, *consistent with statutory purpose*. That phrase does not appear in the comparable UK provision. As the Court of Appeal put the matter:
- "In our view, the insertion of those words of limitation stamped s.32(1) with a quite different character from that of s.3(1)(a) (of the UK Act)...In our opinion the inclusion of the purpose requirement made it unambiguously clear that nothing in s.32(1) justified, let alone required, an interpretation of a statutory provision which overrode the intention of the enacting Parliament".
50. This inclusion has important implications for the techniques of statutory interpretation that may legitimately be deployed in Victoria. Putting the matter simply it is not difficult to see that the techniques of reading broadly and reading down may readily be used to remove an apparent incompatibility between a legislative provision and a Charter right.
51. However, reading words in to a statute is a technique that will rarely, if ever, be permissible. This is because the insertion of new words, where they do not presently exist or in the absence of other words to which they might reasonably relate, will run the gauntlet of altering the primary legislation's purpose or intention.
52. So, in *Momcilovic* the Court of Appeal rightly declined to recast a reverse onus provision that required a person accused of the possession of a trafficable quantity of illegal drugs to satisfy the court that they were not in possession as meaning only that they needed to adduce evidence to that effect. The relevant legislation's imposition on the defendant of a legal burden of proof could not be altered by reading words in so as to alter the legal burden to an evidentiary one.

⁵⁹ *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s.32(1).

53. It was plain from the terms of the legislation, and from its history, that Parliament had deliberately imposed the legal burden so as to discourage possession and facilitate conviction. That purpose could not be subverted even though the reverse onus provision was plainly incompatible with the Charter's presumption of innocence. It is interesting to note that in precisely similar circumstances, the English courts have engaged in just such a recasting of the legislative terms.⁶⁰ This reflects the difference in the way the respective interpretative obligations have been cast.
54. Similarly, the interpretative obligation cannot be deployed to read unexpressed rights into the Charter unless they are some necessary incident of the freedoms already contained there. The recent case of *Castles* provides an instructive example.⁶¹
55. There the appellant, a convicted prisoner, sought to assert her right to obtain IVF treatment on the ground that to deny her that treatment would infringe her right to found a family.
56. The problem is that a right to found a family, although included in the catalogue of rights contained in the ICCPR, has not been included in the Victorian Charter. The appellant argued, nevertheless, that it should be included either by implication or as necessarily incidental to some other right such as the right not to have one's privacy arbitrarily interfered with.
57. Justice Emerton, correctly in my view, determined that it was neither possible nor permissible to read the right in. It was plain from a reading of prior reports and parliamentary debates, that the right to found a family had been omitted deliberately, pending the outcome of a Law Reform Commission inquiry which was to consider treatment for infertility more generally. Consequently, it would have been illegitimate for the court to displace that intention.
58. In short, the Court of Appeal has given the s.32(1) obligation a conservative reading. That reading is consistent with the requirement that statutes continue to be read in a manner that is consistent with their purpose. The obligation to interpret statutes in a manner that is compatible with human rights remains subject to that over-arching limitation.
59. Such a reading preserves the appropriate balance between parliament and the courts. It cautions the courts against trespassing into the legislative domain. It acts as a formidable counter-weight to the prospect - so often claimed by critics of the Charter as inevitable - that it will lead to the wholesale transfer of power from the legislature to the Courts. This has not occurred in Victoria and consequent upon the Court of Appeal's decision it is highly unlikely to do so.

⁶⁰ See *R v Lambert* [2002] 2 AC 545.

⁶¹ *Castles v Secretary of the Department of Justice*, [2010] VSC 181,

60. The Court of Appeal has cast the s.32 obligation explicitly within the traditional terms of the interpretative task. As the Court put it:

“...s.32(1) has the same status as, for example, s.35(a) of the *Interpretation of Legislation Act 1984 (Vic)*. It is a statutory directive, obliging courts (and tribunals) to carry out their task of statutory interpretation in a particular way. It is part of the body of rules governing the interpretative task...What is significant about s.32(1) in our view, is that Parliament has embraced and affirmed (the presumption of legality) in emphatic terms. It is no longer merely a creature of the common law but is now an expression of the collective will of the legislature. Moreover, the rights which the interpretative rule is to promote are those which Parliament itself has declared, in the Charter”.

3.15 Declarations of Inconsistent Interpretation

61. *Momcilovic* is important for another reason. It is the sole case in which the Victorian Court of Appeal has issued a declaration of inconsistent interpretation in accordance with s.36(2) of the Charter. S.36(2) reads relevantly that:

“S.36(2) ...if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect”.

62. Where such a declaration is made, it sets in train a process of parliamentary reconsideration of the statutory provision in question. It is, in the end, for the parliament to determine whether or not the provision should be retained, amended or abandoned. This is, perhaps, the most crucial enforcement provision in the Charter. It makes it plain that it is for Parliament and not the Courts to take the final decision as to whether a statutory provision that conflicts with human rights should be kept or repealed. This scheme of enforcement distinguishes the Victorian Charter from those, for example, present in the United States, Canada and South Africa where final courts of appeal can strike down legislation. The Victorian framework of enforcement, like its counterparts in the UK, New Zealand and the ACT, reserves decisions as to the fate of inconsistent legislation to the legislature. This is the second, strong protection against the potential usurpation by the Courts of the legislative role. It stands as protection against that the Charter might alter profoundly the proper constitutional balance between parliament and the courts. That such an alteration might occur is often cited by critics of the Charter as a reason why it should be constrained or abandoned. The evidence is all to the contrary. No such fundamental or even incremental change to the constitutional relationship between parliament and the courts has occurred either in the UK, New Zealand, the ACT or in Victoria. The critics' argument is nothing more than assertion without evidence.

63. In *Momcilovic*, the Court of Appeal determined that the reversal of the burden of proof effected in s.5 and s. 71AC of the *Drugs, Poisons and Controlled Substances Act 1981*, had the effect of limiting the presumption of innocence protected by the Charter. Consequently, the relevant sections could not be read consistently with the Charter. Prior to issuing a declaration of inconsistent interpretation, however, one more task remained for the Court to undertake. This was to determine whether the limitation was ‘reasonable and could be demonstrably justified in a free and democratic society’ within the meaning of s.7(2) of the Charter.
64. The nature of the judicial task in this respect was clearly set down by Dickson CJ of the Canadian Supreme Court in *R v Oakes*.⁶²
- “...Once a sufficiently significant objective is recognized, then the party invoking s.1 must show that the means chosen are reasonable and demonstrably justified. This involves ‘a form proportionality test’...There are in my view three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right of freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right of freedom, and the objective which has been identified as of ‘sufficient importance’”.
65. The Victorian Court of Appeal has explicitly adopted this approach. That adoption is important for a number of reasons. First, it situates Victorian law in this respect directly in line with the law in comparable jurisdictions. The approach in *Oakes* has become standard in Canada, New Zealand and the ACT for example. Consequently, Courts in Victoria will not ‘fly blind’ in determining the appropriate balance to be struck between individual rights on the one hand and societal interests on the other. Ample precedent is available to guide and constrain the courts’ deliberations and determinations in this respect.
66. Secondly, there is an inherent logic in the three step process set down for determining the proportionality question. This reasoned form of analysis exists to guide the judiciary in determining what may sometimes be ‘hard cases’. It provides meaning and content to the ‘demonstrable justification’ that must be found if legislation otherwise inconsistent with human rights is nevertheless to be regarded as proportionate and appropriate.
67. Thirdly, it may still, sometimes, be the case that in undertaking this balancing exercise, the courts will get it wrong. Where that is so, it remains, finally for the

⁶² [1986] 1 SCR 103, 139.

Parliament to determine, in response to a declaration of inconsistent interpretation, whether the inconsistency uncovered is nevertheless to be overridden by reference to some competing and compelling public interest.

68. In *Momcilovic*, the Court of Appeal determined that there was no reasonable justification for reversing the onus of proof in connection with the drug possession offence. The combined effect of the statutory provisions in question was to presume a person guilty of an offence unless he or she could prove to the contrary. That, in the Court's view was 'not so much an infringement of the presumption of innocence as a wholesale subversion of it'. Pending a High Court appeal, the matter has now been referred back to the Victorian Parliament for final re-consideration.

Part 4 - Strengthening the Charter

4.1 Introduction

1. This section sets out three areas in which the Charter should be strengthened, namely:
 - (a) inclusion of a free-standing cause of action for breach of Charter rights and a broad remedies provision;
 - (b) a mechanism to enable private and non-government organisations and associations to elect to 'opt-in' to the provisions of the Charter; and
 - (c) provision for an annual audit of Charter compliance by public authorities.

4.2 Remedies

2. It is a well established principle of equity that where there is a right, there must be a remedy. Similarly, it is a basic principle of international human rights law that the obligation to respect, protect and fulfil human rights obligations includes a duty to provide effective remedies to victims.⁶³
3. Currently, section 39 of the Charter requires that a person must be entitled to seek relief in respect of the allegedly unlawful act or decision without reference to the Charter before that person is entitled to seek that same relief or remedy on a ground of unlawfulness arising because of the Charter. Section 39 also precludes an award of damages because of a breach of the Charter, but does not affect a person's entitlement to damages other than under the Charter.

⁶³ Office of the United Nations High Commissioner for Human Rights, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

4. Section 39 is unnecessarily complex and unjustifiably limits the Charter's effectiveness. The lack of a free-standing cause of action operates to limit the ability of individuals to challenge breaches of their Charter rights and increases the complexity of any legal action taken. While section 39 was originally justified on the basis that it was necessary to prevent a "flood of litigation", there is no evidence that such a flood has occurred in jurisdictions where human rights laws do include free-standing causes of action, such as the ACT and the UK.
5. The substantive provisions of the Charter provide a bold statement of rights to which all Victorians should have access. The inadequate remedy provisions fail to allow for individuals to properly use the Charter to protect those rights. The remedies section of the Charter demonstrates a missed opportunity to give full force to the rights conveyed in the substantive provisions of the Charter, and to better protect victims of rights abuses.
6. The Consultation Committee engaged to investigate a Charter described the Charter as getting its bite from someone else's teeth.⁶⁴ Liberty calls on the government to strengthen the Charter by giving it teeth of its own.

Liberty recommends that the Charter be amended to provide a free-standing cause of action for breaches of Charter rights. Courts and Tribunals should be empowered to grant any relief or remedy, or make any order, as is just and appropriate, including damages, as in Section 8 of the UK's *Human Rights Act*.

4.3 An opt-in provision for private and non-government organisations

7. Private sector and non government organisations are required to act lawfully, not discriminate unfairly against people and to comply with occupational health and safety and equal opportunity laws. However these organizations, unless they are doing work 'for or on behalf of the government' (s. 4(1)(c)) are usually not required to comply with the provisions of the Charter.
8. At the same time businesses are increasingly aware of their corporate social responsibilities and are putting in place initiatives to fulfill their responsibilities in this regard⁶⁵.
9. However, while the activities of private and non government organizations routinely impact on the human rights of people in the Victorian community, under

⁶⁴ Human Rights Consultation Committee ('Consultation Committee'), Department of Justice (Vic), *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005), p.114.

⁶⁵ Australian Human Rights Commission, *Good practice, good business*, available at: http://www.hreoc.gov.au/human_rights/corporate_social_responsibility/factsheet1.html

the Charter such organisations are not formally required to respect peoples' human rights.

10. Recognizing a similar situation in the United Kingdom, the UK Joint Parliamentary Committee on Human Rights said in its recent report on business and human rights:⁶⁶

The Government should send a clear message to business on the human rights standards which the UK expects its businesses to meet in order to prevent allegations of human rights abuse and to reduce the numbers of individuals who may need to seek a remedy through judicial or other means.

11. Similarly, recognising the impact of the activities of private and non government sector organisations on the human rights of people, the ACT Government in 2009 introduced a mechanism into the *Human Rights Act 2004 (ACT)* (s.40D) to enable private bodies to 'opt-in' and to elect to be bound by the duty to comply with the human rights protected by the Act. As the ACT Attorney-General said in introducing the amendment:⁶⁷

Such a provision ... will promote a meaningful dialogue within the community about human rights, in line with the overall aims of the Human Rights Act and the growing interest among public and private bodies for triple-bottom-line reporting or reporting against the three major dimensions of sustainability: economic, social and environmental.

Liberty recommends that a mechanism be included in the Victorian Charter of Human Rights and Responsibilities to enable private and non government organizations and associations to demonstrate leadership and commitment to human rights and to elect to 'opt-in' to the provisions of the Charter.

4.4 Auditing of Public Authorities

12. Auditing frameworks which provide for the collection, management and analysis of data in relation to compliance with Charter obligations are beneficial in that they:
 - (a) enhance accountability and transparency;
 - (b) raise awareness of rights issues within public authorities and, by consequence, prevent violations from occurring in the first place

⁶⁶ UK Joint Parliamentary Committee on Human Rights *Any of our business? Human rights and the UK private sector* 2009-10.

⁶⁷ Hansard, *Legislative Assembly for the ACT: 2007 Week 13 (6 December)*, available at <http://www.hansard.act.gov.au/hansard/2007/week13/4030.htm>

- (c) identify systemic and structural rights violations;
 - (d) allow for the analysis of the effectiveness of remedial actions; and
 - (e) assist with the development of best-practice models.
13. The Commission's independent annual report on the Operation of the Charter should be maintained and supplemented by auditing and reporting requirements on all public authorities. These requirements could be mainstreamed alongside reporting requirements under freedom of information, occupational health and safety, and environmental laws in order to minimise compliance costs.

Liberty recommends that the Charter be amended to require an annual audit of Charter compliance by public authorities.

Part 5 – Arguing the Charter

1. In this final segment of the Submission, Liberty wishes to address the most common arguments framed in opposition to Charters like that in Victoria. While the Committee's guidelines for submission did not require general argumentation about the value of the Victorian Charter, recent newspaper commentary by such extremist critics as Peter Faris, Mirko Bargaric, James Allan, Ted Lapkin and the Australian Christian Lobby suggests that the disputation about the appropriateness of Charter legislation is not over. Consequently, we deal here again with the major contrary arguments and subject them to analysis.

5.1 A Shift in Political Power from Parliament to the Courts

2. Under Australia's Westminster system of government, parliament is designated as sovereign. Parliamentary sovereignty means, in essence, that the final say on what should be the law of the land must rest with the peoples' elected representatives. It needs to be acknowledged, however, that parliamentary sovereignty in Australia's governmental system is heavily qualified. This is because what the parliament can or cannot do is subject ultimately to the provisions of Australia's Constitution. No law passed by the parliament can transgress the Constitution's provisions. If a law does infringe the Constitution, it may be challenged and struck down by the High Court of Australia. In this sense, the High Court of Australia has always been regarded as the ultimate guardian of the Constitution.
3. It is worth noting, in this respect, that under the Constitution the High Court may make decisions having a huge impact upon the way in which Australia is governed. To take just one recent example, the High Court's decision in the *Workchoices* case in 2006 resulted in a massive shift of power from State

governments to the Commonwealth Government. The interesting thing about this is that no complaints are raised about the ultimate power of the High Court to make such decisions under the Constitution. This is so even when it is clear that the Court's decisions may have very significant implications for Australian politics and government. The question then naturally arises as to why such strong objections should be raised to the involvement of the courts in interpreting the provisions of a Charter since the severity of the political impact of decisions under this Act are dwarfed by those of the decisions of the High Court, Federal Court and State Supreme Courts under our Constitution. There is a contradiction in the argument here which opponents of a Charter need to explain.

4. Even so, some commentators object vigorously to the prospect that the Courts will bleed power from the parliament if a Charter is enacted. So, the objection requires further analysis. The argument is that when interpreting the provisions of a Charter, in which fundamental rights and freedoms are expressed very generally, the Courts will be making what amount to policy rather than legal decisions. But under our system of government it is desirable that policy decisions should remain clearly within the brief of the democratically elected parliament rather than being transferred to an unelected judiciary.
5. There are several points that may be made in response. First, we agree with the general thrust of the argument. It is for precisely that reason that the Victorian Charter explicitly preserves parliamentary sovereignty. Under the model, the final decision as to what action should be taken if a federal law is incompatible with a right or freedom contained in the Charter will be taken by the parliament and not by the courts.
6. Similarly under the Human Rights Act in Britain:

“(Parliament has made it clear that) it remains supreme and that if a statute cannot be read to be compatible with the (European) Convention. A court has no power to override or set aside the statute. All the court may do, pursuant to s.4 of the Act is to declare that the statute is incompatible with the Convention. It will then be for Parliament itself to decide whether it will amend the statute so that it will be compatible with the Convention. Therefore if a court declares that an Act is incompatible with the Convention, there is no question of the court being in conflict with the Parliament or of seeking...to override the will of Parliament. The court is doing what the Parliament has instructed it to do in s.4 of the 1998 Act.”⁶⁸
7. Secondly it is true, nevertheless, that the Courts will accrue additional jurisdiction and power as the result of the enactment of human rights legislation. But this is to say no more than that the Courts accrue additional power every time legislation is

⁶⁸ Lord Hutton, in *R. (Anderson) v. Secretary of State for the Home Department*, [2003] 1 AC 837 (HL) at 895G-H.

passed. The parliament makes new laws, the judiciary interprets them. That is the way our system works.

8. If this is the case, there must be some additional consideration, specific to human rights legislation that worries its opponents. This consideration appears to be that under legislation that sets down Victorians' fundamental rights and freedoms, courts will not just be interpreting the words of a statute but, in addition, will be exercising a breadth of discretion either unusual in their work or undesirable in political practice.
9. It is the case that in human rights legislation, the rights and freedoms to be protected are expressed in quite general terms. So, for example, the Victorian Charter protects Victorians against arbitrary interferences with their privacy. This formulation leaves open the question as to how 'privacy' is to be defined, and in what circumstances and to what extent limits upon this right may be imposed. In reality, however, the discretion vested in the Courts is neither so great nor so unusual.
10. The international human rights treaties, upon which such legislation everywhere is based, have been in effect for many decades. Every Western democracy - except Australia - has constitutional or statutory human rights protection of precisely the same kind. In consequence, a huge jurisprudence of human rights has developed internationally and nationally. Over many decades the meaning of the rights and freedoms guaranteed has been thought about, teased out and refined by courts and tribunals across the globe including in the Westminster systems like our own - in the United Kingdom, Canada and New Zealand and throughout Europe.
11. Given this experience it can quite reasonably be expected that the judicial interpretation of the very similar provisions in Victoria will be interpreted consistently. The Courts here, in other words, do not take leaps into the dark. Rather, they walk along judicially well-worn paths. This has certainly been the experience in Britain where the case law has very closely mirrored that of the European Court of Human Rights. This is not to say that Courts will always be right. There have been examples of Courts elsewhere giving provisions of an Act an unduly expansive interpretation. Equally, there have been examples of Courts interpreting such provisions too narrowly. Courts make mistakes. Usually they are corrected on appeal. But the mistakes in Victorian jurisprudence have been very much the exception rather than the rule. *WBC v Chief Commissioner of Police 2010* in the Supreme Court of Victoria is one of them.
12. Another important consideration in this respect is that Courts nationally and internationally have themselves recognized that they should take a step back where matters of politics or policy are involved. In doing so, they have developed a doctrine of judicial deference. In other words, the judiciary, in recognition of the parliament's legitimacy and expertise in these spheres, will allow the government

and parliament greater leeway in determining how best to respond to certain sets of circumstances than they would where matters that are characterized as legal or jurisprudential are involved. The beginnings of a doctrine of judicial deference in Victoria has been set out by the Court of Appeal in *Momcilovic* previously referred to.

13. In this respect, it needs also to be noted that Courts are not unused to the interpretation of legislation containing generally framed evaluative provisions. In determining the legality of governmental action, for instance, the courts are every day required to give meaning and effect to legislative criteria such as whether the executive actions are 'unreasonable', or 'improper', or 'procedurally unfair' or 'contrary to the public interest'. It is hardly possible to get legislative criteria that are broader. And yet our system of administrative law operates perfectly well with courts accorded such discretion.
14. The situation is similar in constitutional interpretation. The Constitution's terms are of their nature and by necessity cast generally. Not infrequently, the High Court is required to determine whether or not some constitutional guarantee should give way in certain circumstances in the face of some 'competing or compelling public interest'. Similarly, the Court is frequently called upon to determine whether a particular law is 'reasonably and appropriately adapted' to the achievement of some constitutionally mandated purpose. In each of these instances, the courts proceed carefully, developing ascertainable criteria of their own, to assist in effecting the political or policy balance required. There seems to be no reason to expect that, given this experience, Victorian courts will not perform a similar function under a Charter in a similarly measured and methodical way.

5.2 Politicians or Judges?

15. The second argument against a Charter such as Victoria's is closely related to the first. It contends that if one is to make a choice between politicians and judges as to who is best placed to protect Victorians' human rights, then the decision should come down clearly in favour of politicians. There are two reasons for this. First, politicians are elected but judges are not. If politicians make mistakes, therefore, they can be replaced. Judges, in contrast, are appointed for life and cannot be removed. Secondly, politicians are more representative of the general community than judges, who are appointed from a privileged pool. They are therefore better placed to make decisions about what rights Australians should have as they better reflect community attitudes.
16. While initially plausible this argument runs immediately into significant difficulty for the following reason. Human rights, of their nature, are claims for protection against the state. They are claims for protection against laws that are oppressive and against governmental actions that are intrusive, invasive or abusive. The claim

for respect for one's privacy is a legal claim that the government ought not to legislate or act in a manner that invades one's privacy, for example, by monitoring the content of peoples' phone calls or email communications.

17. The question then is how is this right best protected? The answer cannot be - by politicians - as they make the oppressive laws in question. Nor can it be – by bureaucrats – as they administer and enforce the legislation. Human rights can only be protected by some independent third party. And that is why claims against the government, or challenges to legislation, must necessarily be adjudicated by the courts. They are established, independently of government and parliament, for precisely such a purpose. To put the matter another way, if we were to leave the protection of human rights in the hands of politicians or bureaucrats, they would, inevitably and unavoidably, be acting as judges in their own cause.

“We cannot give effect to our democratic values without there being independent judges who hold the ring between the fight against terrorism and the constraints of the law. As long as we hold to those democratic values then the role of the court is clearly to state the legal limits. And until the state unequivocally decides, democratically, to abandon the commitment to the three principles of democracy, the rule of law, and the individuals' right to personal dignity then it is the courts' role to uphold these values.”⁶⁹

18. There is another consideration that is also important in this regard. That is, that to be representative of the general community or to better reflect community attitudes is not necessarily the best qualification to make decisions with respect to human rights. A core value underlying human rights law is that there are some human rights that are so fundamental that they ought not to be capable of infringement even when supported by popular majority. For instance, as a society we ought not to permit torture, or cruel, inhuman or degrading treatment, even if a majority of our fellow citizens (or a majority of our parliamentary representatives) believes that such treatment is legitimate or desirable in certain circumstances. To do so would be to transgress a value so fundamental to our society and to how we constitute ourselves as democratic peoples, that we would all be diminished as citizens as a result. It is precisely to guard against such majority over-reach that human rights legislation has been set in place in every corner of the globe.

5.3 Ordinary Victorians and Minority Interests

20. Next it is claimed that the only people who will benefit from the introduction of a Charter are members of minority groups in society. For the vast majority of

⁶⁹ Lord Falconer, Lord Chancellor and Secretary of State for Constitutional Affairs, the United Kingdom, 'The Role of Judges in a Modern Democracy', Magna Carta Lecture, Sydney, Australia, September 13, 2006.

Victorians, therefore, the Act will either be irrelevant or have the effect of privileging such minorities over the majority.

21. Here again, there is some truth in the argument. Speaking generally, those who initiate claims under a Charter are individuals and groups who feel that they have been unfairly treated by legislation or by government action. And since legislation and regulations are passed by the parliament, in accordance with the wishes of the parliamentary majority, it is unsurprising that the legislation will be challenged in individual cases by those who feel aggrieved by what the majority has done.
22. However, ever since the British philosopher, J.S. Mill coined the term 'the tyranny of the majority', it has been recognized that even in a democracy, what the majority wants is not always socially desirable. And, in particular, it has become generally accepted that the conferral or withdrawal of individuals' human rights cannot and should not be left to parliamentary discretion alone. The bedrock values embodied in the designation and protection of human rights are too fundamental to our understanding of who we are, and what our democracy is, to be readily overturned from one parliament to another. Everyone's human rights demand continuing respect irrespective of the political colour of the parliamentary majority existing from time to time.
23. This raises a further issue. It is quite inaccurate to say that human rights law exists for the protection of minorities alone. It is in the very nature of human rights that they are universal and attach to everyone. It may well be the case, although this is by no means certain, that the majority of Victorians will have no cause to seek vindication of their human rights. But human rights legislation of the kind proposed here still sits as a guarantee that should some future government adopt laws or policies that infringe upon the human rights of a different segment of society, that segment, and the individuals within it, will be able to seek redress and remedy in the same way as those aggrieved now may do so.
24. In the end, the argument about minorities tends to boil down to an assertion that human rights legislation will be used primarily by highly unpopular and undeserving minorities, such as terrorists, criminals, prisoners, social security cheats and other assorted villains. The facts of litigation in other countries, however, do not bear this assertion out. Nor does the Victorian experience in the Charter's first four years – contrary to the protestations of the *Herald-Sun*. It does appear to be the case that in the first two years or so after the introduction of human rights legislation, there is a spike in the number of challenges to criminal procedures that are brought to the courts. However, once a set of precedents has been established in that time, such cases enter into an equally steep decline. What then ensues is what one would expect. That human rights cases are brought

principally in the context of complaints alleging harmful administrative decisions or actions by governmental agencies and their staff.⁷⁰

5.4 Absence of Support for a Charter

25. The final argument made against the adoption of a Charter is not just that there is no need for one but also that there is no demand. It is no doubt the case that in many countries, the adoption of a Bill or Charter of Rights followed some major social upheaval. The examples of the US Bill of Rights, adopted as part of the American Declaration of Independence and the European Charter of Rights, following the Second World War come readily to mind. Australia has experienced no such major social unrest, although segments of Australia's indigenous community may question such a broad generalization. Some argue, for that reason, that there is presently no reason to embark on this path. Further, some critics assert that this is not such a burning issue amongst the Australian populace as to justify contemplating such a measure. It doesn't rate highly amongst Australians' principal, political or social concerns. So, it's best left alone.
26. The problem with this position is that the recent, independent evidence collected about Australians' attitudes towards adopting a Charter points the other way. In the last five years, four independent inquiries have been held to determine whether or not State and Territory governments should enact such laws. Every one has concluded that they should. It is instructive to look more closely at some of these findings.
27. In 2003, the Government of the ACT commissioned an inquiry into whether or not the ACT should adopt a Charter. The inquiry concluded that:

“Human rights for people in the ACT are covered in a partial and haphazard manner under federal, territorial, common, constitutional and international law and therefore cannot be said to be adequately protected under our current political and legal system”.
28. During the course of the inquiry, the inquiry panel conducted a deliberative poll. The polling process brought together a representative sample of ACT residents to discuss and debate the Charter proposal over two days. At the conclusion of the discussion, participants were asked to indicate their position on an Act. 58.6% of participants said they favoured the adoption of such legislation. 38.4% of participants said they did not.⁷¹
29. The numbers who participated in the ACT consultation were relatively small, reflecting the size of the Territory's population. A much larger consultation was

⁷⁰ Review of the Implementation of the Charter , Department of Constitutional Affairs (UK), 2006, pp.29-30.

⁷¹ Report of the ACT Bill of Rights Consultative Committee, *Towards an ACT Charter* , Australian Capital Territory, Canberra 2003, Appendix 3.

conducted in Victoria in 2006. It was a defect in the inquiry's process that no independent polling of community opinion was conducted. Nevertheless, the inquiry panel conducted 55 public meetings across the State to assess community views. Perhaps more importantly, as the result of a vigorous program of public outreach, the inquiry received 2524 public submissions, the second highest number received by any such inquiry in Victoria's history. Of these, 84% favoured the adoption of a Victorian Charter of Rights. This favourable view was held across the State in equal measure in city and country and across all other segments of the community.⁷²

30. In 2007, the Tasmanian Law Reform Institute was asked by the Tasmanian Government to inquire into whether or not Tasmania should adopt a Charter of Rights. It, too, concluded that an Act should be introduced. 403 submissions were received, the largest number ever for an inquiry of this kind. 95% of public submissions expressed the view that human rights were not adequately protected in Tasmania. 383 submissions (94%) indicated a preference for a statutory Charter that would apply to all arms of government – the Executive, the Parliament and the Courts.⁷³
31. The Western Australian inquiry also reported in 2007. In the course of its deliberations it conducted independent opinion polling of Western Australians' attitudes towards the adoption of human rights legislation. The results of this polling are illuminating. A random sample of 400 voters was chosen from urban and regional areas. When asked whether Western Australia should have human rights legislation 89% said yes, 9 % said no. Young people were slightly more likely to be of this view than older people, women more slightly more likely than men to be in favour and, interestingly, country people were slightly more likely than metropolitan people to favour legal protection of human rights.
32. The Western Australian inquiry, to its credit, went further and conducted a survey directed at people 'on the margins', that is, members of disadvantaged groups in society. 405 participants took part in focus groups, face to face interviews, online surveys and telephone interviews. An overwhelming number supported strengthened legal human rights protections. Among face to face participants, for example, 154 of 160 were of this opinion. The inquiry panel concluded that:

“The Committee's consultations established that a wide range of people believe that their rights, or the rights of others, are not given sufficient respect and need greater protection. The breadth of individual and personal concerns was striking. Equally striking was that government agencies with responsibilities for monitoring the activities of other departments and agencies which have difficult and sensitive roles were

⁷² *Rights, Responsibilities and Respect*, The Report of the Victorian Human Rights Consultation Committee, p.2.

⁷³ *A Charter of Rights for Tasmania*, Report of the Tasmanian Law Reform Institute, October 2007.

concerned about the need for improved approaches to protecting human rights. The view that ‘it ain’t broke, so don’t fix it’, was comprehensively answered by the submissions we received from both the public and from government agencies.”⁷⁴

The same is true in Victoria.

Appendix A

Liberty Victoria submits that model act contained in the following appendix should form the basis to any of the amendments recommended above. Whilst the following Model Act was originally drafted as an Act for the Commonwealth of Australia, it has equivalent relevance at the State level in every aspect except those provisions that deal with federal-state relationships.

⁷⁴ *A WA Charter*, Report of the Consultation Committee for a proposed WA Charter, November 2007, p.iii.