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SUBMISSION IN RESPONSE TO THE 2015 REVIEW OF THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

OVERVIEW

1. Liberty Victoria is pleased to add its voice to the discussion about improving the Charter of Human Rights and Responsibilities (“the **Charter**”) provided for by this review.
2. Liberty Victoria is one of Australia’s leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty Victoria is actively involved in the development of Australia’s laws and systems of government. Further information may be found at www.libertyvictoria.org.au.
3. Our submission to the 2011 review detailed Liberty Victoria’s position in relation to:
 - (1) Human Rights, Context and History (Part 1);
 - (2) Whether Additional Human Rights Should be Included in the Charter (Part 2);
 - (3) The Operation and Effect of the Charter (Part 3);
 - (4) Strengthening the Charter (Part 4); and
 - (5) Arguing the Charter (Part 5).
4. Our position in relation to each of the matters addressed in that submission remains unchanged.
5. We reiterate each of the recommendations made in our 2011 submission.
6. This submission, which is intended to be read in conjunction with and supplement our 2011 submission, considers:

- (1) Judicial Remedies (Part 1);
- (2) Additional Rights and Recommendations to Strengthen the Charter (Part 2);
 - A. Public Authorities Should Not Be Exempt from the Charter;
 - B. Repeal of Sections 48, 38(4) and 38(5) of the Charter; and
 - C. Meaning of Discrimination.
- (3) Barriers to Charter Litigation (Part 3);
 - A. The Notice Provision; and
 - B. The Complexity of *Momcilovic* and the Interplay Between Sections 32 and 7 of the Charter.
- (4) Whether Any Future Review of the Charter is Necessary (Part 4).

PART 1: JUDICIAL REMEDIES

Introduction

7. In s 1 of the Charter it is stated that the “main purpose of this Charter is to protect and promote human rights”. This purpose is sought to be achieved through a model that does not provide for an independent cause of action for breach of Charter rights and expressly excludes any right to damages arising from the Charter¹. Behind this model is a Government policy of dispute prevention according to which: “[g]overnment does not wish to create new individual causes of action based on human rights breaches”.²
8. It will be argued in this part of the submission that this policy, which finds expression in s 39 of the Charter, is antithetical to the effective protection and promotion of human rights. Moreover it creates incoherence within the law that is detrimental to the status of and respect for human rights within the Victorian community. The Charter should provide a right to clear, simple and effective judicial remedies for breach of the Charter rights, including a right to claim damages.

No Right without a Remedy

9. It is a fundamental principle of the common law that where the law recognises a right it must provide a remedy for its breach. The maxim *ubi jus ibi remedium* (there is no wrong without a remedy) was expressed by Holt CJ in *Ashby v White* (1703) 2 Ld Raym 938³ as follows:

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without remedy; for...want of right and want of remedy are reciprocal . . . Where a new act of parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him.

10. This statement by Holt CJ is as valid today as it was in 1703. It was applied in the context of a human rights act by the New Zealand Court of Appeal in *Simpson v Attorney-General [Baigent's Case]*⁴ by Hardie Boys J and McKay J.⁵
11. In *Baigent's Case* the court held that damages was an available remedy for breach of the rights enumerated in the *New Zealand Bill of Rights Act 1990*,

¹ *Charter of Human Rights and Responsibilities*, s 39.

² Jeremy Gans, *The Charter's Irremediable Remedies Provision* (2009) 33 *Melbourne University Law Review* 109; Victorian Bar, Submission to the Scrutiny of Act and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act*, 10 June 2011, 15-16.

³ At 953-954.

⁴ [1994] 3 NZLR 667.

⁵ At 697 and 717.

notwithstanding the fact that the legislation did not contain an express right to damages. In his judgment McKay J stated that:⁶

What is...difficult to comprehend, however, is that Parliament should solemnly confer certain rights which are not intended to be enforceable either by prosecutions or civil remedy, and can therefore be denied or infringed with impunity. Such a right would exist only in name, but it would be a misnomer to call it a right, as it would be without substance.

12. Hardie Boys J, expressed the same point as follows:⁷

The New Zealand Bill of Rights Act, unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of the government exercise its functions, powers and duties will observe the rights that the Bill affirms. It is I consider implicit in that commitment, indeed essential to its worth, that the Courts are not only to observe the Bill in the discharge of their own duties, but are able to grant appropriate and effective remedies where rights have been infringed. Enjoyment of the basic human rights are the entitlement of every citizen, and their protection the obligation of every civilised state. They are inherent in and essential to the structure of society.

13. The principle that where there is a right there must be a remedy not only underpins the common law, but is also a principle recognised by international human rights law. The position at international law is encapsulated in this passage from the judgment of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case:⁸

It is a principle of international law, which jurisprudence has considered 'even a general principle of law,' that every violation of an international obligation which results in harm creates a duty to make adequate reparation. Compensation, on the other hand, is the most usual way of doing so.

14. Moreover, article 2(3) of the International Covenant on Civil and Political Rights (**ICCPR**) provides:

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies

⁶ At 717.

⁷ At 700.

⁸ Judgment of July 21, 1980 Inter-Am. Ct. H.R. (Ser C) No 7 (1990) [25].

when granted.

15. The human rights set out in the Charter are derived from the ICCPR. Article 2(3)(b) enunciates the position that an effective remedy means that the rights set out in the ICCPR must be justiciable. Moreover, the UN's Human Rights Committee has stated, with respect to article 2(3), that:⁹

Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

16. This interpretation of article 2(3) has recently been confirmed by the Human Rights Committee in *Horvath v Australia*, where the Committee held that:¹⁰

The Committee also recalls that under article 2, paragraph 3, State Parties are required to make reparation to individuals whose Covenant rights have been violated. Without such reparation the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged.

And

The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the author's rights under...the Covenant.

In accordance with article 2, paragraph 3(a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy including adequate compensation.

17. Although in Victoria Parliament has expressly stated an intention to exclude damages as a remedy for breach of a human right, it is hard to see how the common sense in the statements (referred to above) in Baigent's Case, and those of the Human Rights Committee on article 2(3) is not only consistent with the common law of Australia, but is also essential to the effective enjoyment of the human rights which are to be protected and promoted by the Charter.

⁹ Human Rights Committee General Comment 31 (2004) [16].

¹⁰ UN Human Rights Committee, Communication No. 1885/2009 (*Horvath v Australia*) (27 March 2014) at [8.5], [9] and [10].

Incoherence

18. The failure by the legislator to provide an express remedy for breach of Charter rights, and in particular the failure to allow courts to award damages for such breach, creates incoherence within the law. The history of the international development of human rights and its ethical underpinnings were set out in Liberty Victoria's submission to the Scrutiny of Acts and Regulations Committee in July 2011.¹¹ As was said there, "what is being protected is something essential, that is, human dignity or personhood".¹²

19. On its website the Victorian Equal Opportunity and Human Rights Commission states that:

Human rights are basic entitlements that belong to every one of us.

and

Based on the values of freedom, equality, respect and dignity, human rights acknowledge the fundamental worth of each person.

and

Human rights are the cornerstone of strong, healthy communities where everyone can participate and be included.

20. Although these grand statements about the importance of human rights to the Victorian community are appropriate and affirm the status of these rights as fundamental to human dignity, the lack of an effective remedy for the breach of human rights cannot be reconciled with its projected importance.

21. It has been argued, successfully in our submission, that there is an important parallel to be drawn between human rights law and those torts that are actionable per se, such as trespass and false imprisonment.¹³ Vindictory torts are actionable without the need by a plaintiff to demonstrate that an interference with his or her interest has caused economic loss. With respect to such torts the law's primary function is to ensure that the basic interest protected by the tort is vindicated through an award of damages. This reinforces the high intrinsic value place on those interests.

22. Accordingly, an action for trespass to land will lie against a defendant who, without the plaintiff's permission or licence, so much as sets foot on the plaintiff's land, unless the defendant's entry is justified in some way. To confine a person within

¹¹ Liberty Victoria, Submission Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act*, July 2011, [1] to [35].

¹² Ibid [35].

¹³ Jason Varuhas, *The Evolution of the Damages Remedy Under the New Zealand Bill of Rights Act 1990: From Torts to Administrative Law*, (2015) University of Cambridge Faculty of Law Research Paper No. 15/2015, 7.

an enclosed space against that person's will, although it causes no physical hurt, may constitute false imprisonment, just as to lay a hand on another without the latter's consent may be actionable as battery. There may be an action for trespass to goods, despite there being no damage, if the plaintiff is wrongfully denied possession of the goods or if they are moved without the owner's consent.¹⁴

23. As is the case with vindicatory torts, human rights claims are generally actionable per se. All that a plaintiff has to show is a prima facie interference with their human rights; they do not have to show that they suffered damages as a result of such breach in order to bring a claim. This affirms that the primary function of human rights law is to ensure the fundamental interests in themselves are the subject of strong protection.¹⁵
24. The fact that damages cannot be claimed for breach of the rights protected under the Charter, but can be claimed for the infringement of other interests such as the right to the use and enjoyment of one's chattels, signals that the former rights are of less normative significance than the latter. This is incoherent given, as has already been referred to above, the accepted importance of human rights both in Victoria and internationally.
25. Moreover, as the case of *Horvath v Australia* illustrates, current civil law remedies in Victoria may be inadequate, in certain circumstances, for the protection of individual rights. The problem was not that Ms Horvath did not enjoy adequate rights under the common law, but that she was not afforded an effective remedy to vindicate those rights.

Providing Access to Human Rights

26. The Victorian Equal Opportunity and Human Rights Commission (the **Commission**) each year reports on the operation of the Charter within the Victorian community. A reading of the Commission's reports makes it clear that in most cases those who are in need of protection of their human rights are vulnerable individuals or families who are dependent on government services for access to things such as housing or disability care. Under the current model, for most part, it is up to government departments or other public authorities to decide how to give effect to human rights in dealing with individual members of the public.
27. In its 2013 Report¹⁶ the Commission notes on page 22 that a number of community organisations observed that the Charter would be more accessible if it

¹⁴ LexisNexis, Halsbury's Laws of Australia, (at 9 June 2012) 415 Torts, 'Torts Derived From Trespass' [415 – 325].

¹⁵ Jason Varuhas, *The Evolution of the Damages Remedy Under the New Zealand Bill of Rights Act 1990: From Torts to Administrative Law*, (2015) University of Cambridge Faculty of Law Research Paper No. 15/2015, 7.

¹⁶ Victorian Equal Opportunity & Human Rights Commission, *2013 Report on the operation of the Charter of Human Rights and Responsibilities* (June 2014).

included an independent cause of action and clear relief or remedies for individuals seeking to pursue a breach of their human rights. Moreover, as the Commission notes elsewhere in its 2013 Report¹⁷, uncertainty in Charter case law often goes to the heart of whether a community organisation is willing to commit the necessary resources to rely on Charter arguments in their court work.

28. It is Liberty's view that it is the function of the courts to ensure compliance with the rights of individuals and develop legal principles through which human rights can be protected in a consistent and coherent way. It should not be left to government departments or public authorities to attempt, in an ad hoc fashion, to achieve this task.

Conclusion and Recommendations

29. Experience in the United Kingdom suggests that it is difficult to establish and maintain a culture of human rights across the public service.¹⁸ Clear, simple and effective remedies under the Charter would give people whose human rights have been violated far greater leverage when dealing with government or public authorities.¹⁹ Moreover, instituting them will facilitate the development of human rights jurisprudence in Victoria, which will help to create a consistent approach to the protection of human rights across the State. Such jurisprudence is in our view necessary for the development of a strong and sustainable human rights culture within the Victorian community that will promote compliance with human rights well beyond adjudication before the courts.

30. For that reason, Liberty Victoria recommends that section 39 of the Charter be amended so that:

- (1) There is no requirement that any action alleging a breach of the Charter be tied to a separate cause of action; and
- (2) Damages be made an available remedy for breach of the Charter.

¹⁷ At 21.

¹⁸ Simon Evans and Carolyn Evans, *Legal redress under the Victorian Charter of Human Rights and Responsibilities*, (2006) 17 *Public Law Review* 264, 281.

¹⁹ *Ibid* 281.

PART 2: ADDITIONAL RIGHTS AND RECOMMENDATIONS TO STRENGTHEN THE CHARTER

31. In Part 2 of our submission to the 2011 Review of the Charter, Liberty Victoria provided detailed reasons explaining our recommendation that the Charter should be amended so as to include:

- (1) Fundamental economic and social rights, including at least:
 - A. The right to education.
 - B. The right to the highest attainable standard of physical and mental health.
 - C. The right to housing.
 - D. The right to an adequate standard of living.
 - E. The right to work.
- (2) A provision that embodies and respects indigenous people's culture and traditions, which would be a meaningful and respectful addition to the existing rights catalogue.
- (3) An enforceable claim for compensation when a person has been arbitrarily arrested or detained.
- (4) A provision that requires that every child be registered immediately after birth and given a name.
- (5) Recognition of certain rights as non-derogable, including:
 - A. The right to life.
 - B. Freedom from torture and cruel or degrading treatment.
 - C. Freedom from forced work.
 - D. The right to humane treatment for detainees.
 - E. The freedom of thought, conscience, religion and belief.
 - F. The right to a fair trial.
 - G. The right to appeal to higher courts in criminal proceedings.

H. The right not to be prosecuted under retrospective laws.

32. Liberty Victoria also called for:

- (1) The general override provision provided for at section 31 of the Charter to be removed.
- (2) Further training and analysis to identify where human rights may be engaged by government departments that have less contact with citizens on a day to day basis.
- (3) Greater promotion of human rights and resources to ensure that all Victorians know how they can protect their rights should they need to.
- (4) The Charter to be strengthened in three particular ways:
 - A. Inclusion of a free-standing cause of action for breach of Charter rights and a broad remedies provision (which has been reiterated and expanded upon in Part 1 of this submission).
 - B. A mechanism to enable private and non-government organisations and associations to elect to 'opt-in' to the provisions of the Charter.
 - C. Provision for an annual audit of Charter compliance by public authorities.

33. We reiterate those recommendations for the reasons detailed in our previous submission. In addition, we make the following submissions.

A. Public Authorities should not be Exempt from the Charter

34. Regulation 5 of the *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* provides that the Adult Parole Board, Youth Residential Board, and Youth Parole Board are not public authorities.
35. Accordingly, at present those tribunals are exempt from the obligations of public authorities pursuant to s 38 of the Charter.
36. Liberty Victoria submits that such tribunals should not be exempt from the operation and effect of the Charter. In particular, those bodies make vital decisions about the liberty, freedom of movement and privacy of persons who are often particularly vulnerable. When making those decisions, those tribunals should be required to comply with the Charter, including the right to provide a fair hearing as protected by s 24 of the Charter.

37. To “carve out” public authority exceptions does not add to a human rights culture – indeed it creates a culture of exception that may result in future governments adding to a list of public authorities that are insulated from the operation and effect of the Charter. Accordingly, it is submitted that all public authorities, including all entities established by statutory provisions that have functions of a public nature, should be bound by s 38 of the Charter.

B. Repeal of Sections 48, 38(4) and 38(5)

38. Liberty Victoria supports the repeal of ss 48, 38(4) and 38(5) of the Charter.

39. Section 48 of the Charter provides “[n]othing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2”.

40. It is clear that the Charter does not have retrospective effect. However, with regard to the current legislative landscape, no statute should be excluded from the ambit of the Charter. Should the Courts determine that a statutory provision is incompatible with the Charter, then it is for Parliament to determine whether or not to amend the particular statutory provision.

41. With regard to ss 38(4) and 38(5), it is submitted that there should not be exceptions that enable public authorities to act incompatibly with the Charter and/or fail to give proper consideration to a Charter right. It is submitted that religious bodies should not be above the Charter. In reaching a charter-compatible decision or action a public authority must consider the relevant human rights, and s 14 sets out freedom “of thought, conscience, religion and belief” as one of the human rights that the Charter specifically seeks to protect and promote. The ad hoc special privilege for religious bodies in ss 38(4) and (5) is inconsistent with the scheme of the Charter and should be removed.

C. Meaning of Discrimination

42. Section 8 of the Charter mostly implements Article 26 of the ICCPR, but by referencing the definition of “discrimination” in the *Equal Opportunity Act 2010*, and the list of attributes in s 6 of that Act, it replaces an open list with a closed list of attributes. The Charter should add to the definition of discrimination in s 3(1) that the list of attributes include “or other status” as provided by Article 26 of the ICCPR.

PART 3: BARRIERS TO CHARTER LITIGATION

43. Liberty Victoria understands that the Charter has been underutilised in the protection of rights, particularly in criminal law proceedings.
44. The value of the Charter is diminished or eroded if, for practical or pragmatic reasons, those whose rights have been (or might have been) violated are discouraged from relying on the Charter to seek a remedy or relief.
45. The Charter must be accessible, including to those charged with criminal offences.
46. The most significant barriers to Charter litigation in the criminal jurisdictions of the Supreme and County Courts of Victoria arise from:
 - (1) the obligation, pursuant to s 35 of the Charter, to give notice in the prescribed form to the Attorney-General and to the Commission; and
 - (2) the complexity of the interplay between s 32 and s 7 of the Charter and the different judgments of the High Court of Australia in *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***).

A. The Notice Provision

47. The notice provision can deter accused persons from invoking the rights contained in the Charter because they result in delay in the determination of proceedings. Often this is in circumstances where the liberty of the subject is at stake. Consequently, accused persons are sometimes better placed to endeavour to protect their rights through reliance on, for example, the common law.
48. Liberty Victoria believes that any barriers, including those provided by the notice provisions, detract from the promotion of a rights-based approach and undermine the purpose of the Charter to create a culture which values and encourages the protection of human rights.
49. While the notice provisions may have made sense in the early days of the Charter, particularly before there was a significant body of Charter jurisprudence, it is clear now that there is a clear methodology to be applied in Charter matters post-*Momcilovic*.²⁰ While the correctness of that methodology remains in issue, in practical terms it is able to be understood and applied.
50. Liberty Victoria submits that the notice provision should be abolished apart from when the Supreme Court of Victoria is contemplating making a declaration of inconsistent interpretation. If the Charter is to become accepted as a normal part

²⁰ *Slaveski v Smith and Victoria Legal Aid* (2012) 34 VR 206, *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors* (2012) 38 VR 569, and *Nigro & Ors v Secretary to the Dept of Justice* (2013) 304 ALR 535.

of the legislative landscape, then notice should not be required in most cases, particularly when reliance is placed on the interpretative provision and it is not being submitted that the Court should make a declaration of inconsistent interpretation. Litigants should be able to make and respond to Charter submissions on statutory interpretation in the ordinary course.

51. Judicial officers should retain the power to direct parties to give notice if deemed necessary in individual cases, but fragmentation of proceedings should be discouraged. As is the case now with regard to other interveners, the Attorney-General and the Commission can then make a determination as to whether they wish to intervene in proceedings that are likely to give rise to key developments in Charter jurisprudence.
52. If the Supreme Court of Victoria is contemplating making a declaration of inconsistent interpretation, then Liberty Victoria accepts that it should give notice to the Attorney-General and the Commission.

B. The Complexity of *Momcilovic* and the Interplay Between Sections 32 and 7 of the Charter

53. The different reasons for judgment in *Momcilovic*²¹, and in particular the different approaches of the various judges regarding the relationship between ss 32 and 7 of the Charter, have created significant uncertainty. Accordingly, the High Court of Australia judgment of *Momcilovic* has had a significant chilling effect with regard to accused persons relying on the Charter.
54. Subsequent authority from the Court of Appeal has clarified the methodology to be applied with regard to the interpretative provision, although it is unclear when this will be revisited.²²
55. Liberty Victoria maintains and repeats its submission as made in 2011 in support of the approach of the Court of Appeal in *Momcilovic* to the interpretative provision:

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.

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

²¹ (2011) 245 CLR 1.

²² Supra n 20.

Victoria and consequent upon the Court of Appeal's decision it is highly unlikely to do so.²³

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”.

56. Liberty Victoria prefers the approach of the Court of Appeal in *Momcilovic*²⁴ to an approach that would see s 7 of the Charter affect the interpretative task under s 32.
57. It is understandable that some would want to see issues of proportionality inform the interpretative task, as it would arguably result in s 32 being a more powerful provision with regard to reinterpretation.
58. However, this is open to criticism as undermining parliamentary sovereignty and potentially challenges the dialogue model itself – if the interpretative provision is too strong then declarations of inconsistent interpretation pursuant to s 36 of the Charter have very little work to do, because the relevant statutory provision will be reinterpreted and there will be no occasion for a declaration of inconsistent interpretation which is central to the dialogue model.
59. Further, there is a live issue as to whether proportionality considerations affecting the interpretative provision will create significant difficulties for under-resourced litigants. In short, often better resourced public authorities, in making proportionality arguments that are relevant to statutory interpretation, will have the resources to rely on significant evidence that addresses the criteria in s 7 and therefore whether their favoured interpretation is proportionate. Where there is an inequality of arms, then this may result in litigants who try to avail themselves of Charter protections being unable to effectively respond to significant evidentiary material relied upon by better-resourced parties.
60. Also, there is an analytical problem with considerations of proportionality affecting the interpretative task. That is because considerations of proportionality will inevitably raise utilitarian considerations (whether a particular interpretation is for the general good and will increase aggregate utility).

²³ [58]-[60].

²⁴ (2010) 25 VR 436.

61. However, human rights are supposed to act as a bulwark against the excesses of utilitarianism. The danger of a utilitarian emphasis recalls the warning of Martti Koskenniemi:²⁵

Exit from the tragedy of incompatible and contested goods is bought at the expense of the bureaucratisation of politics into balancing or the search for aggregate utility – paradoxically precisely the outcome that rights discourse originally sought to combat.

62. Accordingly, Liberty Victoria supports the approach taken by the Court of Appeal in *Momcilovic*. This may result in a less powerful interpretative provision, but it is more consistent with the dialogue model. Further, it results in s 32 having broad application, which includes for vulnerable litigants who may not be well placed to respond to evidence addressing proportionality considerations.

²⁵ “The Effect of Rights on Political Culture” in Philip Alston (Ed), *The European Union and Human Rights*, (Oxford University Press, 1999), 99-116, 114.

PART 4: WHETHER ANY FUTURE REVIEW OF THE CHARTER IS NECESSARY

63. Section 45 of the Charter states:

- (1) The Attorney-General must cause a review to be made of the 5th to 8th years of operation of this Charter and must cause a copy of a report of the review to be laid before each House of Parliament on or before 1 October 2015.
- (2) A report under subsection (1) must include a recommendation as to whether any future review of this Charter is necessary.

64. Liberty Victoria does not believe that a future review of the Charter is necessary.

65. In his second reading speech, then Attorney-General Rob Hulls said in relation to this provision:

The bill provides for a review of the operation of the charter after four years, and again after eight years of operation. Human rights are not static, nor are the values and aspirations of the Victorian community. These reviews will help to preserve the flexibility of the charter, to assess whether it is working effectively and to ensure that it continues to reflect the values and aspirations of the Victorian community. The range of matters to be considered in the review include whether the charter should include additional human rights and whether the right to self-determination should be included. Some of these matters were supported during the community consultation and it is appropriate that they be considered further once the charter has been implemented and there has been an opportunity to consider its impact.

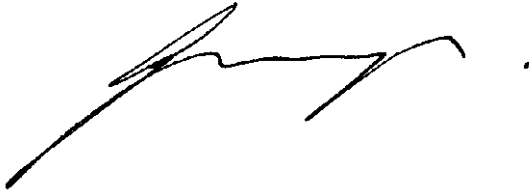
66. The Charter can be improved. To further fulfil its purpose as an instrument that promotes a culture of human rights, tolerance, respect and dignity, it should include additional rights. It should provide for judicial remedies. It should reduce the barriers that discourage the pursuit of Charter litigation. Each of those goals is consistent with the contemporary values and aspirations of our community.

67. This review can promote those goals. A further review might serve to create an impression that the Charter is transitional.

68. Liberty Victoria encourages Victoria's Parliament to grasp the nettle and take the opportunity provided by this review to improve the Charter. Those necessary improvements should not be delayed to a later time following a later review.

69. Thank you for the extension of time granted to make this submission. Should you wish to discuss any aspect of this submission further please contact Liberty Victoria Vice Presidents, Jamie Gardiner or Michael Stanton. This is a public submission and is not confidential.

Yours sincerely

A handwritten signature in black ink, appearing to read 'George A Georgiou SC'. The signature is fluid and cursive, with a prominent initial 'G' and a long horizontal stroke.

George A Georgiou SC
President
Liberty Victoria