Submission to the Charter Review 2015

Review of the Charter of Human Rights and Responsibilities Act 2006 (Victoria)
CATHOLIC ARCHDIOCESE OF MELBOURNE

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The Catholic Church in Victoria made a comprehensive submission to the 2011 Review, which is attached for the consideration of the current Review and referenced in the course of this submission. In responding to the Terms of Reference (TOR) for the current review, the Archdiocese re-endorses the points made by the Church in the 2011 submission. It also offers the following additional observations and comments on these points and others, by way of generally identifying ways to enhance the effectiveness of the Charter (TOR 1) and desirable amendments to improve the operation of the Charter and clarify some of its provisions (TOR 2).

The Archdiocese notes that the 2011 review of the Charter, conducted by the Scrutiny of Acts and Regulations Committee (SARC) of the Parliament of Victoria, presented a number of findings and recommendations which were not implemented. As the 2015 Review Consultation Paper also notes, the Parliament did not make any legislative amendments to the Charter as a result of the previous review. The Archdiocese encourages the 2015 Review to revisit the recommendations of the 2011 SARC review. The Archdiocese especially endorses the adoption of SARC Recommendations 1, 23, 24, 31 and 32, which are discussed within the context of this submission.

The current review is also asked to make a recommendation under Section 45(2) of the Charter, as to whether any further review of the Charter is necessary (TOR 3). The Archdiocese supports further reviews of the Charter as an essential safeguard to ensure that the sovereignty of the Parliament is preserved, and its role in protecting human rights, especially in passing and amending laws to strike the balance between competing rights, is maintained. This last task in particular is vitally important for a culture of human rights in Victoria, both to assist the courts in their own important work and to ensure that the balancing of competing rights does not fall to the courts alone. Dedicated, regular reviews of the Charter should play an important part in preserving the intentions of the Parliament in legislating this statute and averting concerns about important human rights questions being decided by the judiciary alone.

The primary issues and concerns of the Archdiocese articulated in this submission with respect to the Charter relate to:

- The need to insert additional provisions into the Charter to ensure adequate and full protection of the right to freedom of religion, thought, conscience and belief in line with international instruments.
- The selective nature of rights included in the Charter.

• The wide scope of statutory interpretation provisions afforded to the judiciary, and the room created for re-interpreting or reading-down through the operation of section 7(2) and section 32 provisions in the current Charter, and the level of uncertainty that this creates for the public and public authorities.

• Provisions in the Charter for courts to impose limitations on all rights in interpreting the Charter, and particularly, the room for courts to apply and interpret the Charter in a manner that disregards or does not adequately protect human rights in the Charter.

• Generally ensuring that the role of the Parliament in debating and determining the appropriate ways of balancing competing rights and objectives in the law is preserved, both as a protection of human rights and the democratic process in itself, and as an indispensable assistance to the judiciary in its own consideration of these questions.

1. **The need for additional provisions in the Charter to ensure adequate and full protection of the right to freedom of religion, thought, conscience and belief in line with international instruments.**

**Submission 1.**

The Archdiocese makes the following recommendations:

• Provide full protection for the right to freedom of religion, thought, conscience and belief in the Charter through adoption of provisions articulated in Article 18(3) of the *International Covenant on Civil and Political Rights* (ICCPR), and to align Charter provisions with international instruments.

• More broadly, the Archdiocese notes the selective nature of rights included in the Charter and encourages the current Review to revisit and endorse Recommendation 1 of the 2011 Review:

 Recommendation 1

*If the Charter is retained in its current form, SARC recommends that consideration be given to whether the rights contained in the ICCPR omitted by the Human Rights Consultation Committee should be re-examined for inclusion in the Charter.*

The Catholic Church is a strong advocate of human rights, including the fundamental (i.e. foundational) right to freedom of religion, thought, conscience and belief. This right is closely associated with other human rights such as the rights to freedom of opinion, expression and association, all of which are vital to promoting human dignity and human flourishing in society. For the Catholic Church, the significance of human rights generally and freedom of religion, thought, conscience and belief in particular is reflected in Catholic Social Teaching, which underpins the Church’s commitment to upholding and protecting the dignity of the human person. As His Holiness Pope John Paul II said in 1998:

... religious freedom, an essential requirement of the dignity of every person, is a cornerstone of the structure of human rights, and for this reason an irreplaceable factor in the good of individuals and of the whole of society, as well as of the personal fulfilment of each individual. It follows that the freedom of individuals and of communities to profess and practise their religion is an essential element for peaceful human coexistence. Peace, which is built up and consolidated at all levels of human association, puts down its roots in the freedom and openness of consciences to truth.

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5. SARC Review 2011.

6. See also Catholic Church of Victoria Submission 2011, at 3-4.
Moreover, every violation of religious freedom, whether open or hidden, does fundamental damage to the cause of peace, like violations of the other fundamental rights of the human person.\(^7\)

The Archdiocese believes that there is scope to amend and enhance the Charter to better protect freedom of religion, thought, conscience and belief, particularly in light of questions which have arisen about the extent and limit of this right following the Victorian Court of Appeal’s decision in the *Cobaw* case\(^8\). These questions include how broadly or narrowly religious freedom protections (“exemptions”) in anti-discrimination legislation should be applied, whether they apply to corporations as legal persons, what it means for an organisation to be established for religious purposes, and the role of courts in determining the scope and content of religious doctrines and obligations\(^9\).

*Afford Full Protection of the Right to Freedom of Religion, Thought, Conscience and Belief through Alignment with International Standards*

Section 14 of the Charter articulates the right of every person to freedom of thought, conscience, religion and belief. While the provisions in the Charter articulate a general right to religious freedom for all persons, the provisions do not afford the same level of protection of the right as universally recognised and established under international law, and as is widely understood to constitute this fundamental right.\(^10\)

Protection for the human right to freedom of religion and belief is articulated under international law in Article 18 of the ICCPR.\(^11\) Australia is a signatory to the ICCPR. Article 18(3) of the ICCPR particularly stipulates that “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”\(^12\)

These parameters, which are an important safeguard for the realisation of the right, are absent from the Charter, which speaks instead of “reasonable limitations” under Section 7(2).\(^13\) While the Charter makes similar provisions to those articulated in subsections 1 and 2 of Article 18 (i.e. Article 18(1)-(2)) of the ICCPR, the limitations on the exercise of the right articulated in subsection 3 (as well as the right of parents to determine the religious and moral education of their children under subsection 4\(^14\)) of Article 18 have not been incorporated into the Charter.

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8. *Christian Youth Camps Ltd and Mark Rowe v Cobaw Community Health Services Ltd and Victorian Equal Opportunity and Human Rights Commission and Attorney-General for the State of Victoria* [2014] VSCA 75. This decision ultimately concerned the law before the Charter was enacted, rather than the application of the Charter itself. The Court of Appeal determined that the judge at first instance erred in ruling that the Charter was relevant in this case.
10. See also Catholic Church of Victoria Submission 2011, at 22-25.
12. ICCPR, art 18(3).
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<td><strong>Section 14</strong></td>
<td><strong>Article 18</strong></td>
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<tr>
<td>Freedom of thought, conscience, religion and belief</td>
<td>1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.</td>
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<td>(1) Every person has the right to freedom of thought, conscience, religion and belief, including—</td>
<td>2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.</td>
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<td>(a) the freedom to have or to adopt a religion or belief of his or her choice; and</td>
<td>3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.</td>
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<td>(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.</td>
<td>4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.</td>
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<td>(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.</td>
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The Archdiocese recommends that the Review advocate for the incorporation of the full protection of the right to freedom of religion, thought, conscience and belief in the Charter as per the international standard articulated in Article 18 of the ICCPR, specifically through the incorporation of Article 18(3) and (4) provisions.

**Address the Selective Nature of Rights Included in the Charter**

The Archdiocese also wishes to again highlight the selective nature of the rights included in the Charter.\(^{17}\) For example, in addition to the issues raised above regarding insufficient protection of the right to freedom of religion, thought, conscience and belief, the Charter has inadequate protection for the right to life which may be limited by the application of other rights, and is also qualified through section 48 of the Charter.\(^{18}\)

Concerns about the selective nature of the rights included in the Charter were echoed in the findings of the 2011 Review. The SARC observed that the approach adopted by the Human Rights Consultation Committee “resulted in some subjective judgments being made about the inclusion of rights contained in the ICCPR, such as decisions that certain rights were no longer relevant, and that certain rights should not be included because doing so might influence the outcome of the current law reform projects.”\(^{19}\) Further to this the SARC recommended that consideration be given to whether

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16. ICCPR, art 18.
18. Ibid., at 26-32.
19. SARC Review, at 34.
rights contained in the ICCPR which were omitted by the Human Rights Consultation Committee “should be re-examined for inclusion in the Charter.”\textsuperscript{20} This would serve to ensure alignment of Charter provisions with Australia’s obligations under international law and enhance the proper protection of fundamental human rights in Victoria.

The Archdiocese encourages the current Review to revisit and endorse Recommendation 1 of the 2011 Review, namely:

If the Charter is retained in its current form, SARC recommends that consideration be given to whether the rights contained in the ICCPR omitted by the Human Rights Consultation Committee should be re-examined for inclusion in the Charter.\textsuperscript{21}

2. Redress the Wide Scope of Judicial Interpretation and the Charter Provisions on Reasonable Limits.

**Submission 2.**

The Archdiocese particularly emphasises the following recommendations:

- Section 7(2) of the Charter should be reviewed and amended to comply with the international guiding principles on the interpretation of limitations on rights contained in the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. Principles 1, 3, 4 and 10 of the Siracusa Principles are particularly instructive.

- Remove Section 32 of the Charter and accordingly review other provisions in the Charter that may impact on the interpretation of laws by the courts and tribunals.

- The Charter should be reviewed to ensure that the language used throughout the Charter and within individual provisions is clear and written in plain language that is accessible to the general public and to employees of public authorities.

- Section 48 of the Charter should be removed. It has been interpreted in a way that was not intended to permit legislation that overrides human rights, including the right to life and the right to freedom of conscience, to fall outside the purview of the Charter. See the attached Church of Victoria Submission 2011 for further discussion on this recommendation.

- Further to the above, the Archdiocese encourages the current Review to revisit and endorse the following recommendations of the 2011 SARC Review:

**Recommendation 24 - Interpretation of legislation**

*If the Charter is retained, then SARC recommends that consideration be given to whether Charter s. 32 is necessary, in light of common law principles of statutory interpretation. If Charter s. 32 is retained, then sub-s. (1) should be redrafted in a manner that both clarifies that it is limited to traditional approaches to interpretation and makes its meaning accessible to local users, without undue recourse to overseas judgments. For example, sub-s. (1) could be drafted (similarly to s. 35(a) of the Interpretation of Legislation Act 1984) to provide that, in the interpretation of the provision of an Act or a subordinate instrument, a construction that would not limit a human right shall be preferred to a construction that would limit a human right.*

**Recommendation 23 - Conduct of public authorities**

*If Charter s. 38 is retained, then SARC recommends that it be redrafted to state the...*
obligations of public authorities in plain language that is accessible to both lay employees of public authorities and lay users of public services without recourse to overseas precedents. For example, Charter s. 38(1)-(2) could be replaced with a single requirement that a public authority must, in making a decision, give proper consideration to any relevant human right.

Recommendation 31 - Inconsistent interpretation

If Charter s. 36 is retained, then SARC recommends that consideration should be given to amending it to give an independent non-judicial body (such as YEOHRC) the functions of identifying statutory provisions that the Supreme Court has interpreted in a way that limits a human right and forwarding those provisions to a parliamentary committee (such as SARC) for reporting to the Parliament, as well as to the Minister responsible for the statutory provision.22

The Archdiocese is concerned that the discretionary elements and contingencies within the current provisions of the Charter are far too broad and uncertain, which is not helpful when it comes to the courts applying them. The provisions in the Charter with respect to statutory interpretation and “reasonable limits” on the application of rights require attention.

Most notably:

Section 7(2) of the Charter provides that:

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and
(b) the importance of the purpose of the limitation; and
(c) the nature and extent of the limitation; and
(d) the relationship between the limitation and its purpose; and
(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Section 32 of the Charter provides that with respect to interpretation:

So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights” and that “International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision...

These provisions, which vest the courts with the power to impose limitations on all rights in interpreting the Charter and with a significant amount of flexibility in interpreting statutory provisions, are of significant concern to the Archdiocese. The uncertainty that is created for the public and public authorities as a result of the degree of interpretative discretion afforded to the courts under the Charter in applying rights, and the broad scope this gives the courts for determining the balance between competing rights, are particular concerns.

Cases such as Momcilovic v The Queen23, where members of the High Court expressed different possibilities for the interpretation and application of sections 7(2) and 32 of the Charter; and the decision at first instance in Cobaw24 where the tribunal held that religious freedom rights could be significantly limited by other rights through the application of Sections 7(2) and 32 of the Charter, leave a significant degree of uncertainty as to how rights may be applied by the courts, particularly where there are competing rights.

22. Ibid.
24. Cobaw Community Health Services Ltd v Christian Youth Camps Ltd and Mark Rowe [2010] VCAT 1613. As mentioned at n.8 supra, the Court of Appeal subsequently determined that the Charter was applicable in this case.
The Archdiocese is concerned that Sections 7(2) and 32 shift too much power to the judiciary and transfer much of the function of balancing competing rights to the courts, when this role should also be appropriately vested in the Parliament. The judiciary, unlike parliamentarians, are “immune from being removed by the voters for the decisions they reach,” and it is important for a culture of human rights in Victoria that debate about human rights and the striking of the balance between them is not gradually withdrawn by judicial determinations from the democratic law making process in the Parliament.

The Catholic Church in Victoria has previously expressed its concern that Section 32 of the Charter [which requires that the Courts interpret legislation in a way that is compatible with the human rights set out in the Charter “so far as it is possible to do so consistently, with their purpose”], when combined with the requirement to assess reasonable limits for rights [under Section 7 of the Charter], creates the potential for decisions that do not sufficiently respect important fundamental rights such as the right to life and to freedom of religion, thought, conscience and belief; or which do not sufficiently take into account the significance of the family as the fundamental unit of society and the demands of the common good. The Parliament has an indispensable part to play in addressing these problems in the interpretation of human rights law by the courts, and its role must be protected and maintained.

Section 7(2)

The Archdiocese supports the recommendation in the Catholic Church of Victoria Submission 2011, that the Section 7(2) provisions be revisited to incorporate international guiding principles on formulating and interpretation provisions which limit the application of rights. Relevantly, Principles 1, 3, 4 and 10 of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights are particularly instructive, and provide that:

- No limitations or grounds for applying them to rights guaranteed by the [ICCPR] are permitted other than those contained in the terms of the Covenant itself. (Principle 1);
- All limitation clauses shall be interpreted strictly and in favour of the rights at issue. (Principle 3);
- All limitations shall be interpreted in the light and context of the particular right concerned. (Principle 4);
- Whenever a limitation is required in the terms of the Covenant to be “necessary,” this term implies that the limitation:
  (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
  (b) responds to a pressing public or social need,
  (c) pursues a legitimate aim, and
  (d) is proportionate to that aim. (Principle 10).

The Archdiocese is concerned that the provisions in Section 7(2) of the Charter as they currently stand are not compliant with these international principles. For instance, they fail to mention a requirement for strict interpretation of limitations and the favouring of the rights concerned in the

26. See the discussion of this point in Catholic Church of Victoria Submission 2011, at 20-22.
29. Ibid.
Charter. The notion of limitations being “necessary” as Principle 10 of the Siracusa Principle provides is also not explicitly present in the Charter. Section 7(2) of the Charter should be amended to comply with the international guiding principles on the interpretation of limitations on rights contained in the Siracusa Principles, particularly for those situations when rights conflict.

It is important to recognise that many human rights are fundamentally concerned with moral questions. The difficult moral questions that may be raised through the Charter inevitably engage personal moral beliefs and viewpoints and draw out individual subjectivities. This can create significant uncertainty in the law when the judiciary is given a wide remit to interpret and apply human rights. For this reason, interpretative and limiting provisions in the Charter should be clear and precise, and derived primarily from established principles set out in common law and statute, and also from the relevant international instruments and authorities. It is the responsibility of Parliament to ensure that this is the case.

Section 32

There is evidence from the United Kingdom and New Zealand30 which demonstrates serious issues with the operation of provisions similar to Section 32 in the Charter. Both of these jurisdictions have statutory bills of rights which contain what are essentially “reading-down provisions” very similar to Section 32. These provisions have given the judiciary an excessive discretion in interpreting and applying rights, as the reading-down provisions can “end up being a license to rewrite (as opposed to strike down) legislation”.31

What they do is direct the judges, so far as it is possible to do so (Victoria and the UK) or if they can (NZ), to read all other statutes as consistent with the enumerated rights. Of course what is and is not consistent with such rights is wholly up to the judges, as is the question of what is and is not possible. Even the secondary question of what limits on rights are reasonable is one ... wholly with the unelected judges. They decide what aspects of other statutes are or are not consistent with the vague, amorphous rights provisions; they decide what is and is not possible insofar as giving other statutes a different meaning ...

... reading-down provisions such as these throw open the possibility of “Alice in Wonderland” judicial interpretations; they confer an “interpretation on steroids” power on the unelected judges. So although there is no power to invalidate or strike down legislation, the judges can potentially accomplish just as much by re-writing it, by saying that seen through the prism (that is, their own prism) of human rights, “near black” means “near white.”

The alarming impact of reading-down provisions has been demonstrated in cases such Ghaidan v Godin-Mendoza ("Ghaidan") in the United Kingdom, where Lord Nicholls expressly stated that:

It is now generally accepted that the application of s 3 [the reading-down provision in the UK] does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, s 3 may none the less require the legislation to be given a different meaning ... Section 3 may require the court to ... depart from the intention of the Parliament which enacted the legislation ... It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant [meaning, bill of rights-compliant].

The reading-down provisions and the types of judicial interpretations that have ensued from them have also operated to override the general and established rule where the intention of Parliament with respect to statutory provisions is ascertained through the ordinary meaning of the words used in the

30. See Allan, “What’s Wrong About a Statutory Bill of Rights”.
31. Ibid., at 85.
32. Ibid., at 85.
relevant legislation. The operation of reading-down provisions means that “the words of the statute are no longer decisive and so the intention of Parliament at the time is no longer followed”. For instance, in *R v A* the House of Lords held that:

In accordance with the will of Parliament as reflected in section 3 [the reading-down provision in the UK] it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading-down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so.\(^{35}\)

The overseas experience suggests that with a reading-down provision such as Section 32 of the Charter in operation, the judiciary may find that statutory provisions that would otherwise be considered “clear and unambiguous” can be given the “exact opposite meaning as that intended by the elected Parliament ... They can read words in, read words out, and opt for clearly unwanted outcomes.”\(^ {36}\)

The Siracusa Principles on the limitation and derogation of provisions in the ICCPR are an important benchmark in this context, and particularly provide that legal rules limiting the exercise of human rights should be “clear and accessible to everyone”, that limitations on the application of rights should not be applied in an arbitrary manner, and that laws imposing limitations on the exercise of human rights should not be arbitrary or unreasonable.\(^ {37}\)

Significantly, upon the second reading of the Charter, the-then Attorney-General, the Honourable Rob Hulls MP, articulated the intention behind the Charter; namely that it would be “a powerful symbolic and educative tool for future generations and new arrivals in Victoria. This will help us become a more tolerant society, one which respects diversity and the basic dignity of all.”\(^ {38}\) The Background Brief of the current Charter Review further notes that the intention to develop a human rights culture in Victoria was a theme that was “reiterated throughout debate on the Bill.”\(^ {39}\)

Particularly in a democratic society such as Victoria, fundamental human rights should be protected and upheld for each individual without undue risk of erosion by judicial misinterpretation. Failure to do so may also work to counter the intended objectives of the Charter to create a culture of rights in Victoria.\(^ {40}\)

It is important that the law in any jurisdiction provides certainty for both the public and for government, and safeguards the fundamental human rights of all citizens. Case law\(^ {41}\) demonstrates that the operation and application of provisions like sections 7(2) and 32 create great uncertainty as to how courts will interpret and apply rights in a given case.

*Section 38*

There is scope generally to review and improve the clarity of provisions in the Charter to ensure that the language used throughout the Charter and particularly within individual provisions is accessible to the general public and to employees of public authorities. One example is Section 38 of the Charter, on the conduct of public authorities. In addition to the problems in this section identified by the SARC in the 2011 review, the protection (or ‘exemption’) for a public authority which is a religious body is problematic.


\(^{35}\) *Regina v A* [2001] UKHL 25, at para 44.

\(^{36}\) Allan, “What’s Wrong About a Statutory Bill of Rights”.

\(^{37}\) Siracusa Principles, Principles 7, 16 & 17,

\(^{38}\) See Hon Robert Hulls, First Session of the Fifty Fifth Parliament- Legislative Assembly (4 May 2006), Parliamentary Debates (Hansard), Parliament of Victoria, at 1290.


\(^{40}\) Ibid., at 8-9.

\(^{41}\) As discussed above. See also cases and commentary in Leeser and Haddrick, *Don’t Leave Us with the Bill*.
Section 38 of the Charter provides that:

(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

(2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

(3) This section does not apply to an act or decision of a private nature.

(4) Subsection (1) does not require a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.

(5) In this section “religious body” means—

(a) a body established for a religious purpose; or

(b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

The formulation of the obligation in subsection (1), when read with the formulation of the protection in subsection (4) for public authorities which are religious bodies to carry out their responsibilities in accordance with their doctrines, beliefs and principles, can give rise to an inference that the doctrines, beliefs and principles of religious bodies may be contrary to human rights (and therefore have to be “exempted”); and that in any case religious communities are not lawfully obliged to act in a way which is compatible with human rights.

Such an interpretation is clearly not Parliament’s intention, nor what is intended by the provision itself. This ambiguity should be clarified to avert the danger of a misleading and prejudicial inference which works powerfully to devalue respect for freedom of religion, thought, conscience and belief in the Charter itself, as well as casting doubt on the commitment of religious Victorians to human rights.

This problem could be rectified by implementing Recommendation 23 of the 2011 SARC review and the accompanying illustration; that Section 38 (1)-(2) could for instance “be replaced with a single requirement that a public authority must, in making a decision, give proper consideration to any relevant human right”; and by including additional wording to clarify that “giving proper consideration to any relevant human right” may include consideration of the requirements of other human rights, such as the right to freedom of religion, thought, conscience and belief (among others).

3. Reliefs and Remedies under the Charter

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Recommendation 32 - Reliefs and remedies

If Charter s. 38 is retained, then SARC recommends that:

(a) Charter s. 39 be repealed and replaced by a provision that states that, except where a statute expressly provides otherwise, nothing in Charter s. 38 creates in any person any legal right, gives rise to any civil cause of action or affects the rights or liabilities...
of a public authority, and
(b) if any existing relief or remedy in Victorian law is to be made available for a breach of Charter s. 38, it should be provided for by an express amendment to the statute that provides for that relief or remedy.42

The Archdiocese supports the SARC recommendation that Section 39 of the Charter should be replaced by a provision which bars the provision of remedies or reliefs for breaches of Section 38, other than remedies expressly provided for such breaches in a Victorian statute. The Archdiocese agrees with the SARC and Human Rights Consultation Committee’s view on remedies for breaches of Section 38 of the Charter, namely that it “would be better to set out clearly in the Charter that those … avenues are available than to allow it to develop in an ad hoc way over time.”43 In considering any particular proposal for an express amendment to a statute to provide a relief or remedy for breaches of the Charter, the costs and benefits of doing so, and the effects they may have on public authorities, should also be assessed44.

Conclusion:

The Archdiocese would be happy to expand on any of these observations and recommendations or provide further information to the Review if that would be of assistance. The Charter is an important legislative protection for human rights in Victoria, but there remain a number of ways in which its effectiveness could be enhanced and its operation improved. It is critically important that this is done in a manner which protects all human rights without selection or privileging, and provides clear and precise principles for limiting, balancing and interpreting their application to public authorities.

42. SARC Review.
43. Ibid., at 126.
44. Catholic Church of Victoria Submission 2011, at 12.
CATHOLIC CHURCH OF VICTORIA

SUBMISSION

to the
Scrutiny of Acts and Regulations Committee
of the
State Parliament of Victoria
in relation to the
Charter of Human Rights and Responsibilities Act 2006
1 July 2011

Most Reverend Denis J Hart DD
ARCHBISHOP OF MELBOURNE

Most Reverend Peter Connors DD
BISHOP OF BALLARAT

Most Reverend Christopher Prowse DD
BISHOP OF SALE

Reverend Monsignor Francis Marriott
ADMINISTRATOR DIOCESE OF SANDHURST
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Executive Summary

The Catholic Church in Victoria has a long and distinguished record of defending human rights, and particularly the rights of the most vulnerable. Throughout Victoria’s history, Catholics have been staunch exponents of the rights of workers, the poor, the sick, and migrants and refugees. The Catholic Church in Victoria continues to be at the forefront in upholding the right to life, the right of parents to choose the education their children receive according to the parents’ own beliefs, and fostering and promoting the fundamental rights of freedom of religion and conscience.

The Church supports the rule of law in its functions to protect each member of the human family, the family as the fundamental unit of society, and the common good of all.

The Church is a willing participant in the democratic development of public policy, particularly in relation to the effect of public policy on the most vulnerable people in our community the poor, refugees, those with disabilities and those in prison.

The Church understands the human being as a person in a community defined by relationships to those others in the community of which the individual is a member. For the Church, individual rights are not the starting point of human reality but a consequence of being a human being and, as such, a social being. Hence, all human rights are accompanied by responsibilities supporting the common good. The Church is uncomfortable with much of the contemporary human rights discussion precisely because that discussion is predisposed to, and presupposes individualism, viz, the individual standing alone with their list of rights, to be left alone to do as she pleases within the limits of the rights of others and to receive those goods and services necessary for her existence. It is unclear how social responsibilities arise inherently from such a narrow definition of rights.

The Church acknowledges that the Victorian Charter of Human Rights and Responsibilities Act 2006 (the Charter) aims to promote and protect human rights. We acknowledge that it has had a positive impact in heightening the awareness of human rights in the community. Nevertheless as an unequivocal supporter of human rights, the Church does face some difficulties in relation to the Victorian Charter. Though the Charter has had some positive effects in areas such as protecting people in public housing and other areas of vulnerability, the selective list of rights included, compared to the international human rights instruments, and the way in which the Charter treats the rights to life and freedom of religion and the right to freedom of conscience, means that the Church is unable to support this Charter unreservedly, even if the Church were to support the concept of a charter of rights as a good thing for many other reasons.
The areas of most concern with the Victorian *Charter* include:

- The rights listed are selective;
- Inadequate protection for the right to life including the right to life of the child before birth, especially as it may be limited by the application of other rights;
- The clause on religious freedom in the *Charter* does not include the protection contained in clause 18(3) of the *International Covenant on Civil and Political Rights* which makes it subject only to limitations prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others;
- The omission of the right of parents to educate their children in their own religious beliefs contained in clause 18(4) of the *International Covenant on Civil and Political Rights*; and
- Section 32 of the *Charter* which requires that the courts interpret legislation in a way that is compatible with the human rights set out in the *Charter* “so far as it is possible to do so consistently with their purpose”, when combined with the requirement to assess reasonable limits for rights, creates the potential for decisions that do not respect human life, religious freedom, freedom of conscience, significance of the family as the fundamental unit of society, or the common good, which are matters properly reserved for Parliament.

The Church recommends that the Parliament consider:

- Legislat ing along the lines of the Commonwealth *Human Rights (Parliamentary Scrutiny) Bill 2010* which requires a statement of compatibility of legislation with the human rights instruments that Australia has ratified;
- Including a mechanism that requires the Parliament to consider the reports of the Scrutiny of Acts and Regulations Committee and for an override declaration whenever legislation is not compatible with the instruments;
- Removing section 32 which gives application of the *Charter* to courts and tribunals and revision of Division 3 in relation to is effects on the interpretation of laws by the courts and tribunals; and.
- Removal of section 48 which has been interpreted in a way that could not have been anticipated so that it permits legislation that overrides human rights including the right to life and the right to freedom of conscience.
1. The Church and Human Rights

The Catholic Church has a direct interest in human rights because of its interest in the dignity of the human person and its significant involvement in the provision of services in health and welfare, including hospitals, aged care facilities and care of people with disabilities, and in education. Further, the Church is a willing participant in the democratic development of public policy, particularly in relation to the effect of policy on those who are most vulnerable in our community.

The Catholic Church in Victoria has a long and distinguished record of defending human rights, and particularly the rights of the most vulnerable. Throughout Victoria’s history, Catholics have been staunch exponents of the rights of workers, the poor, the sick, and migrants and refugees. Catholics in Victoria continue to be at the forefront in upholding the rights of parents to choose the education their children receive according to the parents own beliefs, and to fostering and promoting the fundamental rights of freedom of religion and conscience.

Confronted with the twin problems of communist and capitalist materialism internationally, in 1891 the Church first expressed the modern concept of human rights in defence of workers, their working conditions, their right to strike and their right to a wage that could support a family. The Church has published many documents on social justice ever since including the most recent Caritas in Veritate by the present pontiff, Pope Benedict XVI. For the Church, human rights

(i) emerge from human dignity,

(ii) are communal not individualistic,

(iii) are based on protecting the flourishing of every member of the human family and the fulfilment of each individual person as a being created to love God and neighbour,

(iv) must be understood by focussing on our relationship to God and that we are made in the image and likeness of God rather than focussing on human beings in isolation,

(v) include political and economic rights and

(vi) are inseparable from the culture of life.

Since 1891, the Church has been a strong and active proponent of all human rights, but especially human life, the family as the fundamental group in society, and freedom of conscience and freedom of religion. The Vatican State has been an

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1 Pope Leo XIII Rerum Novarum 1891
http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum
novarum_en.html

2 Pope Benedict XVI Caritas in Veritate 29th June 2009
http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben
xvi_enc_20090629_caritas-in-veritate_en.html

3 Human beings are social beings who are dependent on one another. The assertion of individual human rights always needs to be understood in the context of a community and respect for the common good. The most fundamental community is the family which needs special protection,

http://www4.samford.edu/lillyhumanrights/papers/Calo_Catholic.pdf

- 3 -
active proponent in the human rights movement with permanent observer status at the UN and an active involvement in the UN Human Rights Committee.

The Church has also noted the positive value of the *Universal Declaration of Human Rights* adopted by the United Nations on 10 December 1948 which Pope John Paul II recognised as "a true milestone on the path of humanity's moral progress".\(^5\)

Catholics continue to be at the forefront of efforts to protect the most fundamental right of all, the right to life, especially for the unborn, those with disabilities and terminal illness, those members of the human family least able to defend this right for themselves. The Church holds that human life be accorded the full protection of the law without regard to race, ethnicity, sex, religion, age, condition of dependency or stage of development. The Catholic Church is deeply committed to this proposition and to the protection of human rights and human dignity that inescapably follows from it.

The value of democracy stands or falls with the values which it embodies and promotes. Values such as the dignity of every human person, respect for inviolable and inalienable human rights, and the adoption of the "common good" as the end and criterion regulating political life are fundamental and not to be ignored. The basis of these values cannot be provisional and changeable "majority" opinions. They stand as objective moral truths as distinct from a purely subjective understanding.

Democracy is government not only by the people but *for* the people. Government "for the people" demands respect for the inherent worth and dignity of every member of the human family and his or her equal and inalienable rights. Government needs to be about respecting the human person and serving the common good which are constants even though knowledge and technology will develop and require governments to adapt to new situations.

As an unequivocal supporter of human rights, the Church does have some difficulties in relation to the Victorian *Charter of Human Rights and Responsibilities Act* 2006. The selectiveness of the rights included, compared to the international human rights instruments, and the way in which the Charter treats freedom of religion, the right to life and respect for the child before birth make it impossible for the Church to support this Charter unreservedly, even if the Church were to support the concept of a Charter of Rights as a good thing for many other reasons.

Other problems include the application of a notion of "reasonable limitations" that provides judges with a broad discretion to balance human rights against each other but in doing so allows a trade off between rights which among other things, can place unacceptable limitations on some rights such as the right to religious freedom. The Charter also offers inadequate protection for the right to human life, and the social responsibility to respect life in its most fragile state of development especially in this context in which it may be limited by the application of other rights. Finally, the clause on religious freedom in the Charter does not include the right of parents to educate their children in their own beliefs.

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\(^5\) John Paul II, Address to the 34th General Assembly of the United Nations (2 October 1979), 7:AAS71 (1979), 1147-1148
Rights can never be considered alone without addressing our responsibilities and duties. In human society for every person's right there corresponds a duty in all other persons: the duty, namely, of acknowledging and respecting the right in question.

While not perfect, the Church would prefer that the Charter reflected rights contained in international instruments to which Australia is a signatory.

The Charter has three areas of application: the development and passage of legislation, the activities of public authorities and its use in the interpretation and application of statute and common law by the courts and tribunals.

The Church is concerned that there has been too little accountability within the Parliament to the Charter and the matters raised by the Scrutiny of Acts and Regulations Committee. The selective nature of the rights and the capacity to impose limitations on all rights in interpreting the Charter create concern about the application of the Charter to the activities of Public Authorities.

Apart from the selective content of the Charter referred to above, the major concern for the Church is the application of the Charter by courts and tribunals in ways that are not necessarily based on respect for the worth and dignity of the person, freedom of conscience and belief, the significance of the family as the fundamental unit of society and the common good. The responsibility to protect human dignity, human rights and the responsibility for the common good should rest with the Parliament which is accountable for any limitations that are imposed on human rights. The matter is too important to allow it to be applied by the courts and tribunals.

Parliament can legislate in a way that is incompatible with the Charter, and the Courts can notify the Parliament if there is incompatibility between an existing law and the Charter but still must apply the statutes passed by Parliament. However the Charter has not been without influence on judicial decisions. This use of the Charter needs to be addressed by the review and recommendations made to the Parliament to determine the role of the Courts in the application of the Charter and how the sovereignty of the Parliament and the elected government is to be maintained.

A possibility in this context would be to enact a Human Rights Parliamentary Scrutiny Act, similar to a Bill currently before the Federal Parliament that requires legislation to be assessed for its compatibility with the international instruments that Australia has ratified. This matter is discussed in section 3.7.1.
2. **Terms of Reference**

The submission addresses each of the terms of reference which include the following questions:

1. Whether the Charter should include additional human rights under the Charter, including but not limited to, rights under the –
   (a) International Covenant on Economic, Social and Cultural Rights (ICESCR);
   (b) Convention on the Rights of the Child (CRC); and
   (c) Convention on the Elimination of All Forms of Discrimination against Women? (CEDAW)

2. Whether the right to self-determination should be included in the Charter?

3. Whether there should be mandatory regular auditing of public authorities to assess compliance with human rights?

4. Whether the Charter should include further provisions with respect to legal proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful by the Charter?

5. What have been the effects of the Charter Act on –
   (a) the development and drafting of statutory provisions;
   (b) the consideration of statutory provisions by Parliament;
   (c) the provision of services, and the performance of other functions, by public authorities;
   (d) litigation and the roles and functioning of courts and tribunals; and
   (e) the availability to Victorians of accessible, just and timely remedies for infringements of rights?

6. What if any, have been the overall benefits and costs of the Charter?

7. What options are there for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria?
3. Responses to the Terms of Reference

3.1 Whether the Charter should include additional human rights under the Charter, including but not limited to, rights under the –

(a) International Covenant on Economic, Social and Cultural Rights (ICESCR);
(b) Convention on the Rights of the Child (CRC); and
(c) Convention on the Elimination of All Forms of Discrimination against Women? (CEDAW)

The Victorian Charter does not include the same rights that are included in the international instruments. The Charter reflects a selection and rewording of rights and the inclusion of interpretation clauses that make the Charter very different from the balance of freedoms that are in the international human rights instruments.

Rights to freedoms, such as the right to free speech or to freedom of association are distinct from economic and social rights, such as the right to an adequate standard of living, health care or housing. Economic and social rights impose obligations to provide goods and services and raise a question about those who are obliged to provide including imposing an obligation on government. Some rights, such as the right to life are both a freedom, the right not to be interfered with in a way that endangers life, and an economic or social right to those goods and services necessary to maintain life.

(a) International Covenant on Economic, Social and Cultural Rights (ICESCR)

In being selective, it is significant that the emphasis in the Charter was on freedoms rather than rights to goods and services. Economic and social rights impose obligations to provide rather than just to refrain. Thus a right to free speech, freedom of religion, freedom of conscious or freedom of association is a freedom which imposes no obligations on anyone other than to leave the person alone, free of interference. Whereas, a right to an adequate standard of living, maternity leave, fair pay or a right to work, makes a claim to be provided with a good or service and thus involve costs for those who have responsibilities under these and other economic and social rights. In large part the economic and social rights in the ICESCR have not been included. The Charter does not protect rights to:

- Work
- Just and favourable conditions of work
- Fair wages
- Safe and healthy working conditions
- Reasonable rest and leisure
- Strike
- Maternity leave
- Of children not to work
• Adequate standard of living
• Physical and mental health
• Primary health care
• Education
• Private education

All of these mostly economic and social rights are in the ICESCR. An economic or social right, because it involves the provision of a good or service, raises issues as to who is in duty bound by the right. It may be that the Parliament could be considered to be imposing significant obligations on the Government of Victoria to deliver if the Charter contained, for instance, a right to an adequate standard of living or to work. Nevertheless there are some claim rights that would seem to be important to include such as the right to safe and healthy working conditions, reasonable rest and leisure, maternity leave and health care. There are also rights in this set that are not claim rights, such as the right of children not to work, the freedom to strike or the freedom of parents to choose the religious and moral education of their children in conformity with their own convictions. These rights would be included if the Church’s recommendation for a Human Rights (Parliamentary Scrutiny) Bill were adopted.

b) Convention on the Rights of the Child (CRC)

The Charter does not protect the following rights in the Covenant on the Rights of the Child: the right to

• Protection of best interests
• Responsibilities, right and duties of both parents
• Identity, family relations
• Not to be separated from parents unless in best interests
• Contact and personal relations with separated parent
• Family reunion
• Parental direction
• Access to media that promotes social, spiritual and moral wellbeing and protection from injurious material
• Protection from harm and abuse
• Best interest in adoption decisions
• Protection and humanitarian assistance as a refugee
• Standard of living and full and decent life if suffering from disability and participation in the community

These issues for children need to be considered by the Parliament to ensure that children and their families have the protection of the law that they need. One of the problems with a limited Charter is that it protects some rights but not others.
c) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

In relation to CEDAW, the main issues about discrimination for all people are covered in the Charter in a general way in clause 8 which excludes discrimination. The rights otherwise specified in CEDAW would seem to be mentioned in the Charter or have already been mentioned above as having been not included in the Charter.

The Church celebrates the differences between men and women and the different contributions that they make as mothers and fathers.

The Church recognises the need to address past injustices and attitudes and practices that limited women’s roles. Public policy and law should ensure that women are protected, especially the unique gifts of motherhood and its essential role in the life of every child within the family.

d) International Covenant on Civil and Political Rights (ICCPR)

The terms of reference do not mention either the Convention on the Rights of People with Disabilities or the rights that have been excluded from the Convention on Civil and Political Rights. These are significant omissions.

The Charter does not protect the following freedoms in the ICCPR:\(^5\): the right to:

- Ensure the religious and moral education of one’s children according to one’s convictions
- Birth registration, name and nationality – this has emerged as a significant problem for Victoria’s indigenous people many of whom were not registered at birth and hence struggle to access government services including ordinary matters such as obtaining a driving licence\(^7\).
- Men and women of marriageable age to marry and to found a family shall be recognized, (with “marriage” being defined as “the union of a man and a woman voluntarily entered into for life to the exclusion of all others”).\(^8\)

The State has an interest in marriage because a relationship between a man and a woman may generate children and its dissolution is a matter for the State because of the pares patræ responsibility of the State for children. The permanence and exclusivity of marriage is fostered by the State because of the importance of the role of marriage in ensuring the identity, status and education of children and their nurture by both a mother and a father.\(^9\)

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\(^5\) [http://www2.ohchr.org/english/law/ccpr.htm](http://www2.ohchr.org/english/law/ccpr.htm)


\(^8\) The cases involving the interpretation of marriage have been based on the legal definition of marriage in the country either at the time of the convention (1966) or in current law. [http://www.deakin.edu.au/buslaw/aw/dlr/docs/vol9-iss2/vol9-2-3.pdf](http://www.deakin.edu.au/buslaw/aw/dlr/docs/vol9-iss2/vol9-2-3.pdf) accessed 18/05/11

\(^9\) This issue is explored in a document “Revising Marriage” on the NSW Council of Churches website: [http://www.nswchurches.org/Resources/Papers/Revising_Marriage_politicians.doc](http://www.nswchurches.org/Resources/Papers/Revising_Marriage_politicians.doc)
The Church supports the protection of children and their need for a stable family life and their right to know, have access to and to be nurtured by both their mother and father, and the obligation of parents to educate their children, including to educate children in their own beliefs. It is important that for the sake of children that the family is supported and protected by law and public policy.

The inclusion of these rights would happen if the Charter were to be replaced as the Church recommends with a Human Rights (Parliamentary Scrutiny) Act.

e) Convention on the Rights of Persons with Disabilities (CRPD)

The Convention on the Rights of People with Disabilities should be considered in the context of the Review. The Convention recognises that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others. It is important that the legislative process and the activities of public authorities are carried out in a way that pays attention to the needs of people with disabilities. The Charter was developed prior to the Convention and it is a significant gap that the needs of people with disabilities are not included.

f) Conclusion in Relation to the International Human Rights Instruments

Clearly the Charter is selective in the rights that are included. It is problematic that a Charter is so selective because it means that whatever effects the Charter has on the development and the application of the law it will promote some aspects of human flourishing rather than others. This matter is discussed further in answer to question 7.

The Church supports:

- a comprehensive standard against which to assess legislation in its development; and
- the role and the responsibility of the Parliament to ensure protection of the worth and dignity of each member of the human family, the family as the fundamental unit of society, and the common good.

The Church does not support the role of the Charter in giving scope for Courts to apply selected rights and prefers that legislation be assessed by the Parliament in accordance with the international human rights instruments to which Australia is a signatory.
3.2 Whether the right to self-determination should be included in the Charter?

Though the history has been mixed, the Church supports just outcomes for Victoria’s indigenous people. A major issue of self determination has been the claim by indigenous people to their own land, and to redress the dispossession of the Aboriginal and Torres Strait Peoples. In substantial part these are matters that go to the Australian Constitution although there are matters that Victoria alone can address.

Moreover there are other factors that are central to self-determination for aboriginal people who reside in Victoria, including the need to be consulted and to give or withhold free, prior and informed consent to decisions that will affect Indigenous people and recognition of the fundamental significance of the connection between Indigenous self-determination and land.

The Church recognises the obvious need to address the losses suffered by the indigenous people of Victoria and to ensure that they are able to direct their own future and protect their own identity and community life. The right to self determination as it is understood in the instruments may usefully guide the process of providing legislation and public policy and provide a benchmark.

However, important as these matters are, and while we support a comprehensive priority for addressing them, these are complex matters, and it is not at all clear that the concept of self-determination in this context and its implications for the community are sufficiently clear for the prudent inclusion of this right in the Charter. We agree on this point with the 2005 Report of the Human Rights Consultative Committee, which concluded:

The Committee is concerned that, in the absence of settled precedent about the content of the right as it pertains to Indigenous peoples, the inclusion of a right to self-determination may have unintended consequences. The Committee wants to ensure that any self-determination provision contains some detail about its intended scope and reflects Indigenous communities’ understanding of the term. This is not something that can be achieved in a Charter that must be general in its terms and operate across all of the varied communities in Victoria.

A fundamental priority is that the inclusion of any right to self-determination should only occur after there has been proper consultation with the Indigenous communities of Victoria and their agreement obtained both to its terms and scope.

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3.3 Whether there should be mandatory regular auditing of public authorities to assess compliance with human rights?

Many non-Government bodies are public authorities for the purpose of the Act. These bodies are subject to a range of audit and compliance requirements, including in relation to professional standards and compliance with Departmental requirements. It would not be prudent to introduce an additional requirement for auditing without first assessing the costs and the benefits of such a process.

Despite the exceptions for religious bodies in section 38 of the Charter, contracts with religious bodies performing functions of a public nature can impose obligations on them to abide by the Charter, thus circumventing the exception contained in section 38 (4) of the Charter. There is a need to clarify this matter.

3.4 Whether the Charter should include further provisions with respect to legal proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful by the Charter?

As noted above, many non-Government bodies are public authorities for the purpose of the Act. It would not be prudent to introduce further provisions affecting such entities without first assessing the costs and the benefits of such processes.

3.5 What have been the effects of the Charter Act on –

(a) the development and drafting of statutory provisions;
(b) the consideration of statutory provisions by Parliament;
(c) the provision of services, and the performance of other functions, by public authorities;
(d) litigation and the roles and functioning of courts and tribunals; and
(e) the availability to Victorians of accessible, just and timely remedies for infringements of rights?

3.5a) What have been the effects of the Charter Act on the development and drafting of statutory provisions;

The inclusion of compatibility statements when Bills are presented would indicate that human rights have been a consideration, at least when assessing the Bill before it is tabled. It would be very difficult for the outside observer to know the extent to which these human rights considerations have influenced the drafting of Bills. However, it could be reasonably assumed that Departments and Ministers would be influenced in the formulation of policy and drafting instructions by the knowledge that a statement of compliance would eventually be open to Parliamentary and public scrutiny.
3.5 b) What are the effects of the Charter on consideration of statutory provisions by Parliament?

The consideration of statutory provisions by Parliament is important. Governments prepare legislation (usually) but it is only in the Parliament that proposed legislation can be properly considered and debated.

The following are some instances that indicate that the role of identifying and responding to conflict between rights and legislation with the Parliament could be improved. The process could be improved by requiring that Parliament should in each instance:

- consider the matters raised in the alert digests of the Scrutiny of Acts and Regulations Committee,
- discuss amendments if needed to achieve compatibility; and
- provide an override declaration whenever legislation is not compatible with the instruments to which Australia is a signatory.

1) Abortion

The Minister’s Second Reading Speech for the Abortion Law Reform Bill 2008 included the following:

In accordance with section 48 of the Charter of Human Rights and Responsibilities, a statement of compatibility for the Abortion Law Reform Bill 2008 is not required. The effect of section 48 is that none of the provisions of the charter affect the Bill. This includes the requirement under section 28 of the charter to prepare and table a compatibility statement, and the obligation under section 32 of the charter to interpret statutory provisions compatibly with human rights under the charter.

Section 48 states:

Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.

As a result it appears from the Hansard that the Parliament did not ever formally bring to bear the Charter provisions to address these questions and the matter of the Abortion Law Reform Bill’s incompatibility with the right to freedom of thought, conscience and belief and the rights of the child before birth.
The problems caused by this section of the Charter in relation to abortion are discussed in an appendix. Also discussed are the proposals to amend the legislation and the questions asked by the Scrutiny of Acts and Regulations Committee indicating incompatibility with the Charter.

ii) Summary Offences

The passage of the Summary Offences and Control of Weapons Acts Amendment (SOCW) Bill shows that the Parliament can choose to legislate in a way that is not compatible with the Charter. When the Bill was introduced the Minister admitted that it was ‘incompatible with the charter to the extent that it limits rights ... in providing powers for police to randomly search persons (including children) and vehicles in public places within designated areas, even if the police have not formed a reasonable suspicion that the person or vehicle is carrying a weapon’.

These powers breach the rights of freedom of association and freedom of expression contained in the Charter. Under the Act, the police may conduct pre-arrest strip searches of any person, including children, in certain circumstances.\textsuperscript{12}

iii) Assisted Reproductive Technology Act 2008

The Assisted Reproductive Technology Act 2008 rewrote the law in relation to reproductive technology with a clear goal of “normalising” reproductive technology and in doing so overrode the rights of children to know, to have access to and to be nurtured by their parents. These are rights that are protected in the ICCPR and the Covenant on the Rights of the Child but not the Charter. In doing so reproductive technology and the many parental possibilities that it creates became accessible to everyone except those who did not pass a police check for offences against children thereby allowing two men or two women or a single person to form a family by using the technology to provide them with a child, including via surrogacy arrangements.

To make that possible, fathers were removed from the legislation altogether. There are birth mothers and there are parents and substitute parents under the new law. The biological relationship between a man and a woman that is the normal basis of parenthood and provides a child with both a mother and a father was no longer the paradigm for parenthood and family formation. Where the legislation has appointed others to be parents or substitute parents, it has also removed any right a child might have to his or her identity and to know, to access or to be cared for by his or her birth mother and biological mother and father.

\textsuperscript{12} http://www.libertyvictoria.org/node/132
This raises questions about the application of the international human rights instruments, but not a matter of conflict with the Charter because the Charter, as noted above, does not include CRC articles 7 (right to know and be cared for by his or her parents), 8 (identity) and 9 (personal relations and direct contact with both parents) and ICCPR article 24 in relation to family formation.

When the Assisted Reproductive Technology Act 2008 was introduced the SARC raised several questions about human rights.\textsuperscript{13}

As with the Abortion Law Reform Bill 2008, the Bill passed without an explanation for why the rights identified by the Committee were being overridden. The Assisted Reproductive Technology Act 2008 and the accompanying Research Involving Human Embryos Act 2008 and the Prohibition Human Cloning for Reproduction Act 2008 and the related changes to the Status of Children Act 1974 involve the right to life as well as a number of rights of children. The inclusion of the rights of children as they are expressed in the CRC, though not perfect would be a significant improvement to the Charter and provide scope for the consideration of legislation such as the Assisted Reproductive Technology Act 2008. It is a matter of special sadness that Victoria has legislated in relation to family formation in a way that ignores Australia’s obligations as a signatory to the CRC.

iv) Euthanasia

The issue of euthanasia is an issue that seems likely to return to State Parliaments on a regular basis. The role of the Charter in relation to it is important. However the current Charter in the way in which it expresses the right to life, as was discussed above, is contingent on whether it is overridden by other rights or subject to section 7(2) and the application of a concept of “reasonable limitations” in the opinion of a court or tribunal. Making the expression of the right to life consistent with the ICCPR and amending section 7(2) would be ways to address this concern.

When the private member’s Medical Treatment (Physician Assisted Dying) Bill 2008 was introduced, the Committee referred to Parliament for its consideration several questions in relation to Section 9 of the Charter.\textsuperscript{14}

The Bill was defeated but seemingly without the report of the Committee playing an obvious part. A cause for concern is that there is no reason to feel confident if a Euthanasia Bill is brought forward again under the current Charter that the Parliament would pay any more attention to compatibility with human rights than happened when the Medical Treatment (Physician Assisted Dying) Bill 2008, was considered. If euthanasia were to become a legitimate option with a determined

\textsuperscript{13} http://www.parliament.vic.gov.au/archive/sarc/Alert_Digests_08/08alt12body.htm#Assisted_Reproductive_Treatment_Bill_2008

\textsuperscript{14} http://www.parliament.vic.gov.au/archive/sarc/Alert_Digests_08/08alt8body.htm#Medical_Treatment_Phyiscian_Assisted_Dying_Bill_2008
structure then life for the chronically seriously ill in Victoria would become contingent upon maintaining a desire to continue in the face of being classified as a burden to others.

Essentially, Euthanasia Bills involve proposals to set up a category for people whose lives may be deliberately ended. Their protected status as a member of the Victorian communities would depend on a contingency. Because euthanasia would be lawful, doctors and nurses would be obliged to inform patients of the option, thus changing dramatically the character of the health vocations from assisting people to live with their illnesses to offering death. Passage of such a Bill would imply that our community considers that continued survival depends on people with terminal or chronic illness not succumbing to the effects of pain and suffering, depends on them not losing hope.

Euthanasia legislation is inherently discriminatory in the way the right to life is treated. It becomes discretionary and contingent. It is important that whatever happens to the Charter it needs to be effective in drawing attention to these matters. It should not continue in a way that permits the selective application of rights especially the derogation of the equal, inherent and inalienable right to life.

In considering legislation that affects the rights of those who are chronically or terminally ill, it is important that the Parliament not be selective in focusing on rights to freedoms, such as a right to autonomy, without considering rights such as a right to be provided with adequate palliative and supported care. It would be a terrible thing if people were driven to seeking euthanasia or assisted suicide because the care available is inadequate.

v) Conclusion

These Bills raise questions about the function of the Charter has in the development and passage of legislation. The Government and the Parliament can largely ignore the reports of the Committee and questions that the Committee raises about the compatibility of legislation with the Charter.

There are several aspects to the problems that these Bills illustrate in relation to the role of the Charter in the development of legislation:

- The alerts digests from the Scrutiny of Acts Committee do not have to be considered in the passage of the legislation. There could be a requirement for the Parliament to discuss amendments to make the legislation more compatible and for an override declaration whenever legislation is not compatible with the instruments to which Australia is a signatory.

- Though the apparent intention had been not to alter the abortion law; the Parliament’s interpretation of section 48, as now demonstrated by the Abortion Law Reform Act 2008, had the unanticipated effect of excluding the application of the Charter to the freedom of conscience of health professionals as well as the protection of the unborn. This could only lead to breaches of human rights, as it has.

- Section 7(2) should be amended to be more in accord with the international instruments in the application of the Charter when rights
conflict. The problems with section 7(2) are discussed further at section 3.7.2 in relation to religious freedom.

- The lack of protection for human life and the rights of children.

3.5 c) What have been the effects of the Charter Act on the provision of services, and the performance of other functions, by public authorities?

The *Charter* would seem to have had a positive effect on the conduct of government bodies that are public authorities requiring them to ensure that they conduct themselves in accordance with the rights in the *Charter*. Feedback from Government authorities, and from service users, is strong on this point. A matter for consideration by the Committee will be the cost and burden on public authorities of achieving compliance with the Charter and the extent to which their activities have been hampered by the additional bureaucratic measures required to ensure compliance.

The effect of the *Charter* on public authorities that are not Government bodies has been blunted to some extent by a lack of clarity as to what bodies are public authorities, and, if they are, whether a whole organisation or just some functions of it are public authorities.

3.5 (d) What have been the effects of the Charter Act on litigation and the roles and functioning of courts and tribunals?

Some concerns about the effect on litigation are discussed in response to question 7. The Church considers this to be a problematic function of the Charter and would prefer that, instead, the Victorian Parliament adopted legislation such as the Commonwealth *Human Rights (Parliamentary Scrutiny) Bill 2010* as discussed in section 3.7.1.2.

Under the *Charter*, courts are required to interpret statutory provisions, consistent with their purpose, in a way that is compatible with human rights (*Charter, s 32(1)*) and to assess ‘reasonable limits’ for the application of rights (*Charter, s 7*). The Church is deeply concerned that the ‘reasonable limits’ requirement provides for the imposition of limits on some rights in ways that are not consistent with respect for the worth and dignity of each person, freedom of conscience and belief, the significance of the family as the fundamental unit of society and the common good.

The responsibility for legislating to protect human dignity, human rights, responsibilities and the common good should rest with the Parliament which is accountable for any limitations that are imposed on human rights. The matter is too important to allow a charter to be selectively applied by the courts and tribunals.
Some of the cases in which the Charter has been invoked include:

- A drugs case in Victoria’s Court of Appeal, R v Momiclovic [2010] VSCA 50 (17 March 2010)\(^{15}\) The Court of Appeal held that the burden of proof imposed on a defendant by s 5 of the Drugs Act infringed the presumption of innocence recognised by s 25(1) of the Charter.

- An equal opportunity case, YMCA – Ascot Vale Leisure Centre (Anti-Discrimination Exemption) [2009] VCAT 765 (4 May 2009)\(^{16}\) which assessed the relationship between human rights and equal opportunity legislation. It was decided by the Victorian Civil and Administrative Tribunal that the YMCA should be granted a temporary exemption from the Equal Opportunity Act 1995 to enable it to conduct women-only swimming sessions and related programmes. This exemption was held to conform with the rights to equality and non-discrimination set out in the Charter.

- Several housing cases, including Director of Housing v Sudi [2010] VCAT 328 (31 March 2010)\(^{17}\), in which an immigrant family was spared eviction into likely homelessness by appeal to the Victorian Charter of Rights. The case has set a precedent for the public housing department’s dealings with its tenants. In particular, it gives vulnerable tenants an opportunity to have their appeal reviewed without having to go to the Victorian Supreme Court. This means an easier and better safeguard for tens of thousands of people in public housing who face unfair or unreasonable treatment. It also focuses public servants on their obligations under the Charter, such as the obligation on public authorities to be mindful of s 17: “Families are the fundamental group unit of society and are entitled to be protected by society and the State. Every child has the right, without discrimination, to such protection as is in his or her best interests....”

- A child abuse case, in which the Court also applied section 17 of the Charter and held found in favour of a child’s right to testify.\(^{18}\)

- An adoption case concerning an application to adopt by a person in a same-sex relationship in which the County Court by using the Charter as an interpretative tool decided that a man in a same-sex relationship could adopt a child (notwithstanding the current provisions of the Adoption Act 1984) (although ultimately the decision was based on a technical provision in the current Act, as the commentary notes).\(^{19}\)


\(^{18}\) http://www.iaiahome.org/blog/molested-children-protected-by-victorias-charter/

• A freedom of religion case, Cobaw (WayOut) v CYC (Phillip Island Adventure Resort)\textsuperscript{20}

These cases show that it is not always possible to predict how the courts and tribunals may apply the Charter as sections 32 and 7(2) give them considerable flexibility in interpreting the law and in limiting some rights. In the Cobaw case, for instance, the Charter allowed rights to be limited by other rights by applying the limitations clause. The case involved s 32 Interpretation, s 7 Limitations, s 8 Discrimination, s14 Religious Freedom, and s15 Freedom of Expression. This is discussed in detail at section 3.7.2.

We are aware that the Momcilovic and Cobaw decisions are currently subject to appeal and that the decision of the appellate courts could have important implications for the interpretation of sections 7 and 32 of the Charter and therefore the future operation of the Charter.

3.5 (e) What have been the effects of the Charter Act on the availability to Victorians of accessible, just and timely remedies for infringements of rights?

The Charter seems to have impacted on the behaviour of public authorities, and thus on the protection of rights. There have been some positive reports in areas such as housing and policing. The Charter does not provide for remedies and as such, it’s effect on remedies would seem to be minimal. However it is questionable whether a Charter of Rights is the best of way of resolving disputes. It would be better to legislate specifically where protection is needed, rather than fostering a litigious society of competing right claims. This is discussed in section 3.7.

3. 6. What if any, have been the overall benefits and costs of the Charter?

The overall effects of the Charter have been mixed. In relation to its impact on new legislation,

• As indicated above, its effect on the development of legislation is not usually a public process and so it is difficult to assess the benefits of the Charter on the development of legislation. However, it can reasonably be assumed that it has had some impact in this area.

• In some areas of concern to the Church, the Charter has not been as effective as it might have been in the consideration of legislation by the Parliament.

This submission has identified concerns about the selective content in the Charter, the operation of section 48 and the effects of section 7(2).

In relation to its impact on the interpretation of legislation:

• We note the potentially adverse impact of the Charter by transferring from Parliament to the Courts the responsibility for deciding whether and how the law of Victoria should protect human dignity, human rights and the common good.

• Section 32 of the Charter, which requires that the Courts interpret legislation in a way that is compatible with the human rights set out in the Charter ‘so far as it is possible to do so consistently with their purpose’, when combined with the requirement to assess reasonable limits for rights, creates the potential for decisions that do not respect human life, religious freedom, freedom of conscience, the significance of the family as the fundamental unit of society, or the common good, which are again matters properly reserved for Parliament.

The Charter has not been without effects in the Courts and tribunals, especially in relation to public authorities and religious bodies as were discussed at section 3.5(d).

In relation to its impact on public authorities, this would seem to be positive for clients, though a question arises about the cost for public authorities. As part of its responsibility to assess the overall benefits and costs of the Charter, we are supportive of the Committee obtaining an assessment of the cost of the Charter on the State of Victoria, its public authorities and its private businesses.

3.7 What options are there for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria?

3.7.1 An Alternative to a Charter?

3.7.1.1 The Content

The phenomenon of a Charter of Human Rights has evolved in contrast to a Bill of Rights in that a Charter guides but does not direct the development and passage of legislation and Parliament can act incompatibly. A Charter does not override legislation but can be used to require legislation to be interpreted by the Courts in a manner compatible with the rights in the Charter. The arguments about sovereignty of Parliament thus have less relevance to a Charter of this kind.

Rather than loss of Parliamentary sovereignty, a concern with the impact of this Charter is that the Charter is selective in the rights it contains and has not been responsive enough to the alerts raised by the Scrutiny of Acts and Regulations Committee in relation to incompatibility. This has been a matter of grave concern in relation to the passage of legislation such as the Abortion Law Reform Act 2008, Assisted Reproductive Technology Act 2008 and human embryo experimentation legislation. The swiftness of the development and passage of this legislation has had a major impact on Victorian society and its families. The Charter and the process it provides for the review of legislation and regulations needs strengthening if it is to serve the interests of a democracy.

As discussed above, if Victoria is to retain a Charter of Rights, it is important that the rights it contains are both comprehensive and consistently applied, and the latter appears not to have been the case given the questions raised by the Committee and apparently not considered, or at least not discussed, by the Parliament. It is also important that in the process of Parliamentary discussion that the alert digests from the Scrutiny of Acts an Regulations Committee have more impact, perhaps requiring those proposing legislation to respond to the concerns and the Parliament to consider amendments to make the legislation more compatible with human rights or
at least provide for an override declaration whenever legislation is not compatible with the instruments to which Australia is a signatory.

3.7.1.2 Human Rights (Parliamentary Scrutiny) Act

There is real danger that the Courts may respond to conflict between rights in ways that may not reflect the wishes of the Parliament, community values or a balanced approach to human rights. The danger in that respect is compounded by the fact that, unlike the Parliament, the Courts are not directly accountable to the Victorian community for their judgments.

These problems with the Charter do raise the question as to whether there are better models.

For the reasons identified in this submission the Parliament might consider replacing the Charter with a Human Rights (Parliamentary Scrutiny) Act, similar to a Bill currently before the Federal Parliament\(^{21}\) that requires legislation to be assessed for its compatibility with the international instruments that Australia has ratified. The Commonwealth introduced the legislation following the Brennan enquiry in which the Victorian model and other possibilities were considered.

The Commonwealth model has the advantage of providing guidance in the development, amendment and passage of legislation, but retains the sovereignty of the Parliament in relation to developing public policy and laws for our people.

The Church understands the human being as a person in a community defined not just by their individuality but also by their relationships and responsibilities to those others in the community of which he or she is a part especially the poor and the vulnerable. For the Church, rights are not the starting point of human reality but a consequence of being a human being and, as such, a social being.

When the Church defends rights, it first and foremost is defending the person in their context in community, the family. This is, of course, particularly the case for children because in the first instance their identity, status and relationships are dependant on their families. It is only when these fail that the responsibility of the State and its agencies are needed to protect children. However the need for community, such as the family, is also very important for people with disabilities and people who are ill or frail. The right to life, for instance, often depends on the care and the services provided by others. Rights make little sense if we do not value the bearer and the community that both defines her existence and supports her. The logic of rights discourse fails when it is focused on the individual as the lone bearer of rights, because the language of rights dissolves into interminable conflicts over competing claims. Rights make sense when the individual is understood as relational and dependent on the community in which he or she lives in a relationship of symbiosis.

The danger of a Charter can be its essential focus on individuality. The value of a Charter can be its acknowledgement of the intrinsic worth of each member and their

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\(^{21}\) Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010
relationships, and the usefulness of rights language in clarifying relationships, obligations and dependencies. A Charter works best in guiding governments and protecting the individual from being exploited or neglected. Where there is a specific need to protect human rights not protected by Common Law or by existing statute, then the Parliament should legislate to do so, such as, for instance, the need to protect the rights of tenants. A problem with applying a Charter in civil matters is that instead of dealing with the narrative of competing parties and resolving their relationship differences, as the Common Law tradition provides, the emphasis is on disembodied rights rather than on people.

The alternative of a Human Rights (Parliamentary Scrutiny) Act requiring the Parliament to apply international human rights instruments to the development and passage of legislation, and to acknowledge if it opts to legislate in a way that is not compatible, would seem to provide a level of protection of human rights whilst retaining the integrity of the democratic process.

3.7.1.3 Public Authorities

There are positive reports of the impact of the Charter in developing greater awareness and understanding of human rights in Public Authorities in relation to areas such as housing and policing. On the other hand there are concerns about the complex definition of Public Authorities and whether the Charter applies to all functions of an entity that exercises a mix of public and private functions.

3.7.1.4 Summary

In summary, the Charter could be amended so that its role in relation to the development and passage of legislation had a stronger human rights scrutiny and content, and the problematic functions in relation to application by the courts and tribunals were removed. The content could be stronger in relation to children and people with disabilities, the right to human life and removing the capacity to limit some rights especially the right to life and the rights to freedom of religion and freedom of conscience. This could be achieved by replacing the Charter with a Human Rights (Parliamentary Scrutiny) Act such as is being considered by the Commonwealth Parliament, linked to the instruments that Australia has ratified.

3.7.2 Freedom of Religion

The Church is most concerned about the lack of protection in the Charter for freedom of religion conscience and belief. As has been illustrated in the Cobaw (WayOut) v CYC (Phillip Island Adventure Resort) case, a court or tribunal may apply the rights contained in the Charter to guide them in a case brought on other grounds. Where there are conflicting rights, then section 7 of the Charter applies. Section 7(2) does not protect the right to religious freedom to the extent provided by the international human rights instruments.

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22 Ibid.
The Charter states:

7 (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-

(a) the nature of the right; and
(b) the importance of the purpose of the limitation; and
(c) the nature and extent of the limitation; and
(d) the relationship between the limitation and its purpose; and
(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The International Covenant on Civil and Political Rights clause 18 on religious freedom is mirrored in the Charter at Clause 14 but is missing, among other things, the following clause:

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Contrary to ICCPR Article 18(3) which limits the right only as prescribed by law for those reasons, the Charter introduces the concept of reasonable limitations. The ICCPR, Article 18(3) makes no reference to reasonable limitations.

Further, the conditions and grounds for permissible limitations on the right to religious freedom in the ICCPR has been defined by the Siracusa Principles. The latter have been used by the United Nations to guide the application of conflicting rights to prevent derogation.

Comparing Section 7(2) of the Victorian Charter with the Siracusa Principles clearly demonstrates Section 7(2) does not comply with Principle 1 and Principle 3 because there is no mention of strict interpretation of limitations or the favouring of the right concerned in the Charter.

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23 As is discussed below, the Charter is also missing clause 18(4) of the ICCPR which pertains to the right of parents to educate their children according to their religious beliefs.
26 "No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself."
27 "All limitation clauses shall be interpreted strictly and in favor of the rights at issue."
The Charter also does not comply with: Principle 4\textsuperscript{28} which requires that all such limitations be provided for by law, nor with Principle 10\textsuperscript{29} because the concept of ‘necessary’ is not explicitly present in the Charter and there is no requirement that the limitation answer a pressing public or social need, pursue a legitimate aim, etc.

Thus in the application of Section 32(1) of the Charter, which stipulates that “So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights”, a Court may identify competing rights including the right to religious freedom and then choose to apply clause 7(2) to limit the right to religious freedom on the grounds that the limitation was reasonable.

Section 32(2) does not require the international standard, ICCPR Article 18, to be the yardstick for interpretation. Rather, the Charter merely provides that “International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.”

This would seem to give judges’ broad discretion, once the Charter has been invoked, to limit the right to religious freedom.

The Charter provides no clear guidelines as to those matters to be taken into account when determining the scope of a human right. The Church is therefore deeply concerned about the possible impact of the Charter on the right to religious freedom and proposes that, at the very least, the Charter should be made consistent with the ICCPR in this respect.

The Church would support amendment of the Charter to ensure that Article 18 of the ICCPR was substituted for section 14 of the Charter and that section 7 be amended to allow for the limitation provisions of article 18(3) interpreted according to the Siracusa principles.

There is a concern with respect to religious freedom that the Charter affords a capacity for a party to invoke the Charter in pursuit of their claim in private litigation. In other words the Charter not only has an effect on the State and its instrumentalities, the public authorities, it also has a role in private litigation.

The Charter is restricted in its application in that it cannot be the cause of a civil action, but it can be brought into a civil action launched on other grounds and used

\textsuperscript{28} “All limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.

\textsuperscript{29} “Whenever a limitation is required in the terms of the Covenant to be “necessary,” this term implies that the limitation:

(a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
(b) responds to a pressing public or social need,
(c) pursues a legitimate aim, and
(d) is proportionate to that aim.

Any assessment as to the necessity of a limitation shall be made on objective considerations.
by the parties to assert competing claims. The Church would prefer that to the extent that human rights should be protected by legislation, rights claims should only be directed against the state – and not against private parties. The problem with the latter is the development of a culture of rights litigation instead of a culture of tolerance. The latter is important in the context of people holding different religious beliefs. The danger of using human rights in civil actions was demonstrated in the divisiveness of the *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc [2006] VSCA* case\(^{30}\)

### 3.7.3 Rights of Parents and Religious Education

Article 18 (4) of the ICCPR is also missing from section 14 of the *Charter*. The Church is deeply concerned that the *Charter* be amended to include the clause:

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

This is a matter of deep concern for many Victorian parents and their right and their obligation to educate the children according to their own beliefs. Even the widely acknowledged father of modern liberalism, John Sturt Mill maintained:

> "Hardly any one indeed will deny that it is one of the most sacred duties of the parents (or, as law and usage now stand, the father), after summoning a human being into the world, to give to that being an education fitting him to perform his part well in life towards others and towards himself."\(^{31}\)

Mill goes on to argue that parental instruction in their own religious beliefs is essential for the child acquiring the capacity to genuinely considering alternative views, and thus, is essential for the child's full development.\(^{32}\)

### 3.7.4 Section 48, Saving Provision

Section 48 of the *Charter* created a situation in which the abortion law could be revised in ways that violated rights that are contained in the Charter including section 9 the Right to Life and 14 the Right to Freedom of Thought, Conscience and Belief.

This section was relied on to pass the *Abortion Law Reform Act 2008* without requiring a Statement of Compatibility even though section 8 of the Act breaches the right to freedom of thought, conscience and belief especially for a health practitioner who regards abortion as the direct killing of a human being and thus morally akin to the crimes of murder or manslaughter. For such a health professional, referral for abortion would be an immoral cooperation in a moral crime. The section also required nurses to perform abortions if a doctor decided that it was an emergency.

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\(^{32}\) Ibid.
Section 8(b) also creates significant practical difficulties because most health practitioners do not know the views of their colleagues on this matter and might find it difficult to identify someone who has no conscientious objection. While some health professionals may support abortion in some circumstances, others would have moral reservations about other circumstances but these precise views are seldom known. Even if the practitioner were to refer the woman to, for instance, a Hospital or to an abortion clinic, that would not suffice. The requirement is to refer to another registered health practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion.

Questions that the Committee put in relation to the right to life including questions about alternative ways of providing for abortion that reduced the impact on the right to life were apparently ignored.

These effects of Section 48 of the Charter were not anticipated. The purpose of section 48 was that nothing in the Charter was intended to effect the law in relation to abortion. Its effect in allowing legislation that overrode the right to life by increasing the availability of abortion in those circumstances in which the child could instead have been born alive if the pregnancy caused medical problems, and which also overrode freedom of conscience could not have been anticipated. Section 48 should be removed from the Charter to allow the proper application of important rights that are set out in the Charter.

3.7.5 Right to Life

In the international human rights instruments the right to life is considered inherent and all the covenant rights are considered inalienable. In being inherent it belongs to each person through their being a member of the human family. It is not earned or acquired. In being inalienable it cannot be lost, stolen or given away. Life is required for the exercise and enjoyment of all other rights and if it is not upheld then no right of the person is respected. There is a concern based on the US experience that other rights, such as the right to privacy may be used to override the right to life unless it is protected.

Unfortunately the Charter does not express the right to life at clause 8

"Every person has the right to life and has the right not to be arbitrarily deprived of life"

in the same way as the comparable ICCPR clause 6.1:

"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

By being neither inherent nor inalienable, the wording in the Charter leaves the right to life vulnerable especially given the “reasonable limitations” provision in Clause 7 – see section 3.7.1 of this submission. The Parliament needs to indicate by the wording that it uses the singular importance of respecting a person as the bearer of all other rights and to not allow that right to be overridden by other rights. The only

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33 *International Covenant on Civil and Political Rights* n. 6
http://www2.ohchr.org/english/law/ccpr.htm
reason for permitting the taking of the life of a person should be where the loss is a side effect of trying to save the life of another.

The UN Convention on the Rights of the Child also refers in its preamble to

"the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"

The Charter currently defines a person as a human being. The latter is a biological term that is inclusive of a human being who is immature and not yet born.

It is important that the right to life is not able to be derogated. A person is discriminated against at a most basic level if his or her life is not protected. The expression of the right to life in the Charter should be strengthened in accordance with the ICCPR, thus making the right both inherent and inalienable and thus not able to be subordinated to other rights.

3.7.6 Civil Application

The experience with the Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc [2006] VSCA case 34 indicates just how divisive the applications of rights can be when what is at issue is the matter of civil remedies. As argued in section 3.7.1, the Church is concerned about the effect on our culture if the Charter fosters a litigious mentality based on an individualistic notion of rights. It is therefore argued that penalties or civil claims should not be associated with the application of the Charter.

3.7.7 Reasonable Limitations

Section 7 of the Charter which includes a reasonable limitations clause makes the charter open to interpretation and allows Courts and Tribunals broad discretion in balancing human rights against each other and in doing so allows a trade off between rights which among other things, can place unacceptable limitations on some rights such as the right to religious freedom. It would be better if it more closely resemble the international human rights instruments, including the Siracusa Principles 35 as discussed in section 3.7.2.

4. Conclusion

This submission has raised a number of ways in which the application of the Charter has been problematic for the protection of human rights in Victoria. A number of positive elements have also been identified.


Appendix

Abortion and the Charter

Under Victoria’s Abortion Law Reform Act 2008, many prolife health practitioners and institutions find that their practices are under threat if they are unwilling to advise or perform an abortion or refer for abortion. The right to conscientious objection by professional health practitioners has been significantly curtailed.

Section 8 of the Act states:

Obligations of registered health practitioner who has conscientious objection

8. Obligations of registered health practitioner who has conscientious objection

(1) If a woman requests a registered health practitioner to advise on a proposed abortion, or to perform, direct, authorise or supervise an abortion for that woman, and the practitioner has a conscientious objection to abortion, the practitioner must:

(a) inform the woman that the practitioner has a conscientious objection to abortion; and

(b) refer the woman to another registered health practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion.

(2) Subsection (1) does not apply to a practitioner who is under a duty set out in subsection (3) or (4).

(3) Despite any conscientious objection to abortion, a registered medical practitioner is under a duty to perform an abortion in an emergency where the abortion is necessary to preserve the life of the pregnant woman.

(4) Despite any conscientious objection to abortion, a registered nurse is under a duty to assist a registered medical practitioner in performing an abortion in an emergency where the abortion is necessary to preserve the life of the pregnant woman.

Section 6 of the Act also extends the practice of abortion to permit a registered pharmacist or registered nurse who is authorised under the Drugs, Poisons and Controlled Substances Act 1981 to supply a drug or drugs may administer or supply the drug or drugs to cause an abortion in a woman who is not more than 24 weeks pregnant.

Section 7 of the Act also allows that a registered nurse or pharmacist may administer or supply a drug or drugs to cause an abortion in a woman who is more than 24 weeks pregnant if the pharmacist is employed or engaged by a hospital and at the written direction of a registered medical practitioner.

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36 Includes medical practitioners, nurses, psychologists and pharmacists.
Doctors, nurses, pharmacists and psychologists would thus have to refer for abortion if they were unwilling to advise or perform an abortion. Catholic institutions that require their health professionals to abide by their code of ethics now have a conflict between their codes of ethics and the legal requirement for health professionals engaged in those institutions to perform or to refer for abortion.

The Victorian Act overturns the age old respect for conscientious exercise of professional judgment, and is at odds with the current position adopted by the Royal Australian College of Nursing, by the Australian Medical Association and by the National Health and Medical Research Council. The Council not only upholds conscientious objection in its code of ethics, it asserts a no disadvantage clause. For instance, the guidelines on use of foetal tissue in research state:

'Those who conscientiously object to being involved in conducting research with separated foetuses or foetal tissue should not be compelled to participate, nor should they be put at a disadvantage because of their objection.'\(^{37}\)

Similarly, ‘no disadvantage’ clauses can be found in guidelines on organ donation and brain death, assisted reproductive technology (ART), the use of stem cells and medical research.

The Medical Council of Australia published a Code of Ethics to guide medical practitioners and the Medical Practitioner’s Boards in each State. The Code states:

2.46 Being aware of your right to not provide or directly participate in treatments to which you conscientiously object, informing your patients and, if relevant, colleagues, of your objection, and not using your objection to impede access to treatments that are legal.

2.4.7 Not allowing your moral or religious views to deny patients access to medical care, recognising that you are free to decline to personally provide or participate in that care.

The Abortion Law Reform Act 2008 thus conflicts with the Code of Ethics applied by the Medical Boards by requiring doctors to participate in a patient’s care by referring them to another practitioner who does not have a conscientious objection.

Many health practitioners who hold that doing abortion is unethical also regard it as unethical to professionally cooperate in abortion by “referring to another whom the practitioner knows does not have a conscientious objection to abortion”. A referral is not a morally neutral act. It implies approval of the conduct and it involves cooperation in the act. For those who hold that abortion is killing a human being, as the Church believes and teaches, clearly asking them to refer is contrary to conscience.

The Catholic Health Australia Code of Ethics Standards states:

“Catholic facilities should not provide or refer for abortion, that is procedures, treatments or medications, whose primary purpose or sole

immediate effects is to terminate the life of a foetus or an embryo before or after implantation.”

In relation to psychologists and social workers the Australian Bishops Conference provided *Advice on Pregnancy Support and Counselling Services (2006)*. In that advice they noted that

“Decision-making counselling ought not to attempt to direct the patient in relation to her pregnancy or toward any particular decision. The client is most likely to make a good choice if the counsellor serves to reduce the sense of panic and urgency and instead assist the client to regain control of her own circumstances. The aim is to give her greater confidence in being able to cope with pregnancy and to assist her to make a reasonable decision for herself. This provides the best chance of a life-affirming choice.”

and the Catholic Bishops went on to say that government funding could not be accepted if it required a counsellor to refer for or actively encourage abortion procedures.

The Act also requires that despite any conscientious objection a doctor is under a duty to perform an abortion in an emergency where the abortion is necessary to preserve the life of the pregnant woman. This raises questions about whose judgement is to be applied, because there often are alternative ways to manage risks to life and health other than direct abortion. Under the CHA code, loss of foetal life may be permitted when it is not directly intended as a means or an end if there is no other way of saving the woman’s life. The Act makes no such distinction.

Nurses have an even worse problem because they would be “under a duty to assist” in a late term abortion, if a doctor requests and claims that it is an emergency. Doctors at least can exercise their discretion and many hold that late term abortion is never medically necessary. Attempting live birth is a safer option if the woman’s life is in danger. Late abortion usually involves an additional procedure such as fatal injection to the child in utero. Under the Act nurses are not permitted to object even though doctors can.

When the Act was considered by Parliament, the Scrutiny of Acts and Regulations Committee (SARC) raised a number of concerns about the Abortion Law Reform Act 2008. In an Alert Digest to the Parliament it raised several following questions about the effect of the Bill on human rights.\(^{38}\)

However, the Minister’s Second Reading Speech remarks included the following:

> In accordance with section 48 of the Charter of Human Rights and Responsibilities, a statement of compatibility for the Abortion Law Reform Bill 2008 is not required. The effect of section 48 is that none of the provisions of the charter affect the Bill. This includes the requirement under section 28 of the charter to prepare and table a compatibility statement, and

the obligation under section 32 of the charter to interpret statutory provisions compatibly with human rights under the charter.

Section 48 states:

Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.

As a result it appears from the Hansard that the Parliament did not ever address these questions and the matter of the Bill’s incompatibility with the right to freedom of thought, conscience and belief and the rights of human beings before birth.

The Church had not anticipated the interpretation of Clause 48 and had understood that the function of Clause 48 was to prevent judicial opinion using the Charter to broaden the scope of existing abortion law. This opinion was reinforced by the Second Reading Speech for the Charter in which Mr Hull’s stated:

The right to life is a key civil and political right and is protected by the bill. As the provision is not intended to affect abortion laws, a clause is included to put beyond doubt that nothing in the charter affects the law in relation to abortion or the related offence of child destruction. The government is mindful of the range of strong community views on this issue and has never intended the charter, which is aimed at enshrining the generally accepted core civil and political rights, to be used as a vehicle to attempt to change the law in relation to abortion.\footnote{Mr Rob Hulls Second reading Speech, Charter of Human Rights and Responsibilities Bill 2006 http://www.justice.vic.gov.au/wps/wcm/connect/justilab/DOJ+Internet/resources/4/b/4b6ab080404a3ef9a149bf15f2791d4a/Second+Reading+Speech.pdf}

Clauses 7 and 8 of the Abortion Law Reform Act 2008 potentially affect human rights in three areas: freedom of thought, conscience, religion and belief (section 14 of the Charter); the right to hold an opinion without interference (section 15(1) of the Charter); and freedom from compulsory labour (section 11(2) of the Charter)

In accordance with the Second Reading Speech the Scrutiny of Acts and Regulations Committee also thought that Clause 48 did not prevent the Committee raising questions about the compatibility of the abortion Bill with the Charter. In relation to the rights of the child before birth, the Committee found that the Charter provides that ‘all persons’ have human rights and defines ‘person’ to mean ‘human being’. Overseas courts have held that the question of defining a human being for the purpose of determining the existence of legal rights is a legal (rather than metaphysical or scientific) one and that there is no international consensus on the legal status of foetuses.\footnote{http://www.parliament.vic.gov.au/archive/sarc/Alert_Digests_08/08alt11body.htm}

The Committee also found that the Charter s. 7(2) permits all rights to be subject to reasonable limits to further other interests, such as the rights of pregnant women. Overseas courts have held that decriminalisation of abortion can be compatible with foetuses’ right to life when accompanied by other adequate measures to discourage
abortion, such as state programmes to encourage women to bring pregnancies to term.

During the debate on the Bill efforts were made to introduce amendments of this kind including:

- Protection for children born alive after an abortion
- Ban on Partial Birth Abortion
- Legal protection (under the Crimes Act) for an unborn child seriously injured during an assault on the mother
- Protection for victims of child sex abuse seeking abortion.
- Information on health risks of abortion
- Independent professional counselling
- Protection for women with disabilities who have impaired decisions-making
- A foetus that is born alive has all the rights of a child
- Approval requirements for abortion clinics
- Offering women 'decision-making' counselling
- Notifying the custodial parent of a child seeking an abortion.
- Keeping an adverse events register
- Requirement to provide foetal tissue samples to police if abuse suspected
- Recording of data on abortion
- Pain relief for foetus

All these amendments were defeated.

The Church is concerned that the right to life should not be overridden. Section 48 creates problems by the breadth of the exclusion and should be removed.

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41 Victorian Hansard 11 September 2008 p. 3620 - 3629
42 Victorian Hansard 11 September 2008 p. 3498-3506
43 Victorian Hansard 11 September 2008 p. 3474-3480
44 Ibid. p. 3629-3631
45 Ibid. p. 3616
46 Ibid.
47 Ibid.
48 Ibid. p. 3622
49 Ibid. p. 3536-3550
50 Ibid. p. 3480-3485
51 Ibid. p. 3620
52 Ibid. p. 3619
53 Ibid. p. 3623
54 Ibid p. 3625