

29 June 2015

Personal Submission to the Charter Review by Jamie Gardiner

As discussed with the Charter Review Secretariat, this submission is my personal one, including some policy ideas which the Liberty Committee did not have the time or resources to consider for possible inclusion in Liberty's submission. It may well be that Liberty would in any case have rejected my proposal around the issue of "consequences". I continue to support Liberty's submission, notwithstanding that this submission in some respects offers other ideas.

I do, however, propose it in my personal capacity for the Reviewer's consideration.

Summary of recommendations

1. Section 1 of the *Charter of Human Rights and Responsibilities* should be taken seriously.
2. Sections 38(4), 38(5) and 48 should be repealed.
3. In Section 3(1) the definition of "discrimination" should include "or other status" in addition to the list of attributes set out in section 6 of the *Equal Opportunity Act 2010*.
4. A definition of "incompatible with human rights" should be inserted in Section 3, referring to having "the effect of limiting a person's enjoyment of a human right to a greater extent than either s 7(2) or s 7(3) permits".
5. Section 7(2)(a) should have added, after "the right," the words "under international law".
6. The consideration of international law referred to in section 32(2) should be mandatory.
7. The Section 36 "declaration of inconsistent interpretation" terminology should be replaced by that of a "finding of incompatibility with human rights"
8. Section 37 should be replaced by a provision repealing the provision subject to a (final) finding of incompatibility with human rights, to come into force by proclamation, or if not earlier proclaimed 12 months after the finding was made. (Additional machinery provisions would be necessary, including ones about tabling the finding in Parliament and publishing the finding and consequential repeal date in the *Gazette*.)

The Name of the Charter

The name by which the Charter is known is important to the development of a human rights culture in Victoria. The Charter needs to be more than "just" a legal document and not "just" an Act of Parliament. It embodies and strives to implement a framework applicable not only to government and public authorities, but also, symbolically, to society at large. It is not constitutionally entrenched, but needs to be respected as a quasi-constitutional document.

It is for this reason that the Charter expressly, in its very first section, endorses its citation as the **Charter of Human Rights and Responsibilities**, without the customary "Act 2006" suffix appropriate to other statutes.

I therefore **recommend (a)** that the Review adopt this usage throughout its report, and **(b)** that it **recommend** to the Attorney-General and the Parliament that this usage be adopted in all publications and instruments.

ToR 2.i “any other desirable amendments”

Repeal s 48

I agree with the Law Institute of Victoria’s 2011 recommendation, re-endorsed in its current submission, that s 48 should be repealed, as no statute should be excluded from the ambit of the Charter.

Repeal ss 38(4)&(5)

Just as with s 48, these two sub-sections unjustifiably quarantine some organizations from the ambit of a law intended to apply generally. If the relevant public authorities, or bodies they supervise, are acting compatibly with human rights these subsections are irrelevant, and if they would be or are found to be acting incompatibly with human rights that means that they have been acting incompatibly with what “can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom,” to use the words of s 7(2). No principled argument can justify giving licence to such behaviour. The notion that religious bodies should be above or beyond the laws applicable to every other body is a relic of the 16th century; it leads to the sort of contempt for human dignity being revealed in the cover-ups and culture the subject of the current Royal Commission into child sexual abuse in or by such bodies.

Meaning of “discrimination”

In its 2011 submission Liberty Victoria referred to several human rights that should be expressly included in the *Charter*, including some human rights included in the *ICCPR*. Liberty has repeated to this Review, and I strongly endorse, those recommendations.

I make one further recommendation here.

Section 8 of the *Charter* mostly implements Article 26 of the *ICCPR*, but by referencing the *Equal Opportunity Act 2010*’s definition of discrimination, and in particular therefore the list of attributes in s 6 of that Act, it replaces an open list with a closed list. The Charter should add to the definition of discrimination in s 3(1) the stipulation that the list in *Equal Opportunity Act* s 6 is deemed to include, for the *Charter* meaning of discrimination, the words “or other status” used in the *ICCPR*’s Article 26.

Dealing with laws incompatible with human rights

As Liberty Victoria and others have submitted, an individual whose human rights have been breached by a public authority needs to have a remedy.

Where the breach results from a provision of a statute that is incompatible with human rights, however, an individual remedy, even if one can be available, is inadequate. The incompatibility needs to be removed.

In the public conversation leading to the enactment of the Charter much was made by its opponents of the supposed problems of the US Constitution’s Bill of Rights and the power of its Supreme Court to strike down legislation. Part of the anxiety at the time seemed to stem from ignorance about the differences between the US Constitution and our own, and part from an ignorance of our High Court’s power to strike down legislation that is in breach of our constitution. A further source of the

anxiety seemed to be a somewhat fanciful belief in the power of the common law to prevent the sort of human rights breaches that the Charter is intended to prevent, or remedy, a power which it clearly does not currently have.

The great virtue of a Charter founded in the international law of human rights, however, and in Australia's freely accepted treaty obligations, is that it is part of a framework with a well-developed jurisprudence, and established methods for resolving conflicts and interactions between rights. The US Bill of Rights, on the other hand, consists of a mostly worthy collection of eighteenth century common law civil rights, expressed somewhat elliptically, and leaving considerable room for the Court to develop new interpretations for later generations. This has led over two centuries to a system of law not always compatible with the international human rights framework, and justifiably accused of politicization of the judiciary.

The response in Australia to ill-founded anxieties should not, however, be to look at US constitutional jurisprudence and resolve to do nothing. The question instead should be how to create a system that leads to reasoned assessment of the human rights consequences of laws and practices of government, and results in removal of provisions incompatible with human rights as they are discovered. Australian courts are fully equipped to assess laws and practices against criteria set out in a law like the Charter and to make findings appropriately when a matter comes before them. What they cannot do is amend provisions of a statute to make it compatible with human rights, except by techniques such as reading down an overbroad scope; anything more radical, such as the UK courts can do, is impermissible under the Constitution as amounting to a legislative function, which is reserved to the Parliament.

The Charter makes an elaborate but ineffectual attempt to deal with this impasse. It is ineffectual for two main reasons. First, the use of "inconsistent interpretation" in s.36 is inconsistent with the more direct language of compatibility and incompatibility elsewhere; and confusions have arisen as to the role of s.7(2) and how "limitation" connects with both the meaning of human rights and the concept of compatibility. Secondly, the process of notices to Ministers, time frames for government to respond, and the interaction with parliamentary procedures and the ordinary exigencies of government will probably result in inaction, if they are ever activated. After eight years there is little reason to expect any change under the current wording.

It is my personal submission that the role of the Charter in re-aligning statutes with human rights could be made much more effective while still respecting parliamentary sovereignty. In summary this involves:

- The missing definitions of "compatibility/incompatibility with human rights" must be supplied.
- The requirement for s 7(2) to be engaged in a s.32 analysis must be clarified.
- The s.32 analysis must result in a finding of compatibility or incompatibility with human rights.
- A finding of incompatibility must trigger the repeal *by the Charter itself* of the incompatible provision, in a way that permits its amendment in charter-compatible form, under parliamentary supervision, in a reasonable time-frame.

A suggested definition of compatibility with human rights is:

A statutory provision¹ is incompatible with human rights if it has the effect of limiting a person's enjoyment of a human right to a greater extent than either s 7(2) or s 7(3) permits

To assist in the application of s 7(2) the reference in s 7(2)(a) to "the nature of" a right must be clarified by adding words such as "under international law" so as to require consideration of the international jurisprudence concerning the rights in question, including whether they have built-in qualifications, or whether they are non-derogable. In similar fashion the consideration of international law referred to in s 32(2) should be mandatory: "may" must be replaced by "must". To say that international law must be considered does not require Courts to be experts in, or write treatises on, international jurisprudence; rather, it means they cannot shirk consideration of any submissions on it, as sometimes appears to be the case in recent years; it also means that counsel will be encouraged to pay more attention to the international jurisprudence than may be justifiable in the climate to date.

If the linking of s 32 to s 7 by means of the definition suggested is not sufficiently clear, a sub-section should be added to s 32 to clarify the point.

In section 36 the heading should be changed to "Finding of incompatibility" or "Finding of incompatibility with human rights". The references to "override declaration" should be removed². The hypersensitive barriers erected in ss 33 and 36 to efficient decision-making should be trimmed considerably: any Court, subject to the usual appeal processes, should be able to make a finding of incompatibility with human rights. Once the appeal process is completed, at whatever stage, including by non-lodgment within the relevant time, a finding of incompatibility is just that.

Consistent with s 36(5) the finding need have no immediate consequences in the judicial system. Its consequence instead is to enliven provisions of the Charter, which should probably be in a division or part of their own with a heading such as "Repeal of a statutory provision incompatible with human rights" or "Consequences of incompatibility with human rights".

The process for acting on a judicial finding of incompatibility with human rights should have the following two features:

The first and most important feature is that a finding of incompatibility with human rights triggers, or brings into force, a Charter provision which repeals the incompatible provision, with a default commencement date of a set period, six months, or perhaps a year, for example, or earlier by proclamation.

The second feature could be one of two options. One option could simply be that the Minister introduces a Bill to amend the provision in question to make it compatible with human rights, and that Bill is enacted (with the consequence that the Charter repeal of the provision's default commencement is cancelled), or the Government allows the repeal to take effect at the default time or sooner, or the Minister introduces a Bill to extend the date of coming into force of the repeal by a certain time, but not more than two years, say. The other option is an

¹ Section 3(1) defines "statutory provision" broadly as "an Act (including this Charter) or a subordinate instrument or a provision of an Act (including this Charter) or of a subordinate instrument"

² This is dependent on the repeal of s 31, as others, including Liberty Victoria, have urged.

alternative procedure, which might be more efficient in its use of parliamentary and government time and resources, and would be to make such amendments by delegated legislation:

- In this “alternative procedure” the Charter also authorizes the Minister responsible for the Act in question to amend the incompatible provision by Order-in-Council or other legislative instrument subject to disallowance by (both Houses of) the Parliament. The amendment could be done by replacing the incompatible provision by the insertion of a provision compatible with human rights to take effect immediately following the Charter-initiated repeal simultaneously proclaimed.
- The Order would be tabled in parliament together with a Statement of Compatibility (from the Minister and/or the Attorney-General) explaining how the amended provision remedies the incompatibility found by the Court in the original provision.
- The “Consequences” division would have, if necessary, a provision specifying that the authorized repeal or amendment has effect regardless of the date of enactment of the incompatible provision, whether before or after the coming into force of the Charter.

The procedure suggested above borrows from the procedures set out in the *Human Rights Act 1997* (UK). Section 10 and schedule 2 of that Act may give some additional assistance towards implementing this proposal.

To avoid repetitive litigation consideration should be given to inserting a provision similar to parts of s 31 to enable the Order (etc) to replace or re-enact the incompatible provision with an avowedly incompatible provision, but with a sunset clause similar to s 31(7), and only in exceptional circumstances, as in s 36(4). A five year sunset would be too long, and a sunset of two or three years is suggested.

The proposal to delegate certain amendments to an Order-in-Council or the like is only intended to facilitate the process that would otherwise, and could in any case, require a separate Bill for an amending Act.

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