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SUBMISSION TO ENQUIRY INTO THE CHARTER OF HUMAN RIGHTS & RESPONSIBILITIES ACT 2006 (VIC)

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1. Respects to the Committee

I offer this submission to the Scrutiny of Acts and Regulations Committee ("the Committee") in relation to its enquiry into, and report upon, the Charter of Human Rights & Responsibilities Act 2006 (Vic) ("the Charter"). I pay my respects to the Parliament of Victoria and its members and to the members of the Committee. During my service as inaugural chairman of the Australian Law Reform Commission (1975-84), I had many associations with the Parliament, governments and committees of the Parliament of Victoria, especially the Victorian Statute Law Revision Committee (later the Legal & Constitutional Committee). This submission is made on my own behalf alone. it should not be attributed to any court or other body to which I formerly belonged. Nor to any organisation with which I am presently associated.

2. Respects to Parliament

I have always been respectful towards the powers, functions and responsibilities of elected legislatures, both federal and State[1]. I have always upheld and respected the privileges of the Parliaments, and Members of Parliament, both federal[2] and State[3]. I acknowledge the primary role that elected legislatures, and their members, play in the democracy of our country. Although judges have, according to the common law tradition, a law-making role, this is subordinate, interstitial and (save in

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1 *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 395. See also S. Churches, "The Courts and Parliament" in I. Freckelton and H. Selby (Eds), *Appealing to the Future: Michael Kirby and his Legacy* (Lawbook Co., 2009) 265 at 267ff and G. Orr and G. Dale, "The Political System", *ibid*, 661 at 669. See also *Durham Holdings Pty Ltd v. New South Wales* (2001) 205 CLR 399 at 427-429 [60]-[66].

2 *Sue v Hill* (1999) 199 CLR 462 at 557 [247] ff.

3 *Egan v Willis* (1999) 195 CLR 424 at 500 [149]ff.

matters concerned with the federal Constitution) subject to reversal or amendment by valid laws enacted by the Parliaments, which the courts must uphold.

3. Charter and the global context

Any decision by the Committee to recommend repeal or substantial amendment of the Charter must necessarily be viewed in the context of the contemporary developments of international human rights law. Over 30 years, and in a number of activities, I have been involved in, and have observed, the development of international human rights law. This is a process that began substantially with the adoption of the Universal Declaration of Human Rights 1948[4]. It has been expanded by many treaties and other international instruments to which Australia is a party, including the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights. Occasionally, Australian legislators, judges and lawyers have been unfamiliar with the development of international human rights law. To some extent, this unfamiliarity has been occasioned by the absence in Australia of general domestic legislation, reflecting the concepts and values expressed in international human rights law. So far, only two jurisdictions can be excepted from this feature of the Australian legal system, namely the Australian Capital Territory and Victoria. The Territory enacted a Human Rights Act 2004 (ACT) and the Parliament of Victoria enacted the Charter in 2006. By taking this initiative, Victoria reflected a common feature of its parliamentary history. This has frequently been in the forefront of Australian legislative thinking and action. It was the Victorian Parliament and its members that took the leading part in the Australian federal movement and in supporting and securing the adoption of the Constitution of the Commonwealth. Such innovations have occurred under successive governments of different political persuasions. It would be a serious misfortune now if Victoria were to repeal or substantially to modify the Charter or to reduce the beneficial role played in its implementation by the judiciary of Victoria. Any proposal to that effect should, in my respectful submission, be rejected or at least postponed. To do otherwise would, I suggest, damage the reputation of Victoria as an innovative intellectual leader in the law in Australia and as an Australian State jurisdiction fully engaged with an important and widespread

[4] Adopted and proclaimed by the General Assembly Resolution 217A(III) of 10 December 1948.

legal development. In this respect, a repeal or a major modification of the Charter would send an unfortunate signal to the world community concerning the engagement of the Victorian Parliament with the global law of human rights. Such a signal would be more serious and negative, in the case of Victoria, than in respect of the other Australian jurisdictions that have so far failed to enact a Charter or equivalent statute. It would be seen, in my submission, as involving disengagement by the State of Victoria from an important contemporary global development in the law. The Committee and the Parliament of Victoria should hesitate long before sending such a signal about the values it espouses and the global engagement it supports.

4. Advantage of federal experimentation

A distinctive and beneficial feature of the federal system of government, as it operates in Australia, lies in the possibility that it allows for experimentation and progress concerning (amongst other things) the boundaries of justice and the accessibility of the rule of law[5]. The several Parliaments in the Commonwealth, and specifically the Victorian Parliament, should cherish the adoption of legislative innovations that lead the way for other Australian jurisdictions. It was in this way that we achieved in Australia important advances in the laws on consumer protection, environmental protection, and the provision of legal equality to sexual minorities. The last mentioned reforms were achieved as a result of initiatives begun in part by the Australian Labor Party government in South Australia in 1974 (the Hon. Don Dunstan MP) and in part by the initiative of the Coalition government in respect of the Australia Capital Territory (the Hon. Robert Ellicott MP). Both sides of politics in Australia can take pride in significant innovations that have expanded the concepts of freedom and equality in this country. Historically, it has been rare for significant legislative reforms of this character, once achieved, to be reversed following a change of government.

5. Overcoming hostility to a Charter

Like most Australian lawyers educated in the legal profession before the 1980s, I was raised in a legal tradition that was hostile to the concept of formal legislative

[5] *New South Wales v The Commonwealth* (Work Choices Case) (2006) 229 CLR 1 at 229 [557]ff.

guarantees of fundamental rights. Initially, I accepted, and shared, that hostility. The foundations of the hostility can be explained by reference to historical and doctrinal causes. In a recent address to a conference in England, marking the tenth anniversary of the commencement of the Human Rights Act 1988 (UK), I explained the reasons traditionally afforded in English-speaking jurisdictions for this hostility and the reasons, and subsequent developments, leading now to the adoption of formal guarantees of rights in virtually every country of the Commonwealth of Nations that previously rejected such guarantees[6]. The position has now been reached that Australia is virtually the only remaining significant country of the common law that has failed or omitted to enact a constitutional or statutory charter or bill of rights. The Victorian Charter needs to be considered in this historical and doctrinal context. The actual provisions of in the Victorian Charter are substantially based on the New Zealand Bill of Rights Act 1990 (NZ) and the Human Rights Act 1993 (NZ), which, in turn, were substantially copied in the Human Rights Act 1998 (UK). In this respect, the Charter is based on a model specifically developed to ensure the continuance of the traditional respect observed in English-speaking democracies for the 'sovereignty of Parliament', whilst affording a limited but appropriate role to a formal guarantee of rights and duties, justiciable before the courts.

6. Absence of harm. Evidence of benefit

It cannot be seriously argued that, in the years since the Charter was enacted in Victoria in 2006, decisions or actions based on the Charter have caused any harm to the State of Victoria or its Parliament, courts or citizens. Indeed, the Victorian Government's submission to the Committee sets out fairly its considerable benefits so far. Some of the complaints voiced in the media (which is intensely self-interested in this regard) have related to the suggested failure of the Charter to afford more substantial protections of freedom of expression or freedom of the press advocated by the media. If there are defects of omission, the proper approach to any such established defects, would be to consider amendments and elaborations to overcome such defects if proved. It would not be to abandon or substantially to alter an initiative which has placed Victoria in the lead of Australian State jurisdictions and

[6] M.D. Kirby, "Protecting Human Rights in Australia Without a Charter"(2011) 37 *Commonwealth Law Bulletin 253.*

in closer harmony with developments that have occurred globally since 1948, and especially since 1990.

7. Fair Period for Operation

Respectfully, I submit that the Committee should recommend that the Charter be retained. A longer period should certainly be allowed before any decision is taken to enact significant, substantive or restrictive changes. Inevitably, with such a statute, containing novel concepts and procedures, the legal profession and the wider Victorian community requires time to become familiar with its provisions and, where appropriate, to bring proceedings before the courts. It would be premature, on the basis of the operation of the Charter for less than five years, to make any substantial changes. At the least, greater experience with the operation of the Charter is needed to permit a fair and informed parliamentary and public evaluation of its operation.

8. Merits of the Charter

The Committee will have received many submissions addressing particular aspects of the Charter and the course of action that the Committee should adopt. In this submission, I wish to state, as briefly as I can, my principal reasons for urging the preservation of the Charter as an important provision for the good government of the people of Victoria:

8.1 Parliament's final say: Far from affording excessive powers to the judiciary, at the expense of the prerogatives and powers of Parliament, the Charter preserves fully the right of Parliament to have the final say in matters concerned with suggested breaches of the Charter brought before the courts. Whilst allowing access to the courts for those alleging a breach of Charter provisions, the Charter withholds from the judiciary any power to annul or invalidate legislation enacted by Parliament. This approach strikes what has been adjudged in the United Kingdom, New Zealand and the Australian Capital Territory as the appropriate means by which to preserve the 'sovereignty of parliament'. It involves a cautious and limited approach which would render any repeal or substantial diminution in the effectiveness of the Charter the more surprising because of the strictly limited powers that the Charter affords to the courts.

8.2 Enlivening Parliament: In this sense, the Charter is in truth a useful adjunct to the functions of Parliament. It is designed to enliven and support the parliamentary process, not to diminish or endanger it. I have seen no evidence whatever that the Charter has diminished or endangered the Parliament of Victoria. Indeed, the Victorian Government's own submission to the Committee points out parliamentary review of legislation has been informed by principle and strengthened in consequence. Further, the evidence, not least in the decision of the Victoria Court of Appeal in Momcilovic, supports the contention of a cautious and parliament-respecting approach by the courts in their applications of the Charter in individual cases[7].

8.3 Avoiding litigation: The Charter is so worded as to avoid, so far as possible, unnecessary litigation, with its potential features of cost and delay. The operation of the Charter is designed, on the contrary, to internalise within the administration of the Executive Government conformity with Charter requirements so as to obviate the necessity of any proceedings in court. The Charter gives guidance to parliamentary counsel and officials concerning proposed new legislation so as to ensure that it is Charter compliant. This, in turn, encourages appropriate conceptual thinking about universal rights, so that they are not eroded or overridden accidentally or by oversight. In the absence of the Charter, there is no obligation on the administration or officials to act in such a way. Certainly, there is no stimulus to do so with the knowledge that, in the event of failure, complaints may be brought before the independent courts.

8.4 Merits of court access: The foregoing procedure would not be so well secured if a complaint lay not to the independent judicial branch of government but to a parliamentary committee. Necessarily, such a committee would lack the expertise in the developing international and national jurisprudence of universal human rights. Inevitably, and properly, a parliamentary committee would be affected by political consideration and this before any opportunity was afforded for independent review of matters of

[7] *R v Momcilovic* (2010) 25 VR 436; 200 A Crim R 453; cf *WMB v Chief Commissioner of Police (Vic)* (2010) 203 A Crim R 167 esp at 175 [32].

contention by members of the judiciary. The existence of the potential of scrutiny by the judicial branch is a healthy assurance to the administration, officials and members of Parliament alike that decisions on Charter compliance of proposed or enacted legislation will be conducted with impartiality, whilst reserving to the elected government and Parliament the last say in all such matters.

8.5 Limits of law reform: Long experience in institutional law reform has taught me that members of Parliament are often too busy with major issues of government and political priorities to attend to particular or limited complaints by citizens concerning suggested defects of enacted law, measured against the standards of universal human rights. The realities of party government, party whips and of the role of the Executive in Parliament, can sometimes present serious dangers that considerations of injustice and departures from basic rights will be neglected or ignored. The existence of an avenue to seek the beneficial construction of legislation or judicial redress where departure from Charter rights is established is an assurance that parliamentary attention will be given to such matters, with the benefit of any judicial conclusions that have been expressed.

8.6 Operation in New Zealand: In New Zealand, the present Attorney-General, the Hon. Christopher Finlayson MP, has made numerous reports in compliance with the New Zealand Bill of Rights Act (which is the model for the Charter). It is my understanding that there is widespread satisfaction in New Zealand, on both sides of politics, with the operation of the New Zealand Act, and no suggestion of its repeal or amendment in that country.

8.7 Democracy and minorities: An honest reflection on the difficulties that are sometimes experienced in securing parliamentary attention to suggested departures from basic rights, particularly in the case of minorities, will indicate the value which the Charter affords to minorities. Democracy, as practised in Australia, should not be concerned only with the will of the shifting opinions of the majority. Where important considerations affecting a minority are raised, it is desirable that, before considering any step to override or deny such rights,

Parliament should be alerted to any serious departure from universal human rights which that decision may involve.

8.8. Australian treatment of minorities: It cannot be said that the Australian record, or indeed that of Victoria, in relation to minorities (and particularly unpopular minorities) is so unblemished that the stimulus of any judicial conclusion on departures from fundamental rights will not, at least sometimes, be useful to Parliament itself and to the community it serves. Illustrations involving the invocation of fundamental rights by courts (sometimes as expressed in binding treaties and sometimes in universal principles of human rights) can be found in numerous judicial decisions affecting:

- Aboriginals and Torres Strait Islanders in respect of land rights[8];
- Short-term prisoners in respect of voting rights[9];
- Homosexuals in respect of rights under the Refugees Convention[10];
- Refugees in respect of stateless persons[11].

8.9 Education in basic rights: The Charter also affords a valuable and practical means for the education of the community, particularly school children, in fundamental rights of citizenship. Research conducted by Dr. Paula Gerber (Monash University) explored the knowledge of the rights and duties of citizenship amongst school children in Massachusetts in the United States and in Victoria. According to Dr. Gerber's study, the Massachusetts students were much more aware of the foundations of their citizenship because taught to them at school and derived in part from the state and federal bills of rights[12]. An important feature of the Charter which, I suggest, will emerge over time, is the impact it has upon instruction of younger Victorians living in a fast changing society, about the mutual respect for the basic rights of all that are expressed in the Charter. This is another way in which the Charter will

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8 *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 43.

9 *Roach v Electoral Commission* (2007) 233 CLR 162 at 178-9 [16]-[18] and *ibid* at 203-4 [100], *citing Hirst v United Kingdom* [No.2] (2005) 42 EHRR 41 and *Sauvé v The Queen* [2002] 3 SCR 519 at 585 [119]

10 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

11 *Al-Kateb v Godwin* (2004) 219 CLR 562.

12 Paula Gerber, *From Convention to Classroom: The Long Road to Human Rights Education* (2008) VDM Publishers, Germany. Reviewed by the author, "Three Books on Human Rights" (2009) *Australian Law Journal* 849.

contribute to strengthening civil society in Victoria and reinforcing community awareness about rights and responsibilities that have previously been substantially unknown and untaught.

8.10 Global engagement: In discharging their duties with or without a Charter, Australian courts have available to them many precedents in which the growing body of the international law of human rights may be invoked, absent any inconsistent law made by parliament[13]. Already, such sources have been accessed by the courts, including the High Court of Australia, in reaching conclusions about the current state of the common law in Australia[14], or the meaning that should be given to constitutional provisions[15]. It is respectfully submitted that it is preferable, as a matter of doctrine and principle, for such basic norms of universal human rights and responsibilities to be expressed in a readily accessible enactment of an Australian parliament, such as the Charter. It existence, in Victoria, terminates the isolation of Australian citizens in this State as well as Australian judges and lawyers, from the growing body of international human rights law that is increasingly utilised, applied and respected in countries with similar legal systems worldwide. To terminate this facility now or to substantially modify it by removing the beneficial role of the courts, would amount to a negative assessment of the Charter by the Victorian Parliament on the basis of inadequate scrutiny and insubstantial criticisms.

8.11 Judicial appointments: Some of the published media criticisms of the Charter have bordered on the ludicrous. In one of them, it was even suggested that a reason for repealing the Charter is that it will place Victorian lawyers out of contention for appointment as judges of federal courts in Australia because they will have been exposed to global considerations of universal human rights that are not known to lawyers in other Australian jurisdictions. This extraordinary assertion[16] simply indicates the extent to which opponents of the

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13 *Mabo* (above n7).

14 *Mabo* (above n7) at 42.

15 Roach (above n8), *ibid*.

16 C. Merritt, "State Charter Lawyers on Path to Isolation" *The Australian*, 19 February 2010, 27; G. Craven, "State Out On A Limb, Warns Craven", *The Australian*, 26 February 2010, 34.

Charter will scrape the bottom of the argumentative barrel. There is no evidence whatever to support the suggestion. On the contrary, the evidence to date suggests its worthlessness. Acquaintance with the growing body of universal human rights law, through consideration and applications of Charter provisions, is a positive advantage for Victorian lawyers, particularly in any dealings they may have with most overseas jurisdictions where such principles are familiar. In any case, Australian courts, federal and state, are increasingly utilising the global jurisprudence of human rights in common law and statutory decision-making. That law is not alien to Australian law. Normally, it is founded on principles known to the common law. The hostility of some media outlets to the Charter is closely related to the role of the judicial branch in decisions concerning the Charter. The judiciary is largely immune from the bullying and blandishments of media in Australia. This is a further reason why the judiciary should be retained in the independent review of cases concerned with Charter compliance. In the end, Parliament can reach contrary conclusions. However, access to the judiciary is an important protection for citizens in Victoria and also a benefit to Parliament itself in reaching an informed conclusion by reference to well-reasoned assessments about the application of Charter provisions.

9. Conclusion

It is respectfully submitted that the Committee will report that the Charter should not be repealed or amended in any substantive way; that the role of judiciary, as provided in the Charter, should be retained; and that any substantive reconsideration of the Charter should be postponed for at least five years to permit a fair interval for the assessment of the Charter's operations.

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