GILBERT + TOBIN CENTRE OF PUBLIC LAW

THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

GILBERT + TOBIN CENTRE OF PUBLIC LAW

20 May 2015

Mr Michael Brett Young
Independent Reviewer

Dear Mr Brett Young

Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

Thank you for the opportunity to make a submission to this review. We do so in our capacity as members of the Gilbert + Tobin Centre of Public Law at the Faculty of Law, University of New South Wales. We are solely responsible for the views and content in this submission.

Below, we make a number of recommendations in respect of improving the operation of the Charter. These recommendations reflect two aspects of the operation of that instrument. First, the Charter has not given rise to the fears expressed at the time of its enactment. In particular, it has not lead to a significant body of litigation. In fact, such litigation has been rare and far less frequent than might have been expected. Second, the Charter can be criticised on the basis that its impact outside of government, such as in the courts, has been too modest. This aspect of the charter should be strengthened.

Interpretive clause

Section 32(1) was intended to provide a robust means of ensuring, where possible, that Victorian statutes are interpreted consistently with the human rights set out in the charter. The interpretive obligation placed upon courts was modified from that set out in the *Human Rights Act 1998* (UK) so as to indicate that Australian courts should not go so far as to follow the approach taken in the United Kingdom in cases such as *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. On the other hand, it was equally intended that this provision enable courts to go beyond existing Australian interpretive methods so as to ensure greater consistency between Victorian statutes and human rights standards.

The decision of the High Court in *Momcilovic v The Queen* (2011) 245 CLR 1 has created significant confusion with respect to the interpretation clause, and has arguably produced a result is at odds with what was intended. The High Court in that case suggested two potential approaches to section 32(1): one which treated the interpretation clause as akin to the common law principle of legality, and another which treated it as encouraging a more flexible approach to interpretation, similar to the approach of the High Court to statutory interpretation in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. The Court divided evenly on this question (as the dissent of Justice Heydon can be excluded).

Momcilovic has produced uncertainty about the scope of this important aspect of the Charter. This is a major barrier to the effectiveness of the instrument, especially since one of the primary objects of the Charter is to provide a clear and well understood means of interpreting Victorian statutes in line with human rights guarantees.

Section 32(1) needs to be amended to clarify how the interpretive process should be carried out. It should establish a clearer, streamlined approach to the interpretation of statutes in line with Parliament's intentions in enacting this provision. In particular, the section should be altered to establish that the interpretive exercise under section 32(1) is distinct, and more robust, than what is applied in regard to the principle of legality and the ordinary principles of interpretation. We propose that this section be amended to read:

> So far as it is possible to do so, all statutory provisions must be interpreted in a way that is compatible with human rights, taking into account the context, general purpose and policy of the statute and its consistency with human rights.

Relationship between sections 7 and 32

Momcilovic also created confusion as to the relationship between section 7 and 32 of the Charter. Three judges (Justices Gummow, Hayne and Bell) found that the application of section 7 precedes the question of interpretation under section 32. Chief Justice French found that section 7 is applied only after a court determines under section 32 that is not possible to reach an interpretation compatible with human rights. Justices Crennan and Kiefel JJ found that section 7 was solely a matter for parliament in the context of section 28. Heydon J favoured the former view, but as he found both sections invalid, his opinion has no precedential value. This uncertainty has implications both for the interpretation of the Charter by Victorian courts, in the context of section 32, and the making of statements of compatibility by members of Parliament under section 27.

We note that the current practice of the Victorian government is to prefer the two-stage approach, and we suggest that this is the better approach. It promotes a more open and transparent dialogue about the scope of rights, and the circumstances under which it is permissible to limit them. Where courts are concerned, it also avoids the possibility that certain negative rights or liberties may be over reinforced, or protected, relative to countervailing community interests or positive Charter values. We therefore suggest that the Charter should be amended to clarify the relationship between section 7 and 32 so as to endorse the two-stage approach. This should be brought about by adding the following subsection to the Charter:

> 7(4) This section must be applied in determining whether a statute is compatible with human rights.

Remedies

Section 39 of the Charter is obscure and difficult to apply. In particular, it fails to provide a clear statement of the remedies that are available for a breach of the Charter. It should be amended to provide this by way of repealing the section and replacing it with a provision providing such remedies. A section akin to section 40C of the *Human Rights Act 2004* (ACT) should be inserted in the Victorian Charter. As that section demonstrates, it is possible to set out such remedies without providing for damages in respect of breaches of the Charter.

Economic, social and cultural rights

The original consultation that led to the Charter, which was chaired by one of the signatories to this submission, demonstrated high levels of support for the inclusion of economic, social and cultural rights. However, a decision was made not to include these at the initial stage, but to amend the Charter

to provide additional protection for these in due course. A similar process has been undertaken in the ACT, which has amended its *Human Rights Act* to include:

> **27A Right to education**
> (1) Every child has the right to have access to free, school education appropriate to his or her needs.
> (2) Everyone has the right to have access to further education and vocational and continuing training.
> (3) These rights are limited to the following immediately realisable aspects:
> (a) everyone is entitled to enjoy these rights without discrimination;
> (b) to ensure the religious and moral education of a child in conformity with the convictions of the child's parent or guardian, the parent or guardian may choose schooling for the child (other than schooling provided by the government) that conforms to the minimum educational standards required under law.

A like clause should be inserted in the Charter, perhaps with the exclusion of subsection 3 on the basis that it acts to unduly limit the right. If there is sufficient community support, additional rights, such as to health, might also be included at this stage.

Further reviews

The Charter should be subject to further, regular reviews. This is important to ensure that the Charter is not seen as a fixed, unchangeable instrument, but a work in progress that should be amended over time to reflect community values and to improve human rights protection. These reviews should not be held every four years, as has been the case. The length of time the Charter has been in operation means that less regular reviews are now appropriate. The Act should be amended to prescribe that the next review should be held in two electoral cycles, that is, in eight years.

Yours sincerely

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