THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRightsCommittee:VK:455919

17 June 2011

Mr Edward O'Donohue, MLC
Chairperson, Scrutiny of Acts and Regulations Committee
Parliament of Victoria
MELBOURNE VIC 3002

Also by email: charter.review@parliament.gov.au

Dear Mr O'Donohue,

Re: Review of the Victorian Charter of the Human Rights and Responsibilities Act 2006 (Vic)

The Law Society of NSW represents over 22,000 members, and the Society's Human Rights Committee (the "Committee") has responsibility to consider and monitor Australia's obligations under international law in respect of human rights; to consider reform proposals and draft legislation with respect to issues of human rights; and to advise the Law Society on any proposed changes. The Committee is a long-established committee of the Society, comprised of experienced and specialist practitioners drawn from the ranks of the Society's members who act for the various stakeholders in all areas of human rights law in this State.

The Committee understands that the Victorian Attorney-General has announced a review of the *Charter of Human Rights and Responsibilities Act 2006* (the "Charter"), to be conducted by the Scrutiny of Acts and Regulations Committee (SARC). Thank you for the opportunity to comment on this important issue.

The Committee will not specifically address the seven questions set out in the Charter Review Terms of Reference; rather, the Committee provides comments of a more general nature below.

1. The Committee supports the Charter

The Committee supports the Charter and urges the Victorian Government to refrain from taking any actions to repeal or weaken the Charter. In the Committee's view, the Charter is an important tool for not only protecting human rights, but also for promoting a healthy human rights culture in Victoria. The Committee notes also that the Charter is part of a burgeoning trend in comparative jurisdictions. Human rights legislation has been in effect in the UK for more than ten years, approximately twenty years in New Zealand and almost thirty years in Canada.

2. Examples of positive effects of the Charter

The Committee notes that several organisations have compiled examples of positive outcomes achieved as a result of the Charter. For example, the Human Rights Law Centre has documented case study examples of where the Charter has resulted in an outcome that promotes dignity and addresses disadvantage.[1]

The Committee notes also that the Victorian Equal Opportunity and Human Rights Commission provides a register documenting such outcomes in "Your Rights, Your Stories".[2] Similarly the Public Interest Law Clearing House Homeless Persons' Legal Clinic has provided sample case studies of how the Charter has been used to obtain better outcomes for its clients.[3]

The Committee respectfully refers the SARC to these catalogues, and while the Committee does not wish to reproduce the numerous examples available there, it is useful to note that those examples cover a broad range of services and functions provided and performed by public authorities. These examples include promoting flexible decision-making for the elderly and vulnerable, preventing eviction into homelessness and including human rights in local government planning.

3. Examples of legislation that adversely affects civil liberties in NSW

Enclosed is a list of recent legislation enacted in New South Wales which the Committee identified as having a negative effect on individuals' civil liberties. The Committee contends that if human rights culture is weak in a State Parliament such as has been the case in NSW, such transgressions on individuals' civil liberties is facilitated. Further, in the Committee's view, it is arguably more important for states to have charters of rights as State Parliaments administer many of the laws which impinge on personal liberty: in the areas of policing; prisons and mental health facilities which hold people in detention; and, of course, the Courts and the criminal justice system.

4. Opportunity to bring the Charter into greater compliance with Australia's international obligations

In the Committee's view, the current review of the Charter is an excellent opportunity for the Victorian Government to ensure greater adherence to Australia's international human rights obligations. At the very least, the Charter should be amended to include all of the rights protected by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Australia is a party to both of these primary human rights instruments and all of the rights occurring under

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[1] Human Rights Law Centre, "Charter of Rights Case Studies" available online: http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/ (accessed 14 June 2011)

[2] Victorian Equal Opportunity and Human Rights Commission, "Your Rights Your Stories" available online: http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=itemlist&layout=category&task=category&id=50&Itemid=505 (accessed 14 June 2011)

[3] Public Interest Law Clearing House Homeless Persons' Legal Clinic, "Sample case studies – how the Charter has been used to get better outcomes for clients" available online: http://www.pilch.org.au/Assets/Files/HPLC%20-%20sample%20case%20studies%20_3_.pdf (accessed 15 June 2011)

these instruments should be equally protected. It is useful to note here that despite the fact that Australia is a federation with legislative powers divided between Commonwealth and the States, State Parliaments are still bound to observe international law in this respect as obligations Australia undertakes when it ratifies a treaty are unaffected by internal legal arrangements.[4]

The Committee notes that in its submission, the Law Institute of Victoria submits that should the Commonwealth Senate pass the *Human Rights (Parliamentary Scrutiny) Bill 2010* as was recommended to it by the Senate Legal and Constitutional Affairs Legislation Committee, then the Commonwealth parliamentary scrutiny of proposed legislation would require reference to:

1. The ICCPR;
2. The ICESCR;
3. The *Convention on the Rights of the Child*;
4. The *Convention on the Elimination of all Forms of Discrimination Against Women;*
5. The *International Convention on the Elimination of all Forms of Racial Discrimination*;
6. The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;* and,
7. The *Convention on the Rights of Persons with Disabilities.*

The Committee supports the LIV's suggestion that it would be appropriate to include in the Charter at least the human rights included in the proposed Commonwealth law in order to promote consistency between State and Commonwealth laws.

The Committee commends the Victorian Government for enacting the Charter, and for engaging with the ongoing process of improving and refining this framework of protection. The Committee again urges the Victorian Government to continue protecting and promoting the rights of Victorians by strengthening the Charter, or at the very least without diminishing the legislative framework already in place.

Thank you once again for the opportunity to provide comment.

Yours sincerely,

Stuart Westgarth
President

[4] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 27.

Examples of NSW legislation adversely affecting individuals' civil liberties

1. *Crimes (Serious Sex Offenders) Act 2006* (NSW)
This Act allows sex offenders who have completed their sentences to be kept in prison even if they have not committed any further offences.

It has been criticised for imposing a double punishment and for operating retroactively. On 18 March 2010, the United Nations Human Rights Committee singled out this piece of legislation as offensive to Article 9 of the *International Covenant on Civil and Political Rights* and gave Australia (not New South Wales) 180 days to respond to that criticism.

Similar Queensland legislation was the subject of a High Court challenge which narrowly failed – *Fardon v Attorney-General of Queensland* (2004) HCA 46. The Committee directs the SARC to the judgment of Justice Kirby (in dissent), who noted that if such sex offenders were assumed to be a danger to the public at the end of their sentences, it was likely to relate to psychiatric injury or illness which should more properly be dealt with in a psychiatric hospital or other like institution, rather than a prison.

2. Part 2A of the *Terrorism (Police Powers) Act 2002* (NSW) – Preventative Detention Orders
A person who may commit terrorism crimes in future can be detained for up to 14 days without charge or trial under this Act. This Part may apply to a person who has never been suspected of a criminal offence, let alone committed one. This Part potentially allows for a situation of pre-emptive punishment.

The procedures have been criticised as the detainee may not be supplied with full details of the application before a hearing takes place in the Supreme Court. The legislation was introduced after an agreement at a COAG meeting in September 2005 and Part 2A is complementary to Division 105 of the Commonwealth's *Criminal Code 1995*, which allows for very limited preventative detention over a maximum of two days. The reason the Commonwealth could not introduce legislation which allowed detention for 14 days was because of legal advice that such legislation would be unconstitutional.

Both pieces of legislation have been criticised as offending fundamental rule of law principles including the presumption of innocence and the liberty of the citizen.

There have also been a number of human rights-based complaints about the procedures in the State Act, including that:
- the hearing can occur in secret;
- the applicant is a member of the Executive (a Police Officer) not the DPP;
- applications can be made on an interim basis in the absence of the applicant let alone the defendant; and,
- the legislation does not prevent multiple applications being made to extend the period of detention, although subsequent applications must be made on different grounds.

3. Part 3 of the *Terrorism (Police Powers) Act 2002* (NSW) – Covert Search Warrants
These secret search warrants have been criticised because only "eligible Judges" may grant them. The Committee's view is that this process appears to seek to avoid the normal processes for obtaining search warrants and may be a breach of the

separation of powers doctrine. A further criticism is that the applicants for such search warrants may be officers of the NSW Crime Commission, a body that has received criticism for not being subject to proper Parliamentary supervision.

An additional criticism has been made that such search warrants may involve searches of premises occupied by people who are unconnected with any allegation of criminality, without their knowledge, for up to 6 months after the issue of a warrant. Section 27O of the Act allows adjoining premises to be accessed in secret, even though the occupants may be blameless and not suspected of any criminality.

4. The *Crimes (Criminal Organisations) Control Act 2009* (NSW)
This Act, commonly referred to as the "bikie" legislation, has a number of deficiencies. These include that applications are made to "eligible Judges", which at the very least may give rise to the perception of Executive interference with the judicial function. Secondly, powers include a control order where one member of an organisation (not limited to bikie gangs) is made subject to orders made under the Act and can be prosecuted for communicating (e.g. sending a text message) to another member. The legislation breaches freedom of association principles (Article 22, *International Covenant on Civil and Political Rights*) because once the particular association has been declared by a Supreme Court order, the members of the organisation can be prosecuted for associating with each other.

An additional difficulty is that the burden of proof is upon the accused to establish that association with another member falls within the exemptions under the Act, for example, being a close family member. This is a reversal of the traditional criminal onus of proof. The former DPP, Mr Nicholas Cowdery QC, in an address to Young Lawyers of the Law Society of NSW in December 2010 pointed out that the legislation could apply to political parties, trade unions, professional associations, clubs, religious groups and charities.

5. Amendments to the *Bail Act 1978* (NSW)
Amendments over the past decade have removed the presumption of bail from a wide range of offences. Such provisions are contrary to Article 9(3) of the *International Covenant on Civil and Political Rights* which requires that there shall not be a general presumption against bail being granted. The traditional common law principles infringed are the presumption of innocence and the right to personal liberty. The Committee is not aware of any evidence that the reversal of the presumption has had an effect on reducing crime rates.

6. *Anti-Discrimination Act 1977* (NSW)
Private educational institutions are excluded from many provisions of this Act. This could have the effect of, for example, a homosexual person being excluded from employment in, or even being a student of, such an institution. This is a breach of the non-discrimination provisions of Article 26 of the *International Covenant on Civil and Political Rights.*