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# **Briefing Paper: A Human Rights Act for Australia**

**6 November 2009**



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# Contents

<b>1. Overview</b>	<b>1</b>
<b>2. National Human Rights Consultation Report</b>	<b>1</b>
<b>3. The Model of Human Rights Act Proposed for Australia</b>	<b>2</b>
<b>4. Arguments in Favour of a Human Rights Act for Australia</b>	<b>4</b>
<b>5. Arguments Against a Human Rights Act for Australia</b>	<b>7</b>
<b>6. Concerns from Some Religious Groups</b>	<b>10</b>

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## About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society. The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships with pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the *Victorian Charter of Human Rights and Responsibilities*; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

## 1. Overview

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1. On 8 October 2009, the Attorney-General, the Hon Robert McClelland MP, released the report of the National Human Rights Consultation Committee (the **Human Rights report**). The report recommends that Australia enact a comprehensive national Human Rights Act.
2. The Human Rights report was released following the biggest public consultation in Australian history. The independent Consultation Committee, chaired by Jesuit priest and law professor Father Frank Brennan, received over 35,000 written submissions. Additionally, it hosted 66 roundtables in 52 locations throughout metropolitan, regional and rural Australia, which were attended by over 5,000 people in total.
3. The Human Rights report reflects very strong support for a Human Rights Act. 87.4 per cent of submissions to the Committee which considered the issue supported the enactment of a Human Rights Act. A cost-benefit analysis provided by the Allen Consulting Group also shows that a Human Rights Act in the form proposed in the report would provide the greatest benefit to stakeholders.<sup>1</sup>
4. This paper sets out:
  - (a) the key findings and recommendations of the Human Rights report;
  - (b) the model proposed for a Human Rights Act;
  - (c) arguments for and against a Human Rights Act; and
  - (d) a consideration of the concerns raised by some people on religious grounds.

## 2. National Human Rights Consultation Report

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### 2.1 Key Findings

5. The Human Rights report made some important findings in relation to the state of human rights protection in Australia:
  - (a) Human rights matter deeply to Australians. They resonate with Australian democratic values, the rule of law and our sense of a fair go. There is strong support for the promotion and protection of all human rights, including economic, social and cultural

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<sup>1</sup> National Human Rights Consultation, *National Human Rights Consultation Report*, 30 September 2009 (**Human Rights Report**), 351.

rights.<sup>2</sup> Indeed, the Human Rights Report confirms that ‘for most Australians, the main concern is the realisation of economic and social rights such as the rights to education, housing and the highest attainable standard of health’.<sup>3</sup>

- (b) While Australia has strong democratic and legal institutions, they do not provide comprehensive or even adequate protection of human rights. The patchwork quilt of human rights protection is missing pieces and this is felt most keenly by the marginalised and vulnerable.<sup>4</sup>
- (c) Human rights are not enjoyed fully or equally by all Australians, including the homeless, people with mental illness, Aboriginal Australians, asylum seekers and people with disability. There is a strong view that ‘we could do better in guaranteeing fairness for all within Australia and in protecting the dignity of people who miss out’.<sup>5</sup> Positive legislative and institutional action to promote human rights has widespread public support.

## **2.2 Key Recommendations**

- 6. As well as recommending the adoption of a Human Rights Act, the Committee also recommended a range of other important measures to protect human rights in Australia, including enhancing human rights education, improving parliamentary scrutiny of human rights, strengthening the Australian Human Rights Commission, improving access to justice and addressing Indigenous disadvantage and exclusion.
- 7. These initiatives would be most effective as complements to human rights legislation. The effective development of a culture of human rights requires a robust enabling framework; namely a comprehensive, national, judicially enforceable Human Rights Act.

## **3. The Model of Human Rights Act Proposed for Australia**

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- 8. The Committee recommends that Australia adopt a comprehensive Human Rights Act with the following key features:<sup>6</sup>
  - (a) The Act should promote a dialogue about human rights between parliament, the executive, the courts and the community.

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<sup>2</sup> Human Rights Report, 96.

<sup>3</sup> Human Rights Report, 365.

<sup>4</sup> Human Rights Report, 127-128.

<sup>5</sup> Human Rights Report, 343-344.

<sup>6</sup> Human Rights Report, 361-375.

- (b) The Act should only recognise and protect the human rights of human beings. Its protection should extend to all people within Australia, as well as all people who are overseas but subject to Australian jurisdiction.
- (c) The Act should enshrine civil and political rights and possibly social and economic rights, particularly the rights to adequate housing, health and education.
- (d) The Act should balance rights, responsibilities and other interests. It should recognise that certain rights are absolute, such as the right to protection from torture and cruel, inhuman or degrading treatment. All other human rights should be subject to such reasonable limits as can be demonstrably justified in a free and democratic society.
- (e) The Act should establish robust pre-legislative human rights scrutiny mechanisms. New bills introduced into parliament should include a statement as to their 'human rights compliance' and a Joint Committee on Human Rights should review the human rights compatibility of all bills.
- (f) The Act should bind 'federal public authorities', including federal Ministers, bodies created by federal laws and undertaking public functions, and private entities that perform public functions on behalf of federal public authorities.
- (g) The Act should require that federal authorities act compatibly with rights (other than economic and social rights) and give proper consideration to human rights (including economic and social rights) in decision making.
- (h) The Act should require courts to interpret all federal law compatibly with human rights, but only so far as is possible consistent with statutory purpose. The Act should not empower courts to invalidate legislation.
- (i) Where it is not possible for legislation to be given a human rights-consistent interpretation, the High Court should be given the exclusive power to make a declaration of incompatibility. Such a declaration would not affect the validity of the legislation but would require that parliament reconsider that legislation within a specified period. The decision as to whether to amend, repeal or leave the legislation untouched would be entirely a matter for parliament.
- (j) The Act should provide people with effective remedies where their human rights are breached by a federal public authority. In the case of civil and political rights, an individual would be able to institute legal proceedings, with the usual suite of remedies available. The Committee recommends that breaches of economic, social and cultural rights not be justiciable, but that the Australian Human Rights Commission be given a mandate to hear complaints in relation to those rights.

## 4. Arguments in Favour of a Human Rights Act for Australia

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### 4.1 The Need for a Human Rights Act and other Protections

9. The Human Rights report finds that the human rights protection afforded by various laws and institutions in Australia is a patchwork that is 'fragmented and incomplete' and that many basic rights remain unprotected while others are haphazardly covered by an assortment of laws.
10. The report further finds that these 'inadequacies are felt most keenly by the marginalised and the vulnerable'.<sup>7</sup> It states that a Human Rights Act could 'provide a resilient thread in the federal quilt of human rights protection' and would be both 'useful and cost-effective'.<sup>8</sup>

### 4.2 The 'Value Add': Benefits of a Human Rights Act

11. As well as enshrining peoples' rights in law and providing redress for the existing gaps in human rights protection, a Human Rights Act would provide important social, economic and cultural benefits. There are a number of key benefits set out below.

#### (a) *Enshrining universal Australian values*

12. A Human Rights Act could enshrine fundamental, universal, democratic Australian values, such as freedom, dignity, equality, the rule of law and our sense of a fair go.<sup>9</sup> This entrenchment would have positive educational and normative influences on parliament, the executive, courts and the broader community.

#### (b) *Improving law-making and government policy*

13. A Human Rights Act could improve the quality of law and policy by integrating relevant human rights considerations into all law-making and policy development processes.<sup>10</sup> There is strong evidence that human rights can provide a framework for the development of more effective, efficient and holistic public and social policy.
14. Although a Human Rights Act may not go so far as *preventing* government and courts from acting contrary to human rights in all circumstances, it would require human rights to be *considered*. In this way a Human Rights Act makes it 'more difficult for Parliament to compromise those rights unreasonably',<sup>11</sup> whether deliberately or inadvertently.

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<sup>7</sup> Human Rights Report, 127.

<sup>8</sup> Human Rights Report, 377.

<sup>9</sup> Human Rights Report, 269.

<sup>10</sup> Human Rights Report, 272-275.

<sup>11</sup> Julian Burnside, 'Justice will prevail', *The Sunday Age* (Melbourne), 18 May 2008, 21.

15. The Human Rights report confirms that there is a need for a better understanding of and commitment to human rights within government and greater consideration of human rights in the development of legislation and policy.<sup>12</sup> It found that instilling a human rights culture in the federal public sector is integral to better protect and promote human rights in Australia.<sup>13</sup>

**(c) Improving public service delivery**

16. Case studies and evidence from comparable jurisdictions – including Canada, New Zealand, the United Kingdom, Victoria and the ACT – demonstrate that a Human Rights Act can improve public service delivery and outcomes. It can encourage a more client-focused, responsive and individualised approach to public services and help facilitate a shift away from inflexible or blanket policies and practices.<sup>14</sup>
17. Further, evidence demonstrates that human rights laws can provide strong frameworks for ethical and effective public service policies and practices.<sup>15</sup>

**(d) Protecting marginalised Australians by addressing disadvantage**

18. There is strong evidence that a human rights culture, underpinned by strong human rights legislation, can:<sup>16</sup>
- (a) empower marginalised and vulnerable individuals, communities and groups;
  - (b) challenge 'poor treatment' and thereby 'improve the quality of life' of marginalised and disadvantaged individuals and groups; and
  - (c) assist in the development of more effective social inclusion and poverty reduction strategies.

**(e) Cultural change – towards a human rights culture**

19. As recently stated by Victorian Assistant Commissioner of Police, Luke Cornelius, a Human Rights Act can provide fundamental support for creating a culture of human rights.<sup>17</sup>

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<sup>12</sup> Human Rights Report, 149-151, 175, 355-356.

<sup>13</sup> Human Rights Report, 186.

<sup>14</sup> Human Rights Report, 273-274. See also UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006).

<sup>15</sup> VEOHRC, *Emerging Change: The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities* (27 February 2009) 16.

<sup>16</sup> See, eg, British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007) 5; UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006); Ministry of Justice (UK), *Human Rights Insights Report* (2008); Audit Commission (UK), *Human Rights Act: Improving Public Services* (2003); OHCHR, *Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002), 2–3.

<sup>17</sup> Comments made at the Human Rights Policy and Practice Conference, Rialto, Melbourne, 21 October 2009.

20. A Human Rights Act would include a clear statement of Australia's human rights and related responsibilities. The legislative articulation of those standards, rights and responsibilities that are necessary in a free, democratic and inclusive society would serve an important educative function and contribute to a culture with a greater awareness of, and respect for, human rights, both within government and throughout the community.<sup>18</sup>

**(f) Economic value add**

21. A Human Rights Act could deliver economic benefits.<sup>19</sup>
22. There is clearly an economic cost associated with policies that do not effectively protect the lives and safety of citizens.<sup>20</sup> Further, there is an extensive body of research which demonstrates the strong correlation between effective and equitable social policy, on the one hand, and economic development and growth on the other.<sup>21</sup>
23. The Allen Consulting Group cost-benefit analysis, commissioned by the National Human Rights Consultation Committee, found that a Human Rights Act would provide high benefits to stakeholders at moderate risk. Although there would be implementation costs associated with a Human Rights Act, the Allen Consulting Group noted that there are ongoing detrimental costs associated with maintaining current human rights arrangements.<sup>22</sup>

**(g) Implementing Australia's international obligations**

24. Australia is already a party to every core international human rights treaty. A Human Rights Act would have significant symbolic value in affirming that Australia is committed to providing its own citizens with human rights standards, in accordance with obligations it has already committed to in the international community.

**(h) Promoting Australia's reputation as a good international citizen and regional and global human rights leader**

25. A Human Rights Act could improve Australia's international standing.<sup>23</sup>
26. As Australia seeks to establish itself as an effective international citizen and regional leader, as demonstrated by seeking a seat at the UN Security Council, our authority and legitimacy on human rights issues requires, at a minimum, that our domestic laws recognise and protect

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<sup>18</sup> Human Rights Report, 275-276.

<sup>19</sup> Human Rights Report, 279-280.

<sup>20</sup> Access Economics, *The Cost of Domestic Violence to the Australian Economy* (October 2004), Parts 1, 3.

<sup>21</sup> See, eg, Thandika Mkandawire (ed), *Social Policy in a Development Context* (2004); Amartya Sen, *Development as Freedom* (1999); Nick Pearce and Will Paxton (eds), *Social Justice: Building a Fairer Britain* (2005).

<sup>22</sup> Human Rights Report, 351-352.

<sup>23</sup> Human Rights Report, 276-278.

those rights which Australia has pledged to uphold by ratifying the core human rights conventions.

27. Australia's status as the only Western democracy without a human rights law undermines its authority and legitimacy of its voice on human rights issues. A number of UN bodies have expressed concern that Australia does not provide any constitutional or other appropriate protection of human rights.<sup>24</sup>

## **5. Arguments Against a Human Rights Act for Australia**

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28. This section addresses a number of arguments which have been raised against introducing legislative protection of rights through a Human Rights Act.

### **5.1 Our rights are already protected by the Constitution, the common law, and our political system of representative democracy.**

29. While some rights are protected, many, if not most, human rights are not adequately protected under our current system. For example, the right to be free from arbitrary detention, the right to life, the right to adequate housing and the right to peaceful assembly are not currently protected by legislation.

30. The Human Rights report concluded that there is a patchwork of human rights protection in Australia but that 'the patchwork is fragmented and incomplete, and its inadequacies are felt most keenly by the marginalised and the vulnerable'.<sup>25</sup>

### **5.2 The sovereignty of Parliament would be undermined by a Federal Human Rights Act.**

31. The dialogue model for a federal Human Rights Act, as recommended in the Human Right report, is compatible with Parliamentary sovereignty. As the courts would not be given the power to invalidate laws, the Committee found that the model proposed is completely consistent with the sovereignty of parliament, because parliament retains the last word on the content of the legislation it passes.<sup>26</sup>

### **5.3 A Human Rights Act will only be used to protect the rights of minorities at the expense of the majority**

32. As the Human Rights report states, at times, parliamentary protection of human rights does not provide adequate protection for members of minority groups.

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<sup>24</sup> The HRC has repeatedly requested that Australia properly incorporate the terms of the ICCPR into domestic law across Australian jurisdictions. See HRC, *Concluding Observations: Australia*, [23], UN Doc CCPR/C/AUS/CO/5, 2 April 2009.

<sup>25</sup> Human Rights Report, 127.

33. However, a Federal Human Rights Act will protect *all* Australians against the unjust or arbitrary exercise of public power. As the experience of other countries has shown, ordinary people stand to benefit from human rights protection.<sup>27</sup>

#### **5.4 Human rights are too individualistic**

34. While some human rights are absolute (such as the prohibition against torture), most invite a balancing act between the rights of the individual and the rights of the community.<sup>28</sup> The role of a Federal Human Rights Act would be to strike a proper balance between protecting these rights and protecting other compelling social and public interest concerns, such as public health, and to ensure that public authorities act in a fair and consistent manner.
35. Far from promoting individualism, human rights instruments such as the Victorian Charter of Human Rights and Responsibilities and the ACT HRA explicitly recognise that: (1) human rights come with responsibilities and must be exercised in a way that respects the human rights of others; and (2) human rights must be balanced with other considerations, such as national security, public health and public order.
36. Moreover, by ensuring that individuals are afforded some recourse when their rights are breached, a Human Rights Act would enhance the cohesiveness of Australian society.<sup>29</sup>

#### **5.5 Creating a Human Rights Act will be detrimental because it will limit our human rights to those contained in the Act.**

37. A Federal Human Rights Act would not exclude other rights and freedoms not specifically contained in the Act. In other jurisdictions, the rights set out in the Act are in addition to other rights already protected. Further, it is a fundamental principle that human rights legislation be interpreted in a dynamic and evolving way to reflect contemporary community standards and values.

#### **5.6 A Federal Human Rights Act would take power away from elected politicians and give too much power to unelected judges.**

38. The experience in the UK demonstrates that under a Human Rights Act, judges would not be metamorphosed into legislators.<sup>30</sup> The role of the judiciary would be to interpret and apply the

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<sup>26</sup> Human Rights Report, 371.

<sup>27</sup> Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (2009), 12.

<sup>28</sup> Lord Thomas Bingham, 'Dignity, Fairness and Good Government: The Role of a Human Rights Act' (Speech delivered to the Human Rights Law Resource Centre, Melbourne, 9 December 2008).

<sup>29</sup> Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (2009), 12.

<sup>30</sup> Lord Thomas Bingham, 'Dignity, Fairness and Good Government: The Role of a Human Rights Act' (Speech delivered to the Human Rights Law Resource Centre, Melbourne, 9 December 2008).

Act, as they do with all other pieces of legislation. Moreover, judges are already involved in making decisions that require the careful balancing of competing rights. As such, they are well-equipped to make reasonable and considered determinations under a Human Rights Act.

39. In some ways, a Human Rights Act removes power from judges and vests it in the legislature by codifying law that would otherwise develop as judge-made law through judicial development of the common law.

#### **5.7 A Human Rights Act could make mischief by creating a conflict between the government and judiciary**

40. Not all the decisions made by the judiciary under a Human Rights Act will be popular with the government. However, it is inevitable, appropriate and desirable that, in a democratic society, at times there will be a healthy tension between the government and the judiciary.<sup>31</sup>

#### **5.8 A Human Rights Act would create a 'lawyers' picnic' and excessive litigation.**

41. In jurisdictions that have a Charter of Human Rights, there has not been the expected flood of litigation – the courts have identified those cases that are meritorious and raise human rights concerns, and those that are not. In fact, the most significant effect of a Human Rights Act is likely to be educational: raising greater awareness of how to protect, promote and respect human dignity in Australia and thereby diminishing the likelihood of human rights breaches and consequent litigation.<sup>32</sup>
42. The Human Rights report notes that independent causes of action have been introduced in New Zealand and the United Kingdom, and that there has not been a costly flood of litigation in either of those jurisdictions.<sup>33</sup>

#### **5.9 A Federal Human Rights Act will not reflect distinctively Australian values**

43. Human rights are deeply Australian. No nation played a more significant role than Australia in developing the *Universal Declaration of Human Rights 1948*. As stated above, the outcome of the National Human Rights Consultation shows that human rights matter deeply to Australians, with over 87% of submissions in favour of a Human Rights Act.
44. At their essence, human rights promote values such as equality, dignity and justice; in short, the idea that people are entitled to 'a fair go'. A Federal Human Rights Act would protect the rights that each Australian needs in order to live their life with dignity. A Human Rights Act

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<sup>31</sup> Lord Thomas Bingham, 'Dignity, Fairness and Good Government: The Role of a Human Rights Act' (Speech delivered to the Human Rights Law Resource Centre, Melbourne, 9 December 2008).

<sup>32</sup> Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (2009).

<sup>33</sup> Human Rights Report, 333.

would be a fluid document that protects certain fundamental freedoms whilst also adapting to the changing conditions of Australian society.

## **6. Concerns from Some Religious Groups**

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45. This section addresses the concerns expressed by some religious groups opposed to legislative human rights protection. It must first be emphasised that these concerns do not reflect the views of all religious groups and individuals. Religious groups' arguments against a federal Human Rights Act are varied and most have been dealt with in the preceding sections. This section considers the remaining objections particular to religious organisations.

### **6.1 Religious Opposition to a Human Rights Act is Far from Universal**

46. Contrary to the views expressed by a small number of vocal church leaders and lobby groups, there is no persuasive evidence of significant levels of opposition to a Human Rights Act from religious individuals. To illustrate, a sophisticated and well-resourced campaign against a Human Rights Act run by the Australian Christian Lobby produced less than 2000 submissions to the National Consultation. This number is to be compared with the 25 000 submissions generated through Amnesty and Get Up!.

47. Further, not all submissions from religious organisations opposed human rights legislation. Submissions that were either supportive of or neutral to a Human Rights Act were received from the:

- Uniting Church of Australia;
- Religious Society of Friends (Quakers);
- Australian Catholic Bishops Conference;
- Australian Catholic Social Justice Council;
- Australian Baha'i Community; and
- General Synod of the Anglican Church of Australia.

48. In addition, a joint letter supporting a Human Rights Act will shortly be sent to all members of parliament by Anglicare Australia, the Brotherhood of St Lurance, the Salvation Army, Uniting Care, World Vision and Mission Australia.

49. This is not to discredit the submissions by religious organisations that opposed a Human Rights Act. However, the position of some religious leaders should not be conflated with a false notion of a uniform 'religious viewpoint'.

## 6.2 Human Rights Laws do not Promote a Secularist Agenda

50. Submissions to the National Consultation made by religious groups tended to support human rights principles, their concern was with the legislative protection of those rights. For example, the Australian Christian Lobby recognised that ‘this is not a question of whether human rights should be protected or not – of course they should be’.<sup>34</sup>
51. The ACL’s opposition to a Charter of Rights is made primarily on the grounds that a Human Rights Act would be used to erode religious freedoms. Cardinal George Pell has similarly argued that a Human Rights Act would impose a ‘hierarchy of rights... with religious freedom well and truly at the bottom’.<sup>35</sup> These claims evince a misunderstanding of the content and application of human rights laws.
52. Freedom of religion is a fundamental human right that the Human Rights Report recommends should be protected in a Human Rights Act. The UN Human Rights Committee has described this right as ‘far-reaching and profound’.<sup>36</sup> It is afforded protection in the *International Covenant on Civil and Political Rights* and in all major domestic human rights instruments, including the ACT *Human Rights Act* and the Victorian *Charter*.
53. There are numerous cases in which human rights laws have protected religious rights. For example human rights laws have been used to:
- overturn a refusal to allow a man to practice as an accountant on the basis that he had refused to enlist in the army where enlistment was contrary to his religion;<sup>37</sup>
  - ensure that a young Sikh boy was allowed to carry his kirpan to school in accordance with his religious beliefs,<sup>38</sup> and
  - allow Jewish condominium owners to construct succahs on their balconies contrary to the ownership agreement.<sup>39</sup>
54. As with all non-absolute human rights, the right to religious freedom may be limited where the limitation is reasonable, demonstrably justifiable, and consistent with the values of a free and

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<sup>34</sup> Australian Christian Lobby, Media Release: ‘Charter of rights should not be foisted on Australians without a referendum’, 6 May 2009, available at [http://www.acl.org.au/pdfs/load\\_pdf\\_public.pdf?pdf\\_id=1309&from=national](http://www.acl.org.au/pdfs/load_pdf_public.pdf?pdf_id=1309&from=national)

<sup>35</sup> Cardinal George Pell, ‘Ideology dressed up as social justice’, *The Australian*, 23 October 2009.

<sup>36</sup> Human Rights Committee, *General Comment No. 22*, CCPR/C/21/Rev.1/Add.4, 30 July 1993.

<sup>37</sup> European Court of Human Rights, *Thlimmenos v Greece* (Application no. 34369/97).

<sup>38</sup> A kirpan is made of metal and resembles a dagger and must be worn at all times by devout Sikh males. *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 (Canada).

<sup>39</sup> A Sukkah is a temporary hut constructed for use during the week-long Jewish festival of Sukkot: *Syndicat Northcrest v. Amselem*, [2004] 2 SCR 551, (Canada).

democratic society based on human dignity, equality and freedom.<sup>40</sup> However, any limitation must be evidence-based and must recognise the importance of the right to freedom of religion. Law-makers, bureaucrats and judges are not given free reign to impose their personal agendas, secular or otherwise.

### **6.3 The Victorian Charter has not Impeded Religious Freedom**

55. In its first two years of operation, there has not been a single instance in which the Victorian *Charter of Human Rights and Responsibilities Act 2006* has limited religious freedom. Nevertheless, the Human Rights report recounts that '[m]any Victorians with church affiliations were worried about three distinct aspects of the state's *Charter of Human Rights and Responsibilities Act 2006*.'<sup>41</sup>

56. These concerns (each of which is discussed below) are based on a misunderstanding of the impact of the *Charter*. As Fr Frank Brennan recently acknowledged:<sup>42</sup>

[t]he Victorian charter has not caused any of these problems, uncertainties or disputes for religious Victorians. Its application might even help to protect the right to freedom of thought, conscience, religion and belief, which is included in the charter.

#### **(a) Religious Vilification: The Catch the Fire Ministries case**

57. In 2004 the Islamic Council of Victoria brought an action against the Catch the Fire Ministries in response to publications and statements made at a seminar that were deemed contrary to the religious exercise of the Muslim faith.

58. The Victorian Civil & Administrative Tribunal (**VCAT**) determined the seminar and articles incited hatred of Muslims because of their Islamic faith and the association was found in violation of the *Racial and Religious Tolerance Act 2001* (Vic).<sup>43</sup> In 2006, the VCAT decision was appealed and overturned.<sup>44</sup>

59. The *Charter* was not in force at the time the *Racial and Religious Tolerance Act 2001* was passed, or when the matter was determined in the Victorian courts. It is therefore incorrect to cite the case as an example of human rights legislation operating to restrict religious freedom. In fact, had the *Charter* been in force, it may have provided additional protection for religious freedom and freedom of expression.

#### **(b) Religious Exceptions to the Equal Opportunity Act**

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<sup>40</sup> See, eg, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *International Covenant of Civil and Political Rights*, art 18(3).

<sup>41</sup> Human Rights Report, 48.

<sup>42</sup> Frank Brennan, 'Rights Charter no Threat to Religious Freedom', *Sydney Morning Herald*, 31 July 2009.

<sup>43</sup> [2004] VCAT 2510 (22 December 2004).

<sup>44</sup> *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284.

60. Many of the submissions of religious organisations expressed concern about the Victorian parliamentary review of the permanent exceptions – including those for religious individuals and groups – in the *Equal Opportunity Act 1995* (Vic). While the review was not necessarily precipitated by the *Charter*, it is true that the parliamentary committee was asked to consider the *Charter* compliance of the exceptions.
61. Contrary to much of the misinformation about the parliamentary inquiry, removal of the blanket religious exceptions (proposed by various human rights advocates and organisations) would not result in a situation where a person or organisation could never discriminate in order to comply with their religious beliefs. Christian churches would not be required to hire a Satanist to teach Sunday school.
62. Repealing the exceptions would simply mean that before discrimination is deemed permissible, regard must be had to the particular circumstances of the case and there must be consideration of the arguments for and against allowing the discrimination. All groups that do not receive special protection from a permanent exception in the *Equal Opportunity Act* are already subject to this process.
63. In any case, on 27 September 2009, Victorian Attorney-General Rob Hulls announced changes to the *Equal Opportunity Act* which would narrow the scope of the current religious exceptions, but continue to allow religious groups and individuals to discriminate on the basis of sexuality and marital status if it is in accordance with their religious beliefs. The Government's announcement, which pre-empted the Committee's Report, was warmly welcomed by religious groups.

**(c) Abortion Law Reform**

64. Many religious groups have also expressed concern about the Victorian *Charter's* application to the *Abortion Law Reform Act 2008* (Vic). That Act includes a requirement that a medical practitioner with a conscientious objection to abortion refer patients to practitioners known not to have that objection. A concern has been raised that the clause would compel Catholic health practitioners to act in a manner inconsistent with their religious beliefs.
65. The question of whether the referral clauses are in fact a violation of religious freedoms aside, the application of the *Charter* to the *Abortion Law Reform Act* is affected by section 48 of the *Charter* which provides that nothing in the Charter 'affects any law applicable to abortion or child destruction'. Section 48 was included on account of the Catholic Church's lobbying efforts.<sup>45</sup>

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<sup>45</sup> ABC News, 'Catholic Maternity Wards 'Face Closure' if Abortion Law Passes', 24 September 2008.

66. The *Charter's* failure to impact upon the referral provisions in the *Abortion Law Reform Act* does not demonstrate that the *Charter* is 'worthless'.<sup>46</sup> On the contrary, it demonstrates the potential unintended consequences of excepting certain areas of law from the general operation of the *Charter*.

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<sup>46</sup> 'Abortion Bill's Rights "Breach"', *The Age*, 6 October 2008.