In the matter of a Proposed Federal Charter of Rights

human rights law resource centre

MEMORANDUM OF ADVICE

1. The federal government has committed to undertake a public consultation process in relation to the most appropriate method of recognising and protecting human rights. We are briefed by the Human Rights Law Resource Centre to advise on the potential impact of the introduction of a federal human rights instrument on various issues that may be of concern to churches and other religious bodies.

Would a federal charter of rights result in a transfer of political power to the courts?

2. It is very likely that any national charter of rights will be an ordinary Act of Parliament, rather than a constitutional charter,[1] and that it will be similar in form to the "parliamentary" or "dialogue" models of the *Human Rights Act 2*004 (ACT) (**the ACT HRA)** and the *Charter of Human Rights and Responsibilities Act 2*006 (Vic) (**the Victorian Charter**). It is also likely that it will contain only civil and political rights drawn from the *International Covenant on Civil and Political Rights*. This is, for example, the model proposed by the New Matilda campaign.[2] This advice is based on those assumptions, although it is of course possible that there may be some different or novel features to a federal charter.

3. A federal charter of rights would require courts to make judgments about issues that may in some cases involve questions of a moral or political nature, something they already do in many cases. However, the dialogue model of rights protection is

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1 See Australian Labor Party National Policy Platform, 2007, Ch 13, para 9, which states that "[a]ny proposal for legislative change in this area must maintain sovereignty of the Parliament and shall not be based on the United States Bill of Rights"; and Australia 2020 Summit - Final Report, page 308 which stated that there should be a "statutory charter or Bill of Rights (majority support) *or* a parliamentary charter of rights or an alternative method (minority support)". See also the statement made by the Prime Minister in an interview with the Karen Middleton, SBS TV News, 20 April 2008, quoted at http://acthra.anu.edu.au/news/federal.htm.

2 The New Matilda model Human Rights Bill is available at http://www.humanrightsact.com.au.

intended to protect human rights in a manner that preserves parliamentary sovereignty and, in our opinion, would not result in any undue transfer of power over political or ethical issues to the courts at the expense of Parliament and the executive. Rather, like the *Acts Interpretation Act* 1901, any charter would give guidance from the Parliament to the courts as to how to interpret legislation and apply the law. At present, when "policy" issues arise, the courts do not have clear guidance from Parliament as to what those policies should be. A charter would provide such parliamentary guidance. As Sir Gerard Brennan has said, "[t]he genius of the [Victorian] Charter is the solution of the problem which beset earlier models, namely, the risks of transferring political power to the judiciary. The Charter has brought the judiciary into constructive dialogue with the Parliament, but that is no more than utilising the interpretative skills of the courts to promote good government in the interests of the community."[3] The manner in which the dialogue model achieves this may be summarised as follows.

4. First, Parliament would at all times retain its sovereign power to enact legislation, even if inconsistent with human rights. The courts would have no power to invalidate federal legislation they find to be inconsistent with human rights.[4] Instead, they would have power to interpret legislation compatibly with human rights so far as it is possible to do so.[5] Cases applying the comparable provision of the *Human Rights Act* 1998 (UK) (**the UK HRA**)[6] suggest that this is a significant power and stronger than the existing common law presumption that Parliament does not to intend to curtail fundamental rights unless it does so clearly and unambiguously. However, it is

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3 The Hon Sir G Brennan AC KBE, "The Constitution, Good Government and Human Rights", 12 March 2008, pages 22-23, available at http://www.hrlrc.org.au. See also the statement made by the Victorian Attorney-General, the Hon R Hulls MP, during the Second Reading Speech for the Charter Bill, Legislative Assembly, *Hansard*, 4 May 2006, at page 1293; and Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006), page 1, which concluded that there had been no significant alteration of the constitutional balance between the Parliament, the Executive and the Judiciary.

4 Section 109 of the Commonwealth Constitution would invalidate State legislation that is inconsistent with a federal charter, but for the purposes of this advice we have assumed that a federal charter would either apply only to the interpretation of Commonwealth legislation and the acts of Commonwealth public authorities (see, eg, clauses 49 and 53 of the New Matilda model Human Rights Bill) or, if it did extend to the interpretation of State legislation, would be designed so that it did not invalidate State legislation found to be incompatible with human rights. We have not considered whether there are any constitutional constraints to such a model.

5 See, eg, s 30 of the ACT HRA and s 32 of the Victorian Charter.

6 Section 3 of the UK HRA. The leading case is *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

tempered by the requirement that the court's interpretation must always be consistent with the underlying purpose of the legislation[7] and by the fact that, if Parliament does not agree with the court's interpretation, it may override it by the ordinary processes.

5. Secondly, where a court finds that legislation cannot be interpreted compatibly with human rights, it may make a declaration to that effect.[8] Such a declaration would not have any effect on the validity of the statutory provision in question or on the outcome of the proceeding in which it is made. The executive and the Parliament may be required to consider the court's declaration, but there would be no obligation to amend the legislation in any way.[9]

6. Thirdly, "public authorities" (which we discuss further below) would be under an obligation to act compatibly with human rights,[10] but the obligation would not apply where, by reason of a statutory provision, the public authority could not reasonably have acted differently, thus ensuring that Parliamentary sovereignty is not indirectly undermined.

7. Fourthly, rights would not be treated as absolute but could lawfully be subject to "such reasonable limits as can be demonstrably justified in a free and democratic society".[11] This assessment, described as a proportionality test in other jurisdictions,

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7 This proviso might be stated expressly, as it is in s 30 of the ACT HRA and s 32 of the Victorian Charter. However, even in the United Kingdom, where there is no such express limitation on the interpretive power in s 3 of the UK HRA, this proviso has been read into s 3 as a matter of interpretation: see The Rt Hon the Lord Walker, "A United Kingdom Perspective on Human Rights Judging" (2007) 8 *Judicial Review* 295 at 297.

8 Called a "declaration of a incompatibility" in s 32 of the ACT HRA and a "declaration of inconsistent interpretation" in s 36 of the Victorian Charter.

9 It has been suggested that the power to make a declaration of inconsistent interpretation under s 36 of the Victorian Charter will place a de facto political obligation on the Parliament to amend the law in question: see J Allan, "The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism" [2006] 33 MULR 906 at 912-916. In so far as this argument relies on an analogy with the Canadian experience, with its different constitutional structure, the comparison is inapt. In the United Kingdom, the government has so far responded to almost every declaration of incompatibility made by the courts by amending the legislation in some fashion (not always so as to remove completely any incompatibility). The Australian experience will not inevitably follow suit. In any event, legislative amendment following a declaration of incompatibility is an act of political and legislative will and the fact remains that, *until* Parliament acts, the legislation remains in force and must be applied, irrespective of any incompatibility.

10 The definition of what constitutes a "public authority" is important, and will be discussed in more detail below, but generally speaking it embraces the executive arm of the government.

11 See s 7(2) of the Victorian Charter; s 28(1) and (2) of the ACT HRA; and cl 10 of the Model Bill of Rights proposed by the New Matilda campaign.

may in some cases involve courts engaging in closer scrutiny of legislative and executive action than they presently do. However, it may be expected that, consistently with overseas experience, the courts will accept that the Parliament or the relevant public authority must in some cases be accorded a "discretionary area of judgment" as to what is or is not compatible with human rights. Put simply, where the legislation in question concerns matters of "broad social policy" or "sensitive areas of ethical judgment", it is less likely that the courts will intervene.[12] These areas may include many issues of concern to religious bodies, such as abortion, euthanasia, artificial insemination and like issues.

8. Fifthly, certain issues considered to be of particular sensitivity in the community might be carved out of the operation of a federal charter entirely. This might be done on a general basis as, for example, in s 48 of the Victorian Charter, which provides that nothing in the Charter "affects any law applicable to abortion or child destruction". The debate over the *Abortion Law Reform Bill* 2008 (Vic) demonstrates that the resolution of this issue still rests with Parliament. Alternatively, excising issues might be done on a case by case basis as, for example, in s 31 of the Victorian Charter, which permits the Parliament to "override" the Charter by declaring that it does not apply to an Act or a particular provision of an Act.[13]

What are the potential cultural impacts of a federal charter of rights?

9. A federal charter of rights designed on the dialogue model is also unlikely to result in a flood of litigation or give rise to a litigious or adversarial culture. The dialogue model is deliberately designed to emphasise the protection of rights through policy development and administrative practices rather than through litigation. In our opinion, this is borne out by the actual experience to date in the various jurisdictions where they have been introduced.

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12 There are numerous authorities to this effect: see, eg, *R v Director of Public Prosecution; Ex parte Kebilene* [2002] 2 AC 326 at 380-381; *R (ProLife Alliance) v BBC* [2004] 1 AC 185 at [132]-[138]; and *Evans v Amicus Healthcare Ltd* [2004] 3 WLR 681; [2004] 3 All ER 1025 at [63]-[64], [110].

13 This power is intended to be used only in exceptional circumstances (see s 31(4)) and has not yet been used.

10. The Victorian Charter, for example, is not intended to create any new, independent cause of action and does not entitle a person to an award of damages for a breach of their human rights.[14] Rather, the Charter is intended to provide an additional ground of relief where a person otherwise has a right to claim some relief or remedy. Although the provisions of the Charter relating to court and tribunal proceedings have been in force for less than a year,[15] there has been only a small number of reported cases in which the Charter has been raised. Some of these have given only passing reference to it. In the majority of cases where a Charter ground has been raised, it has been unsuccessful. There are only a few cases in which a Charter argument been successful and, in those cases, the person raising the argument has also succeeded on other grounds.

11. This is consistent with experience in other jurisdictions. In the United Kingdom, where, by contrast, the UK HRA creates an independent cause of action with the potential for an award of damages, an independent review into the impact of the UK HRA on judicial review proceedings, which are a major avenue for raising human rights claims, found that there was little evidence that the introduction of the UK HRA had led to a significant increase in the use of such proceedings and that it was most often used to supplement established grounds of review.[16] The Twelve Month Review of the ACT HRA by the ACT Department of Justice and Community Safety also found that there had been no flood of litigation.[17]

12. The emphasis on policy development and administration also impacts upon the groups most likely to be significantly affected by a charter. The United Kingdom Department for Constitutional Affairs found that the UK HRA had had "a positive and beneficial impact upon the relationship between the citizen and the State, by providing a framework for policy formulation" and by leading "a shift away from

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14 See s 39 of the Victorian Charter; *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 at [104]-[105].

15 Divisions 3 and 4 of Part 3 of the Charter came into operation on 1 January 2008: see s 2.

16 Public Law Project, *The Impact of the Human Rights Act on Judicial Review – An Empirical Research Study* (June 2003), page 31.

17 Department of Justice and Community Safety (ACT), *Twelve Month Review of the Human Rights Act 2004* (June 2006), pages 11-13. In its present form, the ACT HRA does not provide for a right of action. As from 1 January 2009, the Act will contain an independent right of action where a "victim" claims that a public authority has acted incompatibility with a human right, similar to the UK HRA model.

inflexible or blanket policies towards those which are capable of adjustment to recognise the circumstances and characteristics of individuals."[18] Similar conclusions were drawn by the Twelve Month Review of the ACT HRA.[19] In light of this experience in other jurisdictions, the groups most likely to see real benefit from a charter of rights are disadvantaged or vulnerable groups whose rights depend heavily on the delivery of services and the exercise of powers by public authorities and therefore on good policy development and the implementation of policies and powers by public authorities in a manner that is sensitive to individual circumstances. This would include groups such as homeless persons, persons with physical or mental disabilities, the elderly, children, asylum seekers and so on. As immigration and asylum is a matter of federal law, this is an area which can only be affected by a federal charter, rather than State or Territory charters.

13. A federal charter is unlikely to become a "criminals' charter".[20] Although it may be expected that criminal cases would form a large proportion of cases raising charter issues, a review by the Department for Constitutional Affairs found that the UK HRA had had no significant impact on the criminal law, although it had had an impact on counter-terrorism legislation.[21] This is due, in part, to the fact that, in general, the criminal law already strikes a fair balance between the rights of the community and the rights of accused persons.

What impact might a federal charter of rights have on freedom of religious speech and expression?

14. There is in Australia at federal level no general positive right to freedom of religion or freedom of expression. Rather, such "freedom" is residual – it is what is left after other encroachments are made by the law. Section 116 of the Commonwealth Constitution, which prohibits the Commonwealth from establishing any religion or prohibiting the free exercise of religion, and the implied constitutional freedom of

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18 Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006), pages 4, 19.

19 Department of Justice and Community Safety (ACT), *Twelve Month Review of the Human Rights Act 2004* (June 2006), pages 13-15.

20 See, eg, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006), pages 1, 13, referred to above.

21 Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006), pages 1, 13.

political communication offer only limited protection to religious expression. The recognition in a federal charter of rights of general, positive rights to freedom of religion and freedom of expression would constitute a major advance in the protection of religious speech and expression in Australia.

15. Freedom of religion includes the freedom to manifest one's religion and belief through worship, observance, practice and teaching.[22] This includes "the right to declare religious beliefs openly and without fear of hindrance or reprisal"[23] and to attempt to convert others to one's beliefs (or in other words, to proselytise).[24] Speech or expression that does not constitute religious "teaching" or "practice" but has religious content would be protected by the general freedom of expression (another right not currently finding general recognition under our law, but which would be likely to be recognised under a charter). The existence of a federal charter of rights would support these freedoms, but only, of course, to the extent that the form and structure of the charter permitted. A charter constructed on the dialogue model, designed to preserve Parliamentary sovereignty, would permit freedom of religious expression (and all other rights and freedoms) to be subject to reasonable limits imposed by statute or by public authorities acting (almost invariably) pursuant to statutory powers. These limits are generally confined to the prohibition of speech or conduct that can be characterised as offensive or as likely to incite violence or hatred. A federal charter of rights would provide a useful counterbalance to such laws and a framework within which to assess their compatibility with individuals' freedom of religious expression.

16. The manner in which it may do so might be illustrated by considering the *Racial and Religious Tolerance Act* 2001 (Vic),[25] although there is no equivalent federal legislation. That Act prohibits a person from engaging in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, another person or

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22 See, eg, Art 18 of the ICCPR; s 14 of the ACT HRA; s 14 of the Victorian Charter.

23 *R v Big M Drug Mart* [1985] 1 SCR 295 at 353-354.

24 *Kokkinakis v Greece* (1993) 17 EHRR 397 at [31], where the European Court of Human Rights held that the criminal conviction of a Jehovah's Witness for proselytising violated his freedom to manifest his religion. See also *Larissis v Greece* (1998) 27 EHRR 329.

25 This was the legislation in question in *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207.

class of persons on the ground of their religious beliefs or activities.[26] It is a defence to establish that the conduct was engaged in reasonably and in good faith.[27] It may be accepted that the Act restricts a person's freedom of expression on religious matters. If, in a particular case, a court or tribunal considered that the standard interpretation of the Act would operate to impose an unreasonable limitation on a person's freedom of religious expression it could, in order to read the section compatibly with that freedom, interpret the Act so as to raise the threshold of what constitutes "serious contempt for, or revulsion or severe ridicule" of another person.[28] This was the approach taken in a New Zealand case in which the Supreme Court held that the threshold of what constitutes "disorderly conduct" for the purposes of a public order offence is higher when the conduct in question involves a genuine exercise of freedom of expression.[29] Alternatively, the court or tribunal could take the fact that the person was exercising their freedom of expression on religious matters into account when determining whether the conduct complained of was "reasonable" in the circumstances.[30]

17. We have been referred to a decision of the Human Rights Panel of Alberta in *Lund v Boissoin*[31] which raises similar issues. In that case, a complaint was brought against the respondent Boissoin alleging that, by writing a letter to a local paper in which he denounced homosexuality, he had breached s 3 of the Alberta *Human Rights, Citizenship and Multiculturalism Act* (2000) which prohibited the publication of statements "likely to expose a person or a class of persons to hatred or contempt because of" any one of a number of attributes, including sexual orientation. The respondent claimed that the letter was an expression of his religious beliefs and a contribution to political debate. The Panel found that he had breached the Act.

18. The decision illustrates some of the points we have made above. First, the limit imposed on religious expression derived from a statutory "hate speech" law, not from the *Canadian Charter of Rights and Freedoms.* A federal charter of rights in

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26 *Racial and Religious Tolerance Act*, s 8.
27 *Racial and Religious Tolerance Act*, s 11.
28 See, eg, *Brooker v Police* [2007] 3 NZLR 91; *Connolly v DPP* [2007] EWHC (Admin) 237 at [18]; *Hopkinson v Police* [2004] 3 NZLR 704; and *Hammond v DPP* [2004] EWHC 69 at [21].
29 *Brooker v Police* [2007] 3 NZLR 91 at [24], [42], [58]-[59], [63] and [90]-[92].
30 See, eg, *Hammond v DPP* [2004] EWHC 69 at [22]-[23].
31 File No S2002/08/0137, 30 November 2007.

Australia would *not* impose a prohibition of this kind. Rather, a federal charter would be relevant to the interpretation of a prohibition that is imposed by some *other* law and would provide some protection against the application of such a law in a manner that infringes upon a person's freedom of expression on religious or political matters. In other words, as we have said above, a federal charter is likely to constitute an important counterbalance to such legislation.

19. Secondly, freedom of expression and freedom of religion are not absolute or unlimited. This does not mean that these freedoms must always be subordinated to other rights and interests. Rather, it means that one must have regard to the particular circumstances of each case in seeking to strike an appropriate balance between the protection of these freedoms and the protection of the rights of others not to be subjected to statements or publications that incite hatred or violence. In this case, the Alberta Panel undertook a close analysis of the content of the letter in question and the circumstances in which it was published. These included that the letter "declared war" on homosexuality and encouraged people to take "whatever steps are necessary", but did not advocate any particular form of political action or even refer to a political meeting that was being held by the organisation with which the respondent was affiliated; that the letter conveyed messages such as that homosexuals conspire against society, that there is a link between homosexuality and paedophilia; and so on. There was also evidence from a former police officer of the prevalence of hate crimes in the Alberta community, particularly against the Jewish community and homosexuals, and the victims' reluctance to report it. It was in these circumstances that the Panel found that to apply the "hate speech" prohibition to the respondent's letter did not represent an undue limitation on his freedom of speech.

20. The contextual sensitivity of cases raising human rights issues may also be illustrated by considering the case of *Connolly v Director of Public Prosecutions*.[32] In that case, the appellant had been convicted of sending an article "of an indecent or grossly offensive nature"[33] to another person when, as part of her campaign against abortion, she sent photographs of aborted foetuses to three pharmacists who sold the "Morning

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32 [2007] EWHC (Admin) 237. See also *Hammond v DPP* [2004] EWHC 69 for a similar analysis.

33 Under s 1 of the *Malicious Communications Act* 1988 (UK).

After Pill". The court held that, in the particular circumstances of the case, the conviction constituted a justifiable limitation on the appellant's freedoms of expression and of religion because it was necessary to protect the rights of the pharmacists and their employees, who, the court found, were not in a position to influence the public debate on abortion, from being sent material intended to cause them distress and anxiety.[34] However, and importantly, the court acknowledged that the result may have been different if, for example, the appellant sent the photographs to a doctor who regularly practiced abortions or to a member of Cabinet who publicly supported abortion.[35]

What impact might the recognition of a right to life in a federal charter of rights have on issues such as abortion and euthanasia?

21. The criminalisation of abortion and euthanasia are matters of State criminal law. Assuming that the legal force of the rights set out in a federal charter would be limited to the interpretation of Commonwealth legislation, as in the New Matilda model Human Rights Bill, there should be no effect on these laws. Nevertheless, for the purposes of the discussion of this issue, we assume that a federal charter would also apply to the interpretation of State legislation.[36]

22. As noted above, it is possible that certain issues considered to be of particular sensitivity in the community, such as abortion or euthanasia, may be carved out of the operation of a federal charter. Section 48 of the Victorian Charter, for example, provides that nothing in the Charter "affects any law applicable to abortion or child destruction". The ACT HRA deals with matter differently by providing that the right to life applies to a person from the time of birth.[37]

Abortion

23. In the absence of such an exception, authorities from other jurisdictions suggest that

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34 The court analysed the case primarily in terms of freedom of expression, but accepted that the same principles applied to freedom of religion: see at [34]-[36].

35 [2007] EWHC (Admin) 237 at [28].

36 As we have noted above, we have not considered the potential constitutional impediments to such a course.

37 Section 9(2) of the ACT HRA.

the right to life does not extend to embryos[38] or foetuses,[39] because this is a matter for individual legislatures to determine, and is therefore unlikely to affect the law relating to abortion.

24. However, other rights may be relevant. For example, in Canada and the United States it has been held that specific legislative restrictions on abortion may be inconsistent with a woman's rights to liberty and security of person[40] or privacy.[41] These cases have no parallel in the United Kingdom or New Zealand where the dialogue model of rights protection is in force. In Australia, under a federal dialogue model charter, it is likely that the courts would defer to Parliament about when abortion should be legal and when it should not.

Euthanasia

25. The impact of the right to life (or any other potentially relevant rights, such as the right to privacy or freedom of religion) on the law relating to assisted suicide or euthanasia has been left open under the ACT HRA and the Victorian Charter and has not yet arisen for consideration. However, it has been held in other jurisdictions that the right to life does not confer a right to assisted suicide.[42]

Related laws – the compulsory referral clause

26. Freedom of religion and freedom of expression may also affect the law relating to abortion or euthanasia in less direct ways, as has been demonstrated by the recent debates concerning the *Abortion Law Reform Bill 2008* (Vic). Clause 8 of that Bill requires a health practitioner who has a conscientious objection to carrying out an abortion to inform a patient of their objection (clause 8(1)(a)) refer a patient to a practitioner who does not have such an objection (clause 8(1)(b)). It also requires

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38 *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727 at [19]. The case was taken to the European Court of Human Rights which held that the question of when life begins for the purposes of the right to life fell within the "margin of appreciation" of individual States party to the *European Convention on Human Rights and Fundamental Freedoms*: *Evans v United Kingdom* [2007] ECHR 264 at [54].

39 P Hogg, *Constitutional Law of Canada* (2007, 5th ed), para 37.1(b).

40 *R v Morgentaler (No 2)* [1988] 1 SCR 30.

41 *Roe v Wade* 410 US 113 (1973); *Planned Parenthood Association of Southeastern Pennsylvania v Casey* 505 US 833 (1992).

42 *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800; *Pretty v United Kingdom* (2002) 35 EHRR 1; *Rodriguez v British Columbia (Attorney-General)* [1993] 3 SCR 519.

health practitioners to perform an abortion in an emergency situation where it is necessary to preserve the life of the pregnant woman (clause 8(2)). A concern has been raised that the clause would compel Catholic health practitioners to act in a manner inconsistent with their religious beliefs. Several points can be made about the concerns that have been raised in relation to this issue.

(i) The process of enactment

27. The Victorian Government took the view that s 48 of the Victorian Charter had the effect that there was no requirement for a statement of compatibility to be laid before Parliament when the Bill was introduced.[43] This was unfortunate. There is an argument that a statement of compatibility was required and there was certainly nothing in the Charter to *prevent* such a statement being made. Nevertheless, the Scrutiny of Acts and Regulations Committee drew the issue to the Parliament's attention in its report on the Bill and the issue has since been raised in debate in and outside Parliament.[44]

28. Nevertheless, this does not demonstrate that the Victorian Charter is "worthless".[45] On the contrary, it demonstrates the potential consequences of excepting certain areas of law from the general operation of the Charter, as has been done in s 48, and also that the very nature of a parliamentary bill of rights such as the Victorian Charter means that the Parliament retains the right to legislate for the good government of the State, even if it does so inconsistently with human rights. One of the criticisms made of charters of rights, which we have sought to address above, is that they transfer power to the judiciary. The introduction of the compulsory referral obligation in clause 8 of the *Abortion Law Reform Bill*, however, is plainly an exercise of legislative power.

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43 The Hon Ms Morand, Legislative Assembly, *Hansard*, 19 August 2008, page 2950.

44 The concern was first raised by the report of the Scrutiny of Acts and Regulations Committee on the Bill which said that the question whether the Bill strikes an appropriate balance between the competing rights of a pregnant woman and a health practitioner and was a question for Parliament to determine: SARC Alert Digest No 11 of 2008, 9 September 2008.

45 See "Abortion bill's rights 'breach'", *The Age*, 6 October 2008, page 1.

(ii) The compatibility of clause 8 with the Charter

29. It may be that s 48 of the Charter will prevent the question whether clause 8 is compatible with the human rights of health practitioners from being considered in court proceedings. However, it is at least arguable that the clause is reviewable under the Charter in an appropriate case. If it were reviewable, it is difficult to say whether or not clause 8 would be found to be compatible with the Charter. It is not the purpose of this advice to offer a decided view on that question and we do not do so. However, we set out below the sorts of considerations that would need to be taken into account in any such assessment. We limit our comments to the compulsory referral obligation in clause 8(1)(b), as most attention appears to have been focused on this obligation.[46]

30. Clause 8(1)(b) most obviously impacts upon the freedom of conscience and religion of health practitioners by restricting their ability to maintain a conscientious objection to being in any way involved in assisting a pregnant woman to seek advice about or obtain an abortion. So much may be accepted. But that is not the end of the enquiry.

31. The critical issue is that posed by s 7(2) of the Charter: that is, whether the restriction is a "reasonable limit" that "can be demonstrably justified in a free and democratic society" taking into account the criteria set out in s 7(2)(a)-(e).[47] In essence, that requires an assessment of whether clause 8 strikes a fair balance between the fundamental importance of freedom of conscience and religion and the importance of ensuring that the rights of pregnant women are respected and that they are given access to advice about all of the options available to them under the law. In particular, a court would have to consider whether there were any alternative means reasonably available for achieving the purpose of clause 8 that were less restrictive of a health practitioner's freedom of religious expression.[48] This does not mean that anything

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46 The Joint Opinion by Neil Young QC and Peter Willis, 3 October 2008, which we discuss below, expressed the view that neither clause 8(1)(a) nor 8(2) were incompatible with the Victorian Charter.

47 They are: (a) the nature of the right; (b) the importance of the purpose of the limitation on the right; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; and (e) whether there are any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

48 Section 7(2)(e) of the Victorian Charter.

other than the *least* restrictive means will be incompatible with the Charter. Rather, a court considering the question would be required to consider whether the chosen means fall within "a range of reasonable alternatives".[49]

32. A joint opinion from two members of the Victorian Bar, which has been made publicly available,[50] expressed the opinion that clause 8(1)(b) of the Bill was incompatible with the freedom of religion in s 14 of the Charter, largely because it requires the objecting practitioner to know the views of other practitioners and to find for the woman a specific practitioner with known views on abortion. The authors of the advice considered that the Australian Medical Association's Code of Ethics constituted a satisfactory and reasonably available alternative.[51] The Code requires practitioners with a conscientious objection "to provide women with sufficient information so that they may seek and find treatment elsewhere". The implication is that the ethical requirement imposed by the AMA Code of Ethics falls within the range of reasonable alternatives open to Parliament but that clause 8(1)(b) does not.[52] The issue is obviously finely balanced and a court faced with having to resolve it would probably consider evidence of what, in practice, the AMA Code of Ethics requires and whether that is likely to achieve the apparent purpose of clause 8(1)(b) of the Bill. We do not express any view on the issue other than to say that, given the public debate over this clause at the time of its enactment, it is possible that a court would take the view that the compatibility of clause 8 fell within Parliament's "discretionary area of judgment" and would therefore refrain from making a declaration of inconsistent interpretation under s 36 of the Charter.

33. Decisions of other jurisdictions are relevant to the analysis,[53] but they are not conclusive and they must be examined with care. We have read the advice from DLA

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49 See, eg, *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 at [188].

50 Joint Opinion from Neil Young QC and Peter Willis, 3 October 2008, available at the time of writing at www.doctorsconscience.org/pdfs/Opinion.pdf.

51 See paragraph 62 of the Joint Opinion.

52 The authors of the advice considered the "reasonable range of alternatives" test earlier in their advice at paragraph 33.

53 See s 32(2) of the Victorian Charter, which permits courts to consider international and foreign domestic law in the interpretation of statutory provisions.

Phillips Fox[54] which refers, for example, to an American case of *Taylor v St Vincent's Hospital*[55] where the defendant hospital refused to perform a sterilisation procedure on Mrs Taylor at the time of the delivery of her child by caesarean section. It was the only hospital in the city capable of providing such a service. However, a federal statute had the effect of permitting denominational hospitals to refuse to perform sterilisations. The court held that the statute did not violate the prohibition on the establishment of a religion in the First Amendment to the US Constitution and, if it infringed Ms Taylor's right to privacy, the infringement was outweighed by the need to protect the freedom of religion of denominational hospitals. Thus, the case decided that a statute permitting a denominational hospital to refuse to perform an elective sterilisation procedure in a non-emergency situation was not incompatible with a woman's constitutional rights. Similarly, nothing in clause 8 of *Abortion Law Reform Bill* would require a health practitioner to perform an abortion in a non-emergency situation. The case therefore has little or no bearing on whether *the particular obligations imposed by clause 8* are incompatible with freedom of religion.

34. The only similar case we have been able to find is a decision of the European Court of Human Rights, *Pichon and Sajous v France*,[56] which rejected an application by two pharmacists that their criminal convictions for refusing to sell contraceptives on prescription violated their freedom of religion. However, as we have suggested above, a Victorian court would not necessarily come to the same conclusion in relation to clause 8(1)(b) of the *Abortion Law Reform Bill*.

35. We note that the potential impact of clause 8 of the *Abortion Law Reform Bill* on other rights and freedoms set out in the Victorian Charter have also been raised, but they are unlikely to lead to any different result than the application of the freedom of religion and freedom of expression in ss 14 and 15 of the Charter, respectively, and it is not necessary or useful for the purposes of this advice to address them.

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54 The advice was the subject of an article in *The Age*, "Abortion bill's rights 'breach'", on 6 October 2008, page 1. *The Age* website attached a link to the full advice dated 3 October 2008.

55 523 F 2d 75 (1975).

56 Application No 49853/99, 2 October 2001.

What impact might the recognition of a right to equality and protection from discrimination in a federal charter of rights have on the ability of religious bodies to discriminate on the basis of religion?

36. Under a dialogue model of a federal charter, only "public authorities" would be subject to an obligation to act compatibly with human rights. Religious bodies would therefore only be required to act compatibly with rights such as the right to equality and the freedom from discrimination, as well as any other relevant rights, if they were first found to be a "public authority".

37. A federal charter might exempt religious bodies from the operation of an otherwise general obligation to act compatibly with human rights, as is done in s 38(4) of the Victorian Charter. Or it might contain specific exceptions permitting discrimination on religious grounds by religious bodies in certain circumstances. For example, the definition of "discrimination" in the Victorian Charter[57] picks up the definition of "discrimination" in the *Equal Opportunity Act* 1995 (Vic) which permits discrimination on religious grounds by religious schools[58] and religious bodies.[59]

38. Even in the absence of an express exception, it is unlikely that religious bodies would constitute "public authorities". This would, of course, depend upon the definition that is ultimately adopted. Under the Victorian Charter and the ACT HRA,[60] there are essentially two kinds of public authorities: "standard" public authorities such as Ministers or police officers and "functional" public authorities. Religious bodies would not be "standard" public authorities.[61] Whether they may be "functional" public authorities would depend upon whether the *particular act or decision in question* can be described as a "function of a public nature" and whether it was done

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57 In s 3(1) of the Victorian Charter.

58 See, eg, ss 38 and 76 of the *Equal Opportunity Act* 1995 (Vic); and s 38 of the *Sex Discrimination Act* 1995 (Cth).

59 See, eg, s 75 of the *Equal Opportunity Act* 1995 (Vic); and s 37 of the *Sex Discrimination Act* 1995 (Cth)

60 Part 5B of the ACT HRA, which was introduced by the *Human Rights Amendment Act* 2008 (ACT) and will come into force on 1 January 2009, imposes similar obligations on public authorities to those in the Victorian Charter.

61 See *Aston Cantlow v Wallbank* [2004] 1 AC 546, where the House of Lords held that a local church council exercising compulsory statutory powers was not a public authority under the UK HRA. See also M Wilcox, *An Australian Charter of Rights* (1993), page 251, where it is said that, despite the statutory background of the laws governing the Anglican Church, it is unlikely that the rules concerning eligibility for the priesthood are made pursuant to a "public" function or power.

"for" or "on behalf of" the State or Territory or another public authority. The activities of church bodies in selecting candidates for the priesthood or private denominational schools in selecting teachers and other employees are unlikely, in our opinion, to constitute acts of a public authority.[62] Private hospitals, including religious hospitals, may in respect of some of their activities be public authorities. For example, in *R (A) v Partnerships in Care Ltd*,[63] the applicant was a publicly funded patient who had been compulsorily admitted to a private psychiatric hospital. She challenged the hospital's decision to change the focus of her ward, which resulted in some facilities required for her treatment being unavailable, as an infringement of certain of her human rights. Because the hospital was required by relevant legislation to provide adequate treatment facilities, the court held that the hospital was acting as a public authority when it made the decision in question. However, a private hospital would *not* be a public authority for all of its activities. For example, it is unlikely, in our opinion, that the hiring of staff by a private religious hospital would be a function "of a public nature" undertaken "for or on behalf of" the State or Territory concerned. A line might be drawn, although in some cases it would not be a clear one, between activities undertaken as part of the regulation of the hospital's own internal affairs and activities undertaken as part of the provision of treatment to the public.

39. Even if there were no relevant exceptions and a particular religious body exercising a particular function was found to be a public authority, it still would not necessarily follow that any action of a religious body that discriminated against a person by reason of religion or sex would be incompatible or inconsistent with the freedom from discrimination or the right to equality. A court or tribunal would still need to consider whether the discriminatory act could be justified as a reasonable limitation on those rights and freedoms. We have been unable to find any authority on this issue. This is most likely to be because the human rights instruments in other jurisdictions either do not apply to religious bodies or contain relevant exceptions permitting them to discriminate on religious grounds.

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62 An example under the definition of a "public authority" in s 4 of the Victorian Charter states that although a non-government school in educating students may be exercising a function of a public nature, it would not be a public authority because it would not be doing so "on behalf of the State".

63 [2002] 1 WLR 2610.

40. Although this advice covers a number of complex issues, we have endeavoured to keep it as brief as possible. Please let us know if there are any issues on which further consideration may be of assistance.

Brian Walters SC

Alistair Pound*

* Mr Pound's liability is limited by a scheme approved under the Professional Standards Legislation.