

Summary of selected submissions to the SARC review of Victoria's Charter of Human Rights and Responsibilities

Sue Pennicuik MLC, October 2011

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Foreword

Victoria welcomed its Charter of Human Rights and Responsibilities Act 2006 (the Charter) in 2007, as the second Charter of Rights in Australia (after the ACT).

Built into the Charter (s 44 – see Appendix 2) was a requirement for a review of its operation after four years. This review was undertaken by the Parliamentary Scrutiny of Acts and Regulations Committee (SARC) (see Appendix 3), the same committee that examines and reports on the 'statements of compatibility' as to whether each bill introduced to Parliament complies with the Charter.

Substantive submissions were received from 329 organisations or individuals. A further 1,609 short form submissions were received, with 1,561 in favour of retaining the Charter, and 48 for repealing it.

As there is no public analysis and summary of the 329 substantive submissions available, I commissioned this summary of 99 submissions from key organisations and the five days of hearings, to get an idea of the general themes of the submissions. This report does not aim to present every one of those 99 submissions, but simply to present the themes that emerged from analysis of them.

Despite what appears to be overwhelming support for the Charter in the majority of submissions and hearings, on 14 September 2011 SARC tabled its report, which contained 34 recommendations for modifications to the Charter and a final recommendation (R35), which proposed two options. The second option in R35, which is the majority SARC view, proposes the repeal of the legal obligation of public authorities to protect the human rights of Victorians, and the removal of the right of individuals to take legal action for infringement of their rights. This option does not appear to emerge from the evidence and would render the Charter virtually ineffective.

The state government has six months from the tabling of the report to respond to it. Let's hope it chooses to retain and strengthen the Charter as supported by the majority of the submissions summarised here (listed in Appendix 1).

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October 2011

Summary prepared for Sue Pennicuik by Louise Kyle

Introduction

For this report, 99 public submissions from key community, legal, religious, government and other groups were summarised, including transcripts from the Scrutiny of Acts and Regulations Committee hearings held from 18 to 22 July 2011.

Of the 99 key submissions reviewed here:

- 73 (74%) were supportive of the Charter and/or wanted to strengthen it;
- 20 (20%) were not supportive of the Charter or parts of the Charter;
- 6 (6%) were neutral or unclear.

Supportive views

General comments

Many of the submissions supporting a continuing and/or strengthened role for the Charter raised a number of similar points. Many also suggested that it is too soon to fully judge the operation of the Charter as it is about long term cultural change.

It was noted that the dialogue model in the Charter protects the traditional roles of Parliament and the judiciary, that is, it ensures that parliament has the final say on legislation and therefore resource allocation. Parliament retains its powers and it is the traditional role of courts to review actions of authorities against standards set by Parliament (see for example, PILCH Homeless Persons Legal Clinic, No. 83).

The Charter has been invoked mostly in cases concerning public housing, homelessness and criminal matters.

Some general points made about the Charter included:

- it provides a means to articulate common law protections in a simple and accessible way (Victoria Legal Aid, No. 171);
- that without legislation like the Charter, human rights are "susceptible to the vagaries of the political and democratic process" – a strong Charter and bi-partisan support are important "(International Commission of Jurists, No. 245).

Many submissions referred to the impact of the Charter on certain groups of people. For example, in addition to advocacy for a right to self-determination in the Charter, it was submitted that traditional or familial links to country have a special importance when considering Indigenous cultural heritage, and there is a need to align cultural rights in the Charter (s 19) with express priority for the recognition of Traditional Owners. It was also stated that government policy should be assessed against cultural rights (Victorian Aboriginal Heritage Council, No. 325).

Term of Reference 1 – Additional rights

Virtually all submissions in support of the Charter recommended the inclusion of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), *Convention on the Rights of the Child* (CROC), *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW), *Convention on the Rights of Persons with Disabilities* (CRPD) and *United Nations Declaration on the Rights of indigenous People* (UNDRIP) in the Charter.

A number of submissions called for other articles of the *International Covenant on Civil and Political Rights* (ICCPR) to be included, such as outlawing advocacy of racial and religious hatred (Article 20); the right that every child should be registered immediately after birth and have a name (Article 24(2)). Some also recommended inclusion of the *Convention on the Elimination of all forms of Racial Discrimination* (CERD), *Convention Against Torture* (CAT) and *United Nations Principles for Older Persons*.

In short, many submissions supported the view that the Charter should incorporate all of Australia's international obligations on human rights, so that the Charter can contribute to the practical realisation of these rights. This would link the Victorian legal system with developments in legal systems internationally (International Commission of Jurists in Victoria, No. 245).

Many submissions noted that human rights are interdependent and indivisible; social, cultural and economic rights must be guaranteed to ensure civil and political rights. An example given was a lack of housing options trapping women in violent situations (Womens Health Victoria, No. 173).

Many also argue that non-derogable rights should be listed in the Charter, including the right to freedom from torture.

Some groups, such as the Ethnic Communities Council of Victoria (No. 59), cautiously accepted consideration of inclusion of further rights but questioned their necessity and stated that clarification was required.

Gender and sexuality rights

The inclusion of CEDAW was seen as necessary to provide gendered analysis in law and policy development (for example, Good Shepherd, No. 232). It was submitted that gender identity and sexuality should be covered (ALSO Foundation, No. 280).

Intergenerational and environmental rights

Some submissions advocated rights to a clean and healthy environment, stating that a human rights framework can help address threats from climate change.

There was also a suggestion that the Charter Preamble contain a statement on intergenerational equity (Environmental Defenders Office, No. 271).

Limitation on Charter rights

Regarding the limitation of rights prescribed under the Charter (such as the s 7 conditions on limitations), the Law Council of Australia (No. 249) stated that Charter rights should be framed consistently with international law, that is, some rights are absolute, and s 7 should be amended accordingly.

However the Victorian Equal Opportunity and Human Rights Commission (No. 278) stated that the *Charter* should recognise that some rights are absolute, but that s 7(2) should be retained, as it provides a clear and workable test for determining whether limitations on rights are reasonable.

Term of Reference 2 – self-determination rights

Virtually all submissions supporting the Charter recommended that self-determination be included in the Charter. Most spoke of the value for the Indigenous community and relations between Indigenous and non-Indigenous people; of the need to consult with Indigenous people prior to introducing it; and of potential practical outcomes, such as “closing the gap” measures.

The LIV (No. 247) submitted that it is possible to promote and protect collective rights. However, some were more cautious, suggesting a caveat that self-determination be conditional on compliance with the rule of law and “accepted community standards” (Ethnic Communities Council of Victoria, No. 59) or that it be tempered by Article 30 of the *Universal Declaration of Human Rights* (UDHR) (which states that no right should imply a destruction of other rights).

Some advocated self-determination for people with disabilities and older people.

Term of Reference 3 – mandatory reporting and auditing

Submissions in support of the Charter stated that mandatory reporting and auditing of human rights compliance would enhance transparency and accountability of public authorities, help promote compliance with (and prevent breaches of) human rights, provide a gauge of gaps in services and reduce systemic issues.

There was a submission that all public authorities develop an action plan for the protection and promotion of human rights and compliance with the Charter (Human Rights Law Centre, No. 263). Good Shepherd Youth and Family Service (No. 232) suggested random audits and audits of under-performing authorities.

Many submissions supported a greater role and better resourcing for VEOHRC to monitor compliance, initiate inquiries and undertake investigations and audits, in order to identify systemic issues and avoid litigation. Some suggested that VEOHRC should have similar powers to the Auditor General to review compliance of public authorities (for example, Mental Health Legal Centre, No. 296).

The International Commission of Jurists in Victoria (No. 245) suggested starting with a pilot in specific sectors. The LIV (No. 247) suggested deferring the issue of reporting and auditing until the eight-year review.

Term of Reference 4 – legal remedies

Submissions supporting legal remedies under the Charter generally stated that they would give the Charter greater credibility and clarity, and ensure that authorities take their responsibilities not to breach human rights seriously.

These submissions advocated a free-standing cause of action with just, timely, accessible, affordable and effective remedies. This should include grants of "appropriate relief" such as specific orders to bind an authority and monetary damages.

Some submitters felt that s 39 (the right to commence legal proceedings) is confusing and limiting. Many suggested amending s 39 to empower courts and tribunals to make such orders as are just and appropriate. This would reflect the UK *Human Rights Act*, under which a court can provide relief if "considers just and appropriate" (Australian Lawyers Alliance, No. 168), and would make the Charter consistent with the UDHR and ICCPR (LIV, No. 247).

Some submissions advocated non-court based resolution of disputes and non-judicial remedies through conciliation or mediation. This could be commenced via a complaints mechanism through VEOHRC or the Ombudsman. This would be in addition to the ability to seek redress from a public authority via internal review.

Term of Reference 5(a) – Effect of Charter on development and drafting of statutory provisions

Submissions noted that the Charter formalises dialogue between the three tiers of government and has also been a catalyst for increased community consultation and engagement in formulating legislation.

Assessing laws against human rights standards is, for example, leading to better coronial law and corrections (Federation of Community Legal Centres, No. 205).

The Public Interest Advocacy Centre (No. 211) suggested that the standard of statements of compatibility could be improved by transferring responsibility for

reports to the Attorney-General. It submitted that statements should be more consistent and accessible by the public.

The Catholic Archdiocese of Victoria (No. 272) submitted that, in each case, Parliament should consider SARC's comments, discuss any amendments needed to achieve compatibility, and provide an override declaration whenever legislation is not compatible with international instruments to which Australia is a signatory.

Term of Reference 5(b) – Effect of Charter on consideration of statutory provisions

The Castan Law Centre (No. 285) recommends that s 32 (Interpretation of statutes in line with human rights) be amended in line with the approach taken by the UK House of Lords. (This would address the issues in the *Momcilovic* case – see p 11.)

VEOHRC (No. 278) argued to retain s 36 (Declaration of inconsistent interpretation), as it supports Parliamentary sovereignty and facilitates dialogue between Parliament and the courts.

It was submitted that the Charter has improved the development processes of law and policy, has significantly impacted the development and drafting of statutory amendments (for example, the *Coroners Act: LIV, No. 247*), and has been the impetus for major legislative reviews, such as the *Mental Health Act* and the review of guardianship and administration laws (VICSERV, No. 228).

However, the availability of exposure drafts and time provided for debate by organisations and individuals could be improved (Liberty Victoria, No. 241).

There are also insufficient guarantees of time for SARC's consideration and report to Parliament under s 30, and opportunity for public submissions on the human rights compatibility of Bills before they are debated in Parliament (*LIV, No. 247*).

Term of Reference 5(c) – Effect of Charter on provision of services and performance

It was submitted that the Charter provides a framework for considering rights by:

- improving decision-making processes and practices (examples were given by the Federation of Community Legal Centres, No. 205);
- providing principles to negotiate outcomes, rather than resorting to litigation;
- being educative for public authorities, leading to systemic change;
- improving consistency and worker productivity;
- resulting in greater regard being shown for human rights;

- helping to cut through complex bureaucratic problems, and assisting in critically gauging gaps in services.

(See for example PILCH Homeless Persons Legal Clinic, No. 83; Centre for Excellence in Child and Family Welfare, No. 230.)

However, some submissions stated that there is confusion in relation to coverage of services, for example the jurisdiction of the Ombudsman, and lack of clarity in the definition of "public authority" (ss 3 and 38). Many suggested that all agencies should be covered.

A real issue for the community services and NGO sectors is integrating Charter processes with their other quality and regulatory processes (VCOSS, No. 262).

Term of Reference 5(d) – Effect of Charter on litigation and role and functioning of courts and tribunals

Litigation under the Charter is rarely used, that is, the Charter is being applied in moderation (LIV, No. 247; HRLC, No. 263; VEOHRC, No. 278).

It was suggested that judges tend to avoid deciding cases on Charter grounds, and take the pragmatic approach that the Charter supports common law presumptions against interference with rights (Victorian Bar Council, No. 95). However, the cases emerging from VCAT are making a beneficial difference and providing important guidance.

Regarding the Attorney-General and VEOHRC powers to intervene in proceedings (ss 34 and 40), some submitted that these should be removed as they make raising arguments more onerous and costly, while others consider that intervention has assisted the court (Victorian Bar Council, No. 95) and should remain.

VEOHRC (No. 278) submitted that the intervention powers (ss 34 and 40) and notification requirement (s 35) should remain, with courts able to relieve a party from immediate notice. Victoria Legal Aid (No. 171) agreed with VEOHRC on s 35.

Some submitted that ss 34, 35 and 40 should be reconsidered at the eight-year review of the Charter (for example VEOHRC, No. 278).

Term of Reference 6 – overall benefits and costs

Submissions supporting the Charter identified benefits flowing from the Charter including:

- a culture of rights and positive change in this direction in government;
- fairer, more inclusive and higher quality services in government;

- use as an advocacy tool to protect rights before breach occurs;
- enhanced understanding of the importance of human rights;
- a symbolic expression and an articulation of values;
- a way to build community capacity.

There are general economic benefits from more equitable social policy (Headspace, No. 129), for example, preventing homelessness saves public spending on health and justice services (Council to Homeless Persons, No. 151).

Some submitted that monetary value is not an appropriate measure of "costs", but that the Charter will lead to costs savings over time through guidance of decision-making by authorities and fewer unmeritorious or vexatious claims. The Charter ameliorates delays and costs are avoided by better decision-making and processes (Victoria Legal Aid, No. 171).

Any costs are outweighed by service improvements that result in more equitable policies for economic development (Human Rights Law Centre, No. 263).

Term of Reference 7 – options for reform and improvement

Many submissions called for more education and training on the Charter, particularly for front-line staff, and a well-resourced public campaign to increase awareness of human rights obligations and protections and access to remedies. This means adequate resources for VEOHRC to fulfil its functions under s 41.

There were suggestions for a pool of funds for Charter cases, as there is too much reliance on pro bono lawyers, which is problematic in the long term for access to justice (Victorian Bar Council, No. 95).

There were different views on whether courts and tribunals should be included in the definition of "public authority". HRLC (No. 263) suggested specifying in the definition functions that "are taken to be of a public nature", similarly to the ACT's *Human Rights Act*. Some submissions also suggested an opt-in provision to enable the extension of rights to the private sector, as in the ACT's *Human Rights Act*.

Suggestions to improve the role of SARC included:

- properly resourcing SARC and ensuring it can rigorously examine legislation;
- strengthening SARC's powers to extend periods of adjournment, to enable appropriate consideration and community consultation;
- granting power to SARC to conduct inquiries upon parliamentary reference;
- adjourning Parliamentary debate on a Bill until SARC report is available for consideration, except in exceptional circumstances (PIAC, No. 211, p 12);
- amending s 30 to expand SARC and perhaps establish a Human Rights Subcommittee with adequate resources (HRLC, No. 263).

Other specific improvements submitted were:

- protections for Indigenous people, such as an Aboriginal Justice Commissioner;
- more detail in statements of compatibility;
- removal of the s 31 override provision (Liberty Victoria, No. 241 and others) or amendment to match the South African Bill of Rights s 37 (Castan Law Centre, No. 285);
- a concept of "reasonable adjustment" to be considered by public authorities when applying the Charter, to give people with a disability substantively equal rights to other Victorians (Association of Employees with a Disability, No. 176).

Non-supportive or critical views

Religious rights

The majority of submissions which were not supportive of or critical of the Charter focussed on protection of the unborn child, and claims that doctors are unable to express their freedom of conscience and belief. It was submitted that the s 48 savings provision (meaning that the Charter does not affect abortion or child destruction laws) should therefore be removed.

Many submitted that the Charter does not sufficiently protect the right to freedom of religion, referring to instances where sexuality rights overrode it.

Some submitted that the right to the religious and moral education of one's children in conformity with one's own convictions (an ICCPR right) needed protection.

Other issues

Many submissions were concerned that the Charter gives too much power to the courts, thus undermining the role of parliament.

Other comments on the Charter were:

- it gives too little significance to responsibilities; too much to individual rights;
- it gives too much voice to vocal minorities and frivolous or unworthy claims;
- there is no need for mandatory reporting;
- it should be replaced with a *Human Rights Parliamentary Scrutiny Bill* (Australian Christian Lobby, No. 104).

Term of reference 1 – Additional rights

It was submitted that Charter rights were already covered (for example, women's rights under the *Equal Opportunity Act 2010*) and that new rights would create more uncertainty.

There were submissions that property rights should be included.

Term of reference 2 – Self-determination

It was argued that self-determination of Indigenous people will lead to secession.

Term of reference 3 – monitoring and auditing

Negative responses included that local government was already over-regulated.

Neutral views

The Magistrates' Court of Victoria (No. 102) submitted that it is already doing the work of the Charter, but that Charter had not brought any delay to proceedings. However there was concern from some that the Charter increased the complexity of proceedings, and the time and cost of services delivery (Director of Public Prosecutions, No. 46).

Victoria Police (No. 170) submitted that it was already Charter-compliant through practices they had adopted, but acknowledged benefits of the Charter such as increased emphasis on rights and accountability.

Note: Momcilovic case

The High Court delivered its judgment in *Momcilovic v R* [2011] HCA 34 on 8 September 2011. In this case, a declaration of inconsistency had been made under Charter s 36 in relation to the legislation that Momcilovic was convicted under.

The High Court held 6:1 that Charter s 32 (interpretation of statutes consistently with human rights) is a valid rule of statutory interpretation like any other rule of interpretation, and preserves the proper roles of Parliament and the courts.

A 4:3 majority held that s 36 of the Charter (declarations of inconsistent interpretation by the Supreme Court) is valid, and the Charter's declaration function does not impair the independence of the courts (the minority found s 36 invalid).

The High Court's own summary of its decision in *Momcilovic* is available at: <http://www.hcourt.gov.au/publications/judgment-summaries/2011-judgment-summaries>.

Appendix 1: Submissions analysed for this report

- No. 144. Action for More Independence and Dignity in Accommodation
- No. 280. ALSO Foundation
- No. 147. Amnesty International Australia
- No. 176. Association of Employees with Disability
- No. 130 Australian Association of Social Workers
- No. 104. Australian Christian Lobby
- No. 119. Australian Family Association
- No 89. Australian Family Association (WA)
- No. 168. Australian Lawyers' Alliance
- No. 264. Australian Lawyers for Human Rights
- No. 297. Australians for Native Title and Reconciliation
- No. 60. Beyond Blue
- No. 285. Castan Centre for Human Rights Law
- No. 272. Catholic Archdiocese of Victoria.
- No. 292. Catholic Social Services Victoria
- No. 230. Centre for Excellence in Child and Family Welfare
- No. 117. Child Safety Commissioner
- No. 137. Christian Schools Australia
- No. 16. Community Child Care
- No. 149. Community Connections Victoria
- No. 116. Community Housing Federation of Victoria
- No. 166. Council of the Ageing
- No. 151. Council to Homeless Persons
- No. 46. Director of Public Prosecutions
- No. 159. Disability Justice Advocacy
- No. 226. Doctors in Conscience
- No. 87 Domestic Violence Resource Centre (DVRC)
- No. 78. Endeavour Forum
- No. 271. Environmental Defenders Office
- No. 59. Ethnic Communities Council of Victoria
- No. 254. Family Council of Victoria
- No. 19. Family Voice Australia
- No. 205. Federation of Community Legal Centres
- No. 232. Good Shepherd Youth and Family Service
- No. 129. Headspace
- No. 48. Housing Support Service Inc
- No. 263. Human Rights Law Centre
- No. 113. Humanist Society of Victoria
- No. 133. Institute of Public Affairs
- No. 245. International Commission of Jurists in Victoria
- No. 229. Jesuit Social Services
- No. 20. Land Owners Rights Association Inc
- No. 249. Law Council of Australia
- No.247. Law Institute of Victoria
- No. 241. Liberty Victoria
- No. 102 Magistrates' Court of Victoria
- No. 275. Melbourne Catholic Lawyer's Association
- No. 296. Mental Health Legal Centre
- No. 192. Municipal Association of Victoria

- No. 220. National Association of Community Legal Centres
- No. 195. National Children's and Youth Law Centre
- No. 237. National Council of Women
- No. 282. National Disability Services
- No. 298. Native Title Services Victoria
- No. 118. Joint submission from North & West Metro Community Health Service Providers
- No. 128. Office of the Health Services Commissioner
- No.299. Office of Police Integrity
- No. 158. Office of the Public Advocate
- No. 97 Office of Victorian Privacy Commissioner
- No. 236. Police Association
- No. 65. Ombudsman Victoria
- No. 228. Psychiatric Disability Service (VICSERV)
- No. 211. Public Interest Advocacy Centre
- No. 83. PILCH Homeless Persons Legal Clinic
- No. 257. Public Interest Law Clearing House
- No. 162. Rainbow Network Australia
- No. 94. Right to Life Australia Inc
- No 50. Dorothy Soffe
- No. 15. Prof John Martin (St. Vincents)
- No. 293. Status of Women (UN Association of Australia)
- No. 1. Supreme Court of Victoria
- No. 256. Synod of Victoria and Tasmania - Uniting Church
- No. 100 Tenants Union of Victoria
- No. 123. Transgender Victoria
- No. 213. Vic Health
- No. 171. Victoria Legal Aid
- No. 170. Victoria Police
- No. 105. Victorian Aboriginal Child Care Agency Co-op. Ltd.
- No. 199. Victorian Advocacy League for Individuals with a Disability (VALID)
- No. 325. Victorian Aboriginal Heritage Council
- No. 258. Victorian Aboriginal Legal Service Co-operative
- No. 160. Victorian Alcohol and Drug Association
- No. 95 Victorian Bar Council
- No. 77. Victorian Council of Churches
- No. 262. Victorian Council of Social Services
- No. 259. Victorian Disability Advisory Council
- No. 270. Victorian Gay and Lesbian Rights Lobby
- No. 278. Victorian Equal Opportunity and Human Rights Commission
- No. 88 Victorian Independent Education Union
- No. 204. Victorian Local Governance Centre
- No. 49. Joint submission – Williams, Galbally, Gaze and Storey
- No. 234. Women's Electoral Lobby Vic. Inc.
- No. 173. Women's Health Victoria
- No. 152. Women's Legal Service Victoria
- No. 142. World Federation of Doctors Who Respect Human Life
- No. 85. Young Womens Christian Association
- No. 90. Youth Disability Advocacy Service
- No. 148. Youth Affairs Council of Victoria
- No. 156. Youthlaw

Appendix 2: Charter of Human Rights and Responsibilities Act 2006, section 44

PART 5 GENERAL

44. Review of Charter after 4 years of operation

- (1) The Attorney-General must cause a review to be made of the first 4 years of operation of this Charter and must cause a copy of a report of the review to be laid before each House of Parliament on or before 1 October 2011.
- (2) A review under subsection (1) must include consideration as to whether-
 - (a) additional human rights should be included as human rights under this Charter, including but not limited to, rights under-
 - (i) the International Covenant on Economic, Social and Cultural Rights; and
 - (ii) the Convention on the Rights of the Child; and
 - (iii) the Convention on the Elimination of All Forms of Discrimination against Women; and
 - (b) the right to self-determination should be included in this Charter; and
 - (c) regular auditing of public authorities to assess compliance with human rights should be made mandatory; and
 - (d) further provision should be made in this Charter with respect to proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful because of this Charter.

Appendix 3: Terms of reference: Review of the Charter of Human Rights and Responsibilities Act 2006

1. Whether the Charter should include additional human rights under the Charter, including but not limited to, rights under the –
 - (a) International Covenant on Economic, Social and Cultural Rights;
 - (b) Convention on the Rights of the Child; and
 - (c) Convention on the Elimination of All Forms of Discrimination against Women?
2. Whether the right to self-determination should be included in the Charter?
3. Whether there should be mandatory regular auditing of public authorities to assess compliance with human rights?
4. Whether the Charter should include further provisions with respect to legal proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful by the Charter?
5. What have been the effects of the Charter Act on –
 - (a) the development and drafting of statutory provisions;
 - (b) the consideration of statutory provisions by Parliament;
 - (c) the provision of services, and the performance of other functions, by public authorities;
 - (d) litigation and the roles and functioning of courts and tribunals; and
 - (e) the availability to Victorians of accessible, just and timely remedies for infringements of rights?
6. What if any, have been the overall benefits and costs of the Charter?
7. What options are there for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria?