9 June 2011

Mr Edward O’Donohue, MLC
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

By email: charter.review@parliament.vic.gov.au

Dear Mr O’Donohue


Thank you for the opportunity to provide Victoria Legal Aid’s comments for the Scrutiny of Acts and Regulations Committee’s review of the operation of the Charter of Human Rights and Responsibilities Act 2006 since its enactment.

Please find enclosed our submission to the review, which draws on our practice experience providing legal assistance to disadvantaged and vulnerable Victorians.

Yours faithfully

JOHN HOWIE
Chairperson

cc. The Honourable Robert Clark MP, Attorney General of Victoria
Submission to the Victorian Parliament’s Scrutiny of Acts and Regulations Committee’s Review of the Charter of Human Rights and Responsibilities Act 2006 (‘the Charter’)

A. Victoria Legal Aid

Victoria Legal Aid (VLA) is an independent statutory authority established under the Legal Aid Act 1978 and funded by Commonwealth and State Governments.

The statutory objectives of VLA are to:

- provide legal aid in the most effective, economic and efficient manner
- manage its resources to make legal aid available at a reasonable cost to the community and on an equitable basis throughout the state
- provide to the community improved access to justice and legal remedies
- pursue innovative means of providing legal aid directed at minimising the need for individual legal services.

VLA is empowered to provide assistance notwithstanding that the interests of the assisted person are adverse to the State or Commonwealth, and we must ensure that legal aid is provided in a manner that dispels fear and distrust. As well as offering practical benefits to clients and their families, the provision of legal aid serves the broader community by promoting rights and responsibilities and by quality assuring the actions of government agencies. The provision of legal aid makes possible access to justice, which is central to the rule of law and a critical element of a well-functioning democracy.

VLA is committed to protecting people’s rights and to contributing to a community that is fair, just, participatory, inclusive and rights respecting. Our statutory objectives require efficient and innovative methods for improving access to justice and legal remedies for the community. This requires more than legal representation in individual cases. It includes, but is not limited to, reforming legal processes where they impact disproportionately on disadvantaged and vulnerable people.

B. The Charter and public authorities

The Charter has proved useful in focussing administrative decision makers on circumstances where rights might not be respected, and in persuading decision makers to improve inefficient policies. It provides a reference point for public bodies, decision makers and the recipients of government policies and services, to improve primary decision making.

We agree that statements of the public services and standards to which individuals are entitled should be articulated, with honest and thorough benchmarking and reporting of service delivery performance, and proper channels of internal redress, backed up by an independent and diligent
Ombudsman and accessible administrative law remedies\(^1\), We suggest that such mechanisms are supported by a clearly drafted and accessible Charter.

VLA endorses the following observations recorded in the Victorian Equal Opportunity and Human Rights Commission’s (VEOHRC) 2010 report on the operation of the Charter\(^2\):

- there is a cultural change taking place within government because of the Charter - for many agencies, taking human rights considerations into account in their work is becoming business as usual\(^3\)
- the Charter has prevented human rights breaches by ensuring that human rights are taken into account at the front end of the work of government\(^4\)
- the Charter has assisted many public authorities to develop people-centred policies, raise service standards and increase accountability\(^5\).

VLA has observed that changes to policies compatible with the Charter often facilitate social inclusion, empowering individuals to be active agents in their own rehabilitation and decision-making.

**Case study: moving away from a one size fits all approach**

For some clients subject to orders under the Disability Act 2006, unsupervised access to the community is not permitted or is severely limited, even when they are progressing well through their rehabilitation program and have managed supervised community access. The Charter has provided the basis for VLA to collaborate with service providers operating under the Disability Act in relation to reviewing blanket restrictions to community access. This has allowed service providers, with clients, to tailor community access to the individual circumstances of the client as appropriate, facilitating their reintegration into the community.

**Case study: exploring options to better meet community and individual needs**

An elderly client sought our assistance to engage with a forensic service provider. The client was living in a facility that was ill-equipped to meet her needs. Invoking the Charter, including s 12, we started an effective dialogue with the service provider in charge of housing the client. An application to the Supreme Court was avoided when the service provider agreed that under the Charter, other residence options should be explored. The client was relocated to a more suitable facility. As well as avoiding costly litigation and improving the quality of life of this particular client, the Charter also motivated a change to policies to ensure benefits or future consumers.

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\(^1\) Robert Clark, ‘Towards a just and fair Victoria’ (Speech delivered at the Opening Human Rights Week Panel Discussion, Telstra Theatre, Exhibition Street, Melbourne, 8 December 2010), <http://www.robertclark.net/news/towards-a-just-and-fair-victoria/>


\(^3\) Ibid, page 8

\(^4\) Ibid, page 7

\(^5\) Ibid, page 19
Case study: finding rights-respecting approaches

A resident with an intellectual disability, who was residing at a facility for people with disabilities, was getting frightened at night, and yelling out. Staff had tried various things to keep him calm. They had resorted to threatening to stop him going to church if he didn't keep quiet at night. The facility was advised that it may be considered a public authority, and therefore, required to respect the resident's right to freedom of religion. The facility stopped making the threat, and tried other ways of encouraging the resident to be quiet.

As a statutory authority with public functions, VLA is both bound by, and holds government and other public bodies accountable to, the Charter.

VLA believes that reporting against human rights obligations is a useful mechanism for establishing best practice service delivery and for highlighting areas for improvement across the public sector. We support the vesting of power with the VEOHRC to inquire into and audit a public authority's compliance with the Charter.

C. Litigation and remedies

VLA considers that the legal protection of human rights is an important factor contributing to their practical realisation. Although litigation should not be the first step in resolving a dispute, it must be an option. The threat or mere prospect of recourse to legal action is an essential aspect of protecting and promoting human rights, including by operating as an incentive to ensure that human rights breaches do not occur in the first place.

VLA has not extensively used the Charter in court and tribunal contexts. Where the Charter has been employed, it has usually been engaged in cases relating to housing, detention orders, discrimination, procedural fairness, and proportionality issues dealing with the conduct of police and other authorities.

Case study: guarding against abuses of process

Police re-laid charges against a young client after withdrawing the same charges on the grounds that the client would provide a statement and give evidence against a co-accused at the committal. The charges were again withdrawn at a contest listed nearly a year after the alleged offence took place. The charges were again re-laid six months later. The result was a contested hearing two years after the alleged offence was committed. VLA argued that to allow the charges to proceed was an abuse of process under s25(2)(c) of the Charter (right to be charged without unreasonable delay) and s25(3) (the right to a process that takes into account the child's age and the desirability of promoting the child's rehabilitation). The submission was accepted and the charges were stayed.

Section 39

VLA has observed that legal action using the Charter, which ultimately serves to clarify and strengthen the law, is frustrated by the absence of a direct cause of action for the breach of a Charter right. Section 39 of the Charter has been recognised as problematic. The section stipulates a precondition to a person being able to seek a relief or remedy on Charter grounds. It

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enables a person to seek relief or remedy in respect of the conduct of a public authority on grounds of Charter unlawfulness only where the person may seek the same relief or remedy in respect of the public authority’s conduct on grounds of non-Charter unlawfulness.

There remains no certainty about how s 39 regulates access to the courts to litigate breaches of the Charter, and individuals, courts and lawyers have struggled to understand the process and action available to them. The tension that the section tries to resolve is between the unwanted creation of new processes and remedies, while ensuring that rights breaches can be tested in the courts.

Section 39 could be amended to make it clear that illegality arising from a Charter breach can form the basis of a proceeding taken in a traditional way (for example, judicial review or an application to exclude evidence) without the need to 'piggy back' on an independent basis for that proceeding. Alternatively, s 39 could be replaced with a provision that establishes a direct cause of action for breaches of protected human rights which is justiciable in the appropriate court or tribunal, including the Victorian Civil and Administrative Tribunal. A direct cause of action is unlikely to result in increased litigation. Instead, it is likely to create the conditions for clear guidance on the practical application of the Charter to and for public authorities. Under a new or amended section, a court or tribunal should be empowered to grant a relief or remedy, or make such order within its powers as is just and appropriate.

The Charter should also be amended to include non-judicial remedies for breaches of human rights, including provision for engaging in dispute resolution processes such as conciliation and mediation, lodging a complaint with the VEOHRC or Ombudsman and seeking redress with the violating public authority (such as internal review).

D. Benefits and costs of the Charter

Given the short period of time it has been operating, a cost benefit analysis of the Charter is unlikely to provide a meaningful assessment of its efficiency until some of its basic shortcomings have been rectified to ensure a more accessible, more efficient and more cohesive Act.

We note that any cost benefit analysis of the Charter, and the use of any findings, must be sensitive to the complexities of placing a raw fiscal value on rights. Fair treatment, accountable government and human dignity are inherently valuable. It is well established that a community which provides effective mechanisms for respecting rights is more socially cohesive, has better public health and education outcomes, has better individual and community well being, and can reduce violence, crime and family breakdown. Furthermore, a 2010 report on Government services conducted by the Productivity Commission found that ‘the civil justice system sustains and fosters social stability and economic growth’.

As outlined earlier, VLA has observed a considerable benefit of the Charter to be its influence on improving the actions and efficiencies of public authorities.

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There have not been significant implementation or ongoing costs arising from VLA's obligations under the Charter. Nor has the Charter’s introduction caused an overall increase in workload for VLA lawyers. There have been no measurable increases in the number of applications for legal aid as a result of the Charter.

VLA undertakes public interest advocacy, matters which have a broader impact beyond benefit to an individual. While there is currently no legal aid guideline specific to the Charter, a case that raises Charter arguments that is not otherwise funded under an existing guideline, may be funded under the public interest and test case guideline. Such cases when well targeted provide a cost effective means of advancing the objectives of the Legal Aid Act.

E. Further improvements to the Charter

In addition to the points raised about s 39 of the Charter above, other aspects of the Charter that could be clarified or amended to ensure the Charter operates effectively and efficiently, include:

Section 6
Section 6(2)(b) applies the Charter only to a court that has functions under Parts 2 or 3. Section 4(1)(j) makes a court a ‘public authority’ only when they are operating in an administrative rather than judicial capacity. The combination of these sections has proved difficult in practice and has added confusion and complexity to the way in which the Charter operates. A number of other equivalent jurisdictions do not limit the application of equivalent pieces of legislation to courts in this way. Instead, courts are obliged to act consistently with human rights, as reasonably limited in a free and democratic society. There is no good reason to maintain the protection from compliance with human rights of courts operating in a judicial capacity in Victoria.

Section 35
In VLA's experience, s 35, which requires that the Attorney General and VEOHRC be notified of proceedings brought under the Charter, has had the effect of frustrating court proceedings. In heavy court lists that are often carefully calibrated and where VLA has limited time and resources to prepare applications and defences, the giving of notice can be onerous.

We have observed that the County and Supreme Courts have at times marginalised the obvious relevance and application of the Charter in criminal matters in part because of the requirement to give notice and the anticipated delay that this will cause for the proceeding.

We recommend that s 35 be repealed. Alternatively, s 35 should be amended to provide courts and tribunals with a discretion to relieve a party from giving notice where to do so would unduly disrupt or delay a proceeding, or for other good reason.

F. Conclusion

The Charter is an important tool for protecting and promoting human rights and advancing a rights respecting community. The Charter is contributing to a more robust and informed approach to the development of policy and service delivery within Victoria, with tangible benefits for the Victorian community. However, in its current form aspects of the Charter are problematic. It is not, by design or application, a panacea for all disadvantage, rather it is an essential part of a broader framework of rights protection for the Victorian community, and accordingly should be strengthened and retained.