Submission to the Scrutiny of Acts and Regulations Committee regarding the inquiry into the *Charter of Human Rights and Responsibilities Act 2006*

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**Introduction**

1. I welcome the opportunity to comment on the content and operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the *Charter*) in respect of the review currently being undertaken by the Scrutiny of Acts and Regulations Committee (the SARC).

2. I have engaged with the Charter as a lawyer practising in litigation and dispute resolution and also as a Masters of Laws student. This experience with the Charter has included its use in litigation, the provision of legal advice and assistance, policy assessment and advocacy, and academic study. My views concerning the operation of the Charter have also benefited from insights gained through my current position at the Danish Institute for Human Rights (a Paris Principles-accredited national human rights institution).

3. I consider that the Charter, in its first four years of operation, has made a positive, substantial and important contribution to the protection, promotion and realisation of rights in Victoria.

4. The purpose of this submission is to provide further comments on the following matters within the scope of the SARC's inquiry into the Charter, as defined in the Terms of Reference:
   - the matters referred to in s44(2) of the Charter – specifically, whether additional rights should be included in the Charter, including social, economic and cultural rights, and self-determination rights;
   - the effects of the Charter on the availability to Victorians of accessible, just and timely remedies for infringements of the Charter;
   - options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria; and
   - the overall benefits and costs of the Charter.

5. This submission is made in my personal capacity.

**Recommendations**

**Recommendation 1:** ESC rights should be included in the Charter.

**Recommendation 2:** The Charter should recognise and protect all ESC rights identified in the International Covenant on Economic, Social and Cultural Rights.

**Recommendation 3:** ESC rights should be included in terms similar to the rights currently recognised in the Charter, and afforded the same protections and remedies.
Recommendation 4: Either the approach to the articulation of ESC rights adopted in the South African Bill of Rights or that proposed by the ACT Economic, Social and Cultural Rights Project should be considered and adopted as a model for the articulation of ESC rights in the Charter.

Recommendation 5: That further consideration be given to the inclusion of self-determination rights in the Charter, in consultation with indigenous Victorians.

Recommendation 6: That a free-standing cause of action be included in the Charter.

Inclusion of economic, social and cultural rights

6. The inclusion of economic, social and cultural rights (ESC rights) in the Charter is referred to in s44(2) of the Charter and identified as a matter for consideration in this inquiry in the Terms of Reference.

7. ESC rights are commonly understood to be those rights articulated in the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, that there is some overlap and duplication between rights recognised in ICESCR, and those recognised in its 'sister' covenant, the International Covenant on Civil and Political Rights (ICCPR).

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8. These recommendations, and the discussion immediately below, draw from the results of research I undertook in 2010 in connection with my Masters of Laws studies. This research sought to identify guidance provided by, and learnings which could be drawn from, approaches to the protection of ESC rights adopted in foreign domestic jurisdictions.

A. Why economic, social and cultural rights should be included

9. I strongly support the inclusion of ESC rights in the Charter for the following reasons.

10. Victorians recognise that the protection of ESC rights is crucial to the promotion and realisation of human dignity and full participation in society.

a. More than 40% of the submissions received by the Human Rights Consultation Committee in 2005 supported the inclusion of ESC rights. A recent consultation commissioned by the Victorian Equal Opportunity and Human Rights Commission

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1 Two rights currently included in the Charter, the right to the protection of families and children, and cultural rights, are identified in both the ICCPR and ICESCR.

suggests that a majority of both organisations and individuals drawn from the
general community currently support the inclusion of ESC rights in the Charter.³

11. All human rights are universal, interdependent, interrelated and indivisible.⁴ The adequate
protection of any human right requires and benefits from the protection of all.

a. The indivisibility and interdependence of all human rights is a fundamental tenet of
international human rights law.⁵

b. Evidence suggests that failure to protect ESC rights undermines and impairs
enjoyment of civil and political rights.⁶ Realisation of civil and political rights is
promoted by the protection of all human rights. Nelson Mandela relevantly
observed:

A simple vote, without food, shelter and health care is to use first generation rights
as a smokescreen to obscure the deep underlying forces which dehumanise people.
It is to create an appearance of equality and justice, while by implication socio-
economic inequality is entrenched. We do not want freedom without bread, nor do
we want bread without freedom. We must provide for all the fundamental rights and
freedoms associated with a democratic society.⁷

12. Inclusion of ESC rights in the Charter will provide clarity in respect of the legal standards
with which government and public authorities are expected to comply.

a. The limited protection of ESC rights effected through the interpretation of civil and
political rights⁸ is inadequate and fails to provide clear standards and guidance to
government and other public authorities.

b. The express inclusion of ESC rights in the Charter would clarify the circumstances
in, and extent to, which these rights are protected and the standards required of
government and public authorities. Such guidance would facilitate greater
consistency between the approach adopted by the three branches of government
and other stakeholders to address issues relevant to ESC rights, including
homelessness, health care and education.

13. There is no inherent difference between civil and political rights and ESC rights, and ESC
rights are appropriate for inclusion in the Charter.

³ Victorian Equal Opportunity and Human Rights Commission, Talking Rights: Consulting with Victorians about
economic, social and cultural rights and the Charter (2011).
⁴ Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (12 July 1993), [5], [8].
⁵ Office of the United Nations High Commissioner for Human Rights, Economic, Social and Cultural Rights:
Handbook for National Human Rights Institutions (2005), 3-6. See also United Nations General Assembly
resolution 32/130 (16 December 1977), which states that (a) all human rights and fundamental freedoms are
indivisible and interdependent; equal attention and urgent consideration should be given to the
implementation, promotion and protection of both civil and political, and economic, social and cultural rights;
(b) the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is
impossible; and (c) the achievement of lasting progress in the implementation of human rights is dependent
upon sound and effective national and international policies of economic and social development.
⁶ See, for example, Dr K Young, 'The Brennan Report’s unanswered question: How to protect economic and
social right in a dialogue model', The Canberra Times, 10 December 2009.
⁷ N R Mandela, 'Address: On the occasion of the ANC’s Bill of Rights Conference, in A Bill of Rights for a
Democratic South Africa: Papers and Report of a Conference Convened by the ANC Constitutional Committee,
May 1991 (Centre for Development Studies, UWC, 1991), 9-14, 12.
⁸ There have been a number of Charter cases in Victoria which, in the course of addressing civil and political
rights protected by the Charter, have simultaneously had the effect of remedying infringements of ESC rights —
demonstration of the interrelatedness of all rights. For more information about such cases, see, for example:
Director of Housing v Turcan [2010] VCAT Ref No R201011922 (Unpublished, 4 May 2010); Director of Housing
a. The distinction commonly drawn between ESC rights and civil and political rights is not based on their inherent characteristics. It is artificial and emerged as a result of cold war politics. Australian human rights law expert David Kinley states:

The 60-odd years of the UDHR have been marked first by the creation of the rift between the supposed status...of civil and political rights...and economic, social and cultural rights...and then by ongoing efforts to repair it. This was a very politico-legal rift borne of misaligned dichotomies of the Cold War...

b. This artificial dichotomisation, which emerged from political considerations which have no application to present-day rights protection in Victoria, does not provide a sound basis for the exclusion of ESC rights from the Charter.

c. ESC rights are appropriate for inclusion in the Charter. It is well established that concerns regarding alleged 'inherent differences' between ESC rights and civil and political rights are misplaced. ESC rights have certainty of content, are justiciable, are not inherently more resource-intensive and can be effectively addressed in an instrument such as the Charter without undermining the traditional separation of government powers.

14. The inclusion of ESC rights in the Charter is consistent with both Australia’s international legal obligations and the emergent commitment to the protection and promotion of these rights at the international, regional, foreign domestic and Australian domestic levels.

a. Examples of the current commitment to the protection and promotion of ESC rights in international and foreign jurisdictions include: the adoption of the Optional Protocol to ICESCR in 2008; recognition of duties to respect ESC rights under the African Charter on Human and Peoples’ Rights by the African Commission on Human and Peoples’ Rights; recent decisions of the Inter-American Court of Human Rights providing effective enforcement of certain ESC rights; the inclusion of ESC rights in South Africa’s Constitutional Bill of Rights; and the incorporation of ESC rights in Constitutional directive principles in Ireland and India.

b. The inclusion of ESC rights in human rights instruments has also received significant support in Australia. The inclusion of ESC rights in a manner similar to civil and political rights has been strongly recommended in respect of the Human Rights Act 2004 (ACT), and also the proposed Tasmanian and Western Australian

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17 Constitution of Ireland 1937; Constitution of India 1950.
human rights instruments.  

Consideration and more limited support for the inclusion of ESC rights was also made in respect of the current Charter and also the proposed National Human Rights Act.

15. On the basis of my experience, in particular as a volunteer lawyer with the Homeless Persons Legal Clinic, I consider that there is an urgent need to address issues stemming from economic, social and cultural disadvantage and inequality in Victoria, and that the inclusion of ESC rights in the Charter would facilitate the development of a more holistic and effective approach.

a. In providing legal assistance to clients suffering from homelessness, mental illness and serious substance addiction, I have become aware of a number of gaps and failures in the way in which issues relating to these conditions are addressed in Victoria. These include: unavailability and under-resourcing of support services; failure of support services to consider individual client needs – for example, an Indigenous client was offered culturally inappropriate crisis accommodation; lack of clarity concerning process and procedure; disempowerment of persons lacking the resources, physical or mental health, or education to pursue available remedies; and a general apparent lack of consistency and coordination between and within relevant government and other public bodies.

b. I consider that if ESC rights are included in the Charter, the holistic and dialogic approach adopted by the Charter has the potential to effectively address the complex challenges presented by economic, social and cultural inequality and disadvantage. It facilitates consistency of approach, and collaboration between, government bodies, service providers and other stakeholders, and also the adoption of measures which are effective, mutually reinforcing and more resource-efficient.

B. Which economic social and cultural rights should be included

16. All ESC rights identified in ICESCR should be included in the Charter to enable the full enjoyment by Victorians of their human rights.

17. The benefits of including all ESC rights identified in ICESCR include:

a. recognising and reinforcing the indivisibility, interrelatedness and interdependence of human rights;

b. maximising realisation of human rights in Victoria and enabling the adoption of effective measures to address rights-related issues;

c. ensuring that the Charter supports, and does not impair, Australia’s compliance with its obligations under international law; and

d. facilitating the relevance and utility of international and foreign domestic jurisprudence to guide and support interpretation and application of the Charter.

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18. Constitutional issues may inhibit the full inclusion of all ESC rights in the Charter. If this is the case, efforts should be made to ensure that the rights recognised in ICESCR are included to the maximum extent possible.

C. How economic social and cultural rights should be included

19. The approach adopted to include ESC rights in the Charter is likely to significantly impact the outcome and consequences of their inclusion.

20. In considering how ESC rights should be included in the Charter, I consider it is important to ensure:
   a. consistency with Australia's international legal obligations;
   b. identical treatment of ESC rights and civil and political rights; and
   c. adoption of a sophisticated approach to the articulation of ESC rights which recognises both that 'positive' and 'negative' obligations are created by these rights, and also that some obligations are immediate and some may be subject to 'progressive realisation'.

21. The experience of foreign domestic jurisdictions provides useful learnings regarding different approaches which have been adopted to the inclusion of ESC rights, and also their potential outcomes. Understood in context, guidance can be drawn from these experiences and applied to consideration of how the inclusion of ESC rights in the Victorian Charter should be effected.

   1. Australia's obligations under international law

22. Australia has ratified ICESCR without reservation, making a commitment which is binding under international law to uphold the rights identified in ICESCR.

23. It should be noted that Australia's commitment to uphold ESC rights is a baseline commitment. It is open to Australia, and Victoria, to go 'beyond mere compliance' in seeking to realise ESC rights.

24. The approach adopted to the inclusion of ESC rights in the Charter should seek to ensure that Australia's obligations under international law in respect of ESC rights are supported, and not undermined or impaired.

25. Australia's legal obligations can be supported by:
   a. including in the Charter all ESC rights identified in ICESCR;
   b. ensuring that the articulation of ESC rights in the Charter is consistent with, or at least not narrower than, their articulation in ICESCR; and
   c. ensuring that any limitations, such as that currently provided by section 7 of the Charter, do not hinder or prevent compliance with Australia's obligations under international law generally, and ICESCR in particular.

26. Effecting the inclusion of ESC rights in the Charter in a manner consistent with Australia's obligations under international law will strengthen both the certainty of content and consistency of interpretation of these rights. It will achieve this by facilitating reference by parliament, the courts, and other public authorities and stakeholders to the significant body
of international and foreign domestic consideration of ESC rights, removing the need to 'reinvent the wheel'.

2. Identical treatment of rights

27. I consider that ESC rights included in the Charter should be treated identically to rights currently included in the Charter.

28. Approaches which may be adopted to the inclusion of ESC rights in the Charter include:
   a. identical treatment: inclusion of ESC rights in similar terms to rights currently recognised in the Charter; and
   b. non-identical treatment: inclusion of ESC rights but in varied terms – for example, as a separate 'category' of rights subject to some form of blanket limitation, or as mere 'directive principles'.

29. The benefits of treating ESC rights identically with civil and political rights include:
   a. recognition of the indivisibility, interdependence and equal status of human rights;
   b. strengthened protection of ESC rights to maximise realisation and enjoyment of all human rights in Victoria;
   c. adoption of a sophisticated and case-by-case approach to the articulation of individual rights (discussed further below);
   d. provision of clarity and certainty of content of ESC rights and the standards with which government and other public bodies must comply;

30. The ACT Consultation Committee, which was appointed in 2002 to inquire into whether the ACT should adopt a bill of rights) strongly supported identical treatment, considering it would underline the indivisibility of ESC rights and civil and political rights. It hoped that:

   [B]y identifying the deep connections between the two Covenants [ICCPR and ICESCR]...the simplistic distinction often drawn between economic, social and cultural rights on the one hand and civil and political rights on the other will be seen to have no substance.

31. The experiences of South Africa and India in respect of the protection of ESC rights suggest that identical treatment of ESC rights is preferable.

32. Non-identical treatment is often considered to be a more cautious, 'safer' approach to the protection and/or promotion of ESC rights. However, the comparative experiences of South Africa and India suggest that not only does identical treatment facilitate more robust protection of rights, but it also reduces risks associated with uncertainty by clarifying the nature, scope and content of rights protected.

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20 Recourse to international and foreign domestic jurisprudence has provided assistance to the courts in considering and determining claims made in respect of civil and political rights protected by the Charter.

21 ACT Bill of Rights Consultation Committee, Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultation Committee (2003), [5.32].

22 The benefits and risks of different models for the adoption of ESC rights and the experiences of foreign jurisdictions is discussed extensively in the recent report: Australian Capital Territory Economic, Social and Cultural Rights Project, Report (2010).
3. Articulation of rights

33. Adequate, effective and sustainable inclusion of ESC rights in the Charter requires their appropriate articulation. I consider that an articulation of ESC rights with the following characteristics is likely to enhance facilitate the most positive outcomes:
   a. consistency with the articulation of ESC rights identified in ICESCR;
   b. recognition of the complexity of individual rights and both the positive and negative obligations which they create; and
   c. tailored qualifications and/or limitations which operate only where, when and to the extent to which they are necessary to support effective rights protection and promotion.

Models for the articulation of ESC rights

34. Two models for the articulation of ESC rights which reflect these characteristics are provided by the South African Bill of Rights²³ and also the ACT Economic, Social and Cultural Rights Project (ACT ESCR Project).²⁴

35. I consider that both of these approaches provide an appropriate model for the articulation and robust protection of ESC rights in the Victorian Charter.

36. The main difference between these models, in effect, is that the model proposed by the ACT ESCR Project reinforces the importance of non-discrimination in the protection of ESC rights, and also provides express guidance as to the considerations relevant to determining whether measures taken to progressively realise ESC rights are reasonable. Although this test has also been applied to ESC rights under the South African Bill of Rights, in South Africa, relevant considerations have not been expressly provided in the Bill of Rights, but have instead been developed by the courts.

South African Bill of Rights model

37. ESC rights protected by South Africa's Bill of Rights include the right to housing, the right to health care, food, water and social security, children and education.²⁵

38. The articulation of each of these rights is tailored to recognise its unique features, including obligations it gives rise to and any qualifications and/or limitations which may be appropriate and necessary. For example, the right to housing and the right to health care, food, water and social security are articulated as follows:

26. Housing

1. Everyone has the right to have access to adequate housing.

2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

27. Health care, food, water and social security

1. Everyone has the right to have access to
   a. health care services, including reproductive health care;
   b. sufficient food and water; and
   c. social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

3. No one may be refused emergency medical treatment.

39. Each right in the South African Bill of Rights is unpacked, addressing separately and each component obligation. In respect of the rights re-produced above, the following obligations can be identified:

   a. an immediately enforceable 'negative' obligation: that is, in the absence of demonstrable justification, retrogressive measures in respect of (for example) the right to access housing should not be taken;
   b. a 'positive' obligation which is subject to the qualifications of reasonableness, available resources and progressive realisation: that is, the state must take ongoing positive steps towards realizing access to housing, but only to the extent that such steps are reasonable and within available resources; and
   c. reinforcement of the immediately enforceable 'negative' obligation to provide a minimum obligation or safety net: that is, the state has a minimum obligation to protect against the creation of crisis or emergency situations, for example, through arbitrary eviction.

40. Learnings which can be drawn from the South African experience are discussed further below. However, it should be noted that principles have been developed by the South African Constitutional Court to assess the reasonableness of measures taken by the state, providing clarity and consistency to the interpretation of this obligation.

   ACT ESCR Project model

41. Similar to the approach adopted in the South African Bill of Rights, the model proposed by the ACT ESCR Project recommends that ESC rights be articulated individually in terminology consistent with that of international law.

42. However, the ACT ESCR Project takes a different approach to the articulation of the progressive realisation qualification. It is likely, however, that the practical effect of this contrasting articulation would be very similar. For example, the ACT ESCR Project proposes the right to housing be articulated as follows:

   **27A Right to adequate housing**

1. Everyone has the right to have access to adequate housing.

2. Aspects of this right that are not subject to progressive realisation include the following:
   a. everyone is entitled to enjoy this right without discrimination;
   b. no one may be unlawfully or arbitrarily evicted from his or her home;
   c. no one may have an essential utility service to his or her home unlawfully or arbitrarily withdrawn.
3. In this section:

**essential utility service** means a utility service under the *Utilities Act 2000*.

43. It proposes the qualification of progressive realisation as follows:

28A **Territory to progressively realise economic, social and cultural rights**

1. The Territory must take reasonable measures, within its available resources, to progressively achieve the full realisation of economic, social and cultural rights.

2. In deciding whether reasonable measures have been taken, all relevant factors must be considered, including the following:
   a. the availability of the Territory’s resources;
   b. whether the measures are likely to assist in progressively achieving the full realisation of the economic, social or cultural right;
   c. whether the measures include emergency relief for people whose needs are urgent;
   d. whether the public was appropriately consulted and effectively informed about the measures;
   e. that a wide range of measures may be taken to progressively achieve the full realisation of the economic, social or cultural right.

3. To the extent that aspects of economic, social and cultural rights are not subject to progressive realisation, those aspects may be subject only to the limits under section 28.

44. The following obligations can be identified in the articulation proposed by the ACT ESCR Project:

a. a ‘positive’ obligation which is subject to the qualifications of reasonableness, available resources and progressive realisation: that is, the state must take ongoing positive steps to realize access to housing, but only to the extent that such steps are reasonable and within available resources; and

b. an immediately enforceable ‘negative’ obligation in respect of certain aspects of the right: that is, in the absence of demonstrable justification, the state must ensure certain minimum obligations and non-discrimination.

45. This approach also provides more detailed guidance regarding the considerations relevant to assessing the reasonableness of measures taken, and reinforces the entitlement to non-discrimination. However, in the proposed form, the progressive realisation qualification is applied to all ESC rights, which may not be appropriate having regard to the scope and content of each right.

The South African experience: direct constitutional protection of ESC rights

46. ESC Rights have been expressly protected in South Africa through a Constitutional Bill of Rights since 1996. Commonly described as a ‘transformative’ constitutional, it seeks to facilitate a fundamental and effective departure from South Africa’s history of colonial rule, injustice and socio-economic divisions. It is widely regarded as the leading domestic

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approach to the protection and promotion of ESC rights, and provides guidance which is useful and applicable to the Victorian context.

47. As noted above, ESC rights are incorporated in the same manner as civil and political rights, with any qualifications built into the articulation of individual rights. The South African Bill of Rights includes a general limitations clause substantially similar to that provided by section 7 of the Charter, to which ESC rights are subject.

48. The following outcomes and benefits of the approach adopted in South Africa can be identified:

a. by framing ESC rights as 'the right to have access to', that the realisation of these rights is substantially within the public domain is implicitly recognised;²⁷

b. courts are conscious of both the separation of powers and the scope and extent of courts' functions and seek to respect those boundaries - indeed leading academic Sandra Liebenberg has observed that protection of ESC rights appears to be deepening, rather than undermining, participatory democracy;²⁸

c. the sophisticated articulation of ESC rights seeks to ensure that effective, achievable and long-term progress towards realisation of these rights is achieved, whilst also maintaining a 'safety net' to address urgent need;

d. deprivation of existing enjoyment of rights has been found to require the most stringent justification;²⁹

e. in relation to the application of the requirement that 'reasonable measures' be taken to progressively achieve ESC rights:

   i. criteria have been developed which preserve the role of parliament and respect the separation of powers between the three arms of government;³⁰

   ii. courts have found it inappropriate to enquire into whether other or more favourable measures could have been taken, or whether public money could have been better spent;³¹

   iii. courts have emphasised that the state can adopt a range of measures to meet its obligations;³²

   iv. the concept of 'minimum core obligations' has been rejected in respect of the assessment of reasonableness - the courts found that it was unable to specify the content of a minimum core obligation given the diversity of needs confronting different groups, and that the adjudication of minimum core obligations was inconsistent with the role and competencies of the judiciary;³³

²⁹ See for example: Jattha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (1) BCLR 78 (CC).
³⁰ Government of the Republic of South Africa v Grocott's World Media Group 2000 (11) BCLR 1169 (CC), [40]-[43]; Minister of Health and Others v Treatment Action Campaign and Ors (1) 2002 (10) BCLR 1033 (CC), [123].
³¹ Government of the Republic of South Africa v Grocott's World Media Group 2000 (11) BCLR 1169 (CC), [41].
³² Ibid.
³³ Ibid, [33]; Minister of Health and Others v Treatment Action Campaign and Ors (1) 2002 (10) BCLR 1033 (CC), [37]-[38].
v. the reasonableness review approach has the advantage of being flexible, context-sensitive and providing discretion to elected branches of government;\textsuperscript{34}

f. In relation to the qualification that states take measures within available resources:

i. this qualification effectively addresses the concern that ESC rights may be resource-intensive;

ii. it has been held to imply that the state’s obligation does not require more than its available resources;\textsuperscript{35}

iii. it has the effect that the state’s resources will be an important consideration in determining whether measures taken were ‘reasonable’;\textsuperscript{36}

iv. South African courts have been reluctant to engage with budgetary issues,\textsuperscript{37} however, this should not be understood to imply abdication by the judiciary of its duties;

g. In relation to the qualification that certain obligations be subject to progressive realisation:

i. this qualification recognises that full enjoyment of certain rights cannot be achieved immediately, or necessarily within a foreseeable period of time;

ii. progressive realisation does not deprive an obligation of meaningful content but rather provides necessary flexibility – the Constitutional Court adopted CESC\textsuperscript{R}’s approach to ‘progressive realisation’ which states:

[T]he fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real work and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in light of the overall objective, indeed the raison d’être of the Covenant which is to establish clear obligations for States parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.\textsuperscript{38}

h. international jurisprudence has provided useful guidance to the interpretation and application of rights; however, as in Victoria in respect of the Charter, courts have exercised discretion and judgment in determining the extent to which the reasoning underlying international approaches can be directly applied within their own jurisdiction.

49. Although ESC rights are protected in South Africa through a constitutional, rather than legislative, mechanism, I consider that many of the learnings which can be drawn from the South African experience provide relevant guidance for the development of the Charter. In

\textsuperscript{34} See discussion in L Chenwi, ‘Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions’, Human Rights Law Review 8:1 (2008), 105.

\textsuperscript{35} Government of the Republic of South Africa v Grooteboom 2000 (11) BCLR 1169 (CC), [46].

\textsuperscript{36} L Chenwi, ‘Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions’, Human Rights Law Review 8:1 (2008), 123.

\textsuperscript{37} Soobramoney v Minister of Health, KwaZulu-Natal 1997 (12) BCLR 1696 (CC).

\textsuperscript{38} United Nations Committee on Economic, Social and Cultural Rights in General Comment No 3 (Fifth session, 1990) The nature of States parties obligation (art 2(1) of the Covenant), UN doc. E/1991/23 at [9].
particular, it should be noted that the South African and Victorian legal systems share a number of significant commonalities, including their common law bases.

Inclusion of self-determination rights

50. The inclusion of self-determination rights in the Charter is referred to in s44(2) of the Charter and identified as a matter for consideration in this inquiry in the Terms of Reference.

**Recommendation 5:** That further consideration be given to the inclusion of self-determination rights in the Charter, in consultation with Indigenous Victorians.

51. I strongly support, in principle, the inclusion of self-determination rights in the Charter.

52. I believe that the form of such rights should be developed and determined in consultation with Indigenous Victorians, recognising the diversity of their needs, goals, aspirations, identities and cultural practices.

Creation of a free-standing cause of action

53. Consideration of the creation of a free-standing cause of action is relevant to the following matters included in the Terms of Reference:

- the effects of the Charter on the availability to Victorians of accessible, just and timely remedies for infringements of the Charter; and
- options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria.

**Recommendation 6:** That a free-standing cause of action be included in the Charter.

54. A free-standing cause of action should be included in the Charter, which operates in addition to and in conjunction with other available remedies.

55. I consider that the inclusion of a free-standing cause of action in the Charter would improve the protection of rights in Victoria by better enabling access to remedy by victims of human rights infringements. Without access to effective remedy, human rights cannot be fully realised.

56. The omission of a free-standing cause of action in the Charter inhibits access to effective remedy by victims of human rights infringements because:

- a. the current complexity of section 39 creates confusion amongst claimants, legal advisors, courts and other stakeholders regarding the circumstances in which remedy may be available;
- b. the operation of section 39 combined with the absence of a free-standing cause of action effectively (and arguably arbitrarily) discriminates between claimants who have a non-charter cause of action, and those who do not.

57. The creation of a free-standing remedy is unlikely to create an avalanche of litigation. The four years of the Charter's operation to date have demonstrated that only a small number of claims have been brought before the courts, and the creation of a free-standing cause of action is unlikely to significantly alter this.
Overall benefits of the Charter

58. As Australians, and no less as Victorians, many of us like to think the notion of 'a fair go' surrounds and infuses our culture, our actions and our interactions.

59. But 'a fair go' does not describe the experience of, or opportunities afforded to, many within our community.

60. The Charter provides us with a framework and mechanism through which we can work towards making 'a fair go' – that is, respect, dignity and equality of both opportunity and participation – a reality for all in Victoria.

   a. By facilitating a dialogue between elected and judicial branches of government, and other stakeholders, the Charter enables deep and lasting changes to our approach to decision and policy making to be effected.

   b. By setting out clearly the rights of Victorians and the responsibilities of government and other public authorities, expectations and obligations have been clarified, providing a point of reference for dialogue, engagement and change.

61. The Charter doesn't provide a bandaid solution, or a quick fix. But it isn’t supposed to. Effecting real change and addressing deep-seated and complex issues in a diverse society cannot be achieved overnight.

62. I feel strongly that the Charter has provided the means and the space through which we can begin, and indeed have begun, to work towards these goals.

63. I therefore urge SARC to recognise what has been achieved to date because of the Charter, and to consider ways in which it can be strengthened to that we can continue to use it, seeking that 'a fair go' become the lived experience of all in Victoria.