Review of the *Charter of Human Rights and Responsibilities Act 2006*

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1. ABOUT WOMEN'S HEALTH VICTORIA

Women's Health Victoria is a statewide women's health promotion, information and advocacy service. We are a non-government organisation with most of our funding coming from various parts of the Victorian Department of Health. We work with health professionals and policy makers to influence and inform health policy and service delivery for women.

Our work at Women's Health Victoria is underpinned by a social model of health. We are committed to reducing inequities in health which arise from the social, economic and environmental determinants of health. These determinants are experienced differently by women and men. By incorporating a gendered approach to health promotion work that focuses on women, interventions to reduce inequality and improve health outcomes will be more effective and equitable.

Women's Health Victoria welcomes the opportunity to respond to this important consultation. Our vision is for a society in which there is an accepted approach to health that is empowering and respectful of women and girls; one that recognises the importance of gender in determining health outcomes and utilises a sound gender analysis in policy making and in health and community service design. Human rights are an important step towards reaching this goal.

2. EXPANSION OF THE CHARTER TO INCLUDE THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Women's Health Victoria believes that the International Covenant on Economic, Social and Cultural Rights should be incorporated into the Victorian Charter of Human Rights and Responsibilities Act 2006 (the Victorian Charter). There is strong evidence that legal protection of human rights is an important factor contributing to their practical realisation.

Economic, social and cultural rights are well established internationally, universally tested and legally tested.

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*See also Australian Public Service Commission. 2007. Changing behaviour: A public policy perspective, which found that “carefully planned, comprehensive, long-term approaches encompassing education and information, legislation and restrictive measures” are the most effective in producing normative and behavioural change.*
2.1. Indivisibility of human rights

The Universal Declaration of Human Rights does not distinguish between civil and political rights, and economic, social and cultural rights. The United Nations (UN) consistently reaffirms the indivisibility of civil and political rights and economic, social and cultural rights². The UN Committee for Economic, Social and Cultural Rights stated in 1993:

Violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights³.

Women's Health Victoria believes that the International Covenant on Economic, Social and Cultural Rights (ICESCR) should be incorporated into the Victorian Charter.

RECOMMENDATION: The Victorian Charter should be expanded to reflect the indivisibility and interdependence of civil and political rights and economic, social and cultural rights by incorporating the International Covenant on Economic, Social and Cultural Rights.

2.2. Economic, social and cultural rights

Economic, social and cultural rights are those rights that are necessary to meet basic human needs such as the right to food, water and shelter, the right to health, to education, to employment and to social insurance. They are a powerful way of redressing inequality and disadvantage and the Victorian Charter should incorporate these alongside civil and political rights.

Australia has ratified the International Covenant on Economic, Social and Cultural Rights and incorporating some if not all of these rights into the Victorian Charter would be an important way of meeting our international obligations⁴.

For example, the right to an adequate standard of living and the right to health both have the power to make a tangible difference to the lives and experiences of Victorian women. It is easy to see that violations occur across Victoria every day, yet without these rights, other rights cannot be fully enjoyed.

A number of countries and regions have included economic, social and cultural rights in their human rights instruments. These include Quebec⁵, South Africa⁶, Finland⁷, Norway and India⁸. The Charter of Fundamental Rights of the European Union also contains economic, social and cultural rights⁹.

2.3. Reasons for including economic, social and cultural rights

Economic, social and cultural rights can strengthen our democracy and ensure the participation and empowerment of Victorians. They are not vague and aspirational as some argue¹⁰. It is a myth that economic, social and cultural rights are not as urgent or important as civil and political rights. For people without adequate housing or food, these needs are immediate and may impinge on their ability to exercise civil and political rights effectively.
Economic, social and cultural rights have been argued to be matters of government policy and not suitable issues for judges to decide on. The UN Committee on Economic, Social and Cultural Rights, however, has clearly stated that to prevent judges from deciding on these issues is to ‘drastically curtail the capacity of courts to protect the rights of the most vulnerable and disadvantaged groups in society’.[11]

Economic, social and cultural rights can be justiciable (that is, they give a right of action in the courts for individuals whose rights have been violated). Experience in other parts of the world, such as the Inter-American Court on Human Rights, demonstrates that the justiciability of rights is about reinstating rights. Femia Tinta notes:

the reality of international law has shown that artificial separations of the two sets of rights do not occur in real cases...rights are intertwined and interwoven[12].

Widespread public support for economic, social and cultural rights exists. Salvaris notes a number of Australian surveys in which respondents were asked to rank a selection of rights. Economic, social and cultural rights such as the right to education, health, work and a decent standard of living were consistently high on the list[13]. There is strong community support for the inclusion of economic, social and cultural rights in the Charter[14]. The National Human Rights Consultation found that economic and social rights ‘matter most to Australians, and they matter most because they are the rights at greatest risk, especially for vulnerable groups in the community’[15].

It is our view that the indivisibility of human rights should be respected. All economic, social and cultural rights are important, but Women’s Health Victoria believes that the following rights in particular should be included in the Victorian Charter:

- Article 11 ICESCR: the right to an adequate standard of living, including adequate food, clothing and housing and the continuous improvement of living conditions
- Article 12 ICESCR: the enjoyment of the highest attainable standard of mental and physical health

RECOMMENDATION: The Victorian Charter should include the right to health and the right to an adequate standard of living as these rights would help to eradicate discrimination, poverty and violence against women.

2.4. The right to an adequate standard of living

This right is an important way of ensuring that inequality of economic participation and disparities in living standards and housing options for women are addressed by governments.

A right to an adequate standard of living addresses how:

- Economic inequality is a central factor of women’s lives that affects their experiences of independence and disadvantage.
- Poverty and a lack of housing options trap women in situations of violence.
These factors affect the capacity of women to access and enjoy all the human rights available to them. The Victorian Charter should be used to challenge discrimination, acknowledge the role of women as unpaid carers and comprehensively tackle violence against women by ensuring that housing options and economic independence are strengthened and maintained.

2.5. The right to health

The World Health Organisation Commission on Social Determinants of Health recommends an approach to health that addresses the social determinants of health, including poverty, gender, race, early life experiences, social exclusion and conditions of work. This is reiterated by the UN Special Rapporteur on the Right to Health from 2002 to 2008, Paul Hunt, who stated that the right to health encompasses not only access to healthcare, but also the underlying determinants of health. Participation, empowerment and accountability all intersect with the right to health. It is the right to have opportunities to be healthy.

This understanding of the right to health would ensure the development of policies that address the structural and social determinants of health. A range of issues that impact on the health of Australian women could be considered including violence against women, discrimination, economic participation and social exclusion.

The inclusion of the right to health in the Charter would require government to take this right into account when drafting legislation and policy. This would be a powerful and transformative document as it would provide a framework that acknowledges and addresses the intersection between health, inequality and injustice. Incorporation of the right to health would also offer a consistent approach with the inclusion of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), as detailed below.

3. EXPANSION OF THE CHARTER TO INCLUDE THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) recognises that women’s civil and political rights are inherently linked to their economic and social development. Rights under CEDAW are considered indivisible from the civil and political rights, as detailed in 2.1 above. For this reason, CEDAW should be incorporated into the Victorian Charter.

In practice, this would involve assessment to ensure that the broad principles of the Charter are consistent with CEDAW, and inclusion of specific rights that are relevant to women. Women’s Health Victoria believes that these are best represented in:

- Article 5 CEDAW: Sex Role Stereotyping and Prejudice
- Article 12 CEDAW: Health

These articles reflect items that are not included in the Charter as it currently stands. Elements of these rights that are unique to women’s experiences are detailed further below.
3.1. Sex role stereotyping and prejudice

Women are subject to significant sex role stereotyping and prejudice. The Portrayal of Women Advisory Committee identified a number of issues in relation to the images of women in outdoor advertising. These include:

- Failure to represent the diversity of women in terms of body size and shape, as well as race, sexuality, disability and religion.21
- Use of women’s bodies and body parts to sell products. For example, use of images which only show parts of women’s bodies or depictions of women as inanimate objects for consumption.22
- Association between women with sex. Women are represented as sexual objects and/or as sexually available.23

These issues apply not only to outdoor advertising, but in relation to advertising and music videos more broadly. Images of this nature impact on community perceptions of women, and:

... perpetuate[s] and reinforce[s] stereotypes, encourage[s] negative views of women's status in society, and foster[s] attitudes about women and sex that are less than positive.24

This can manifest in negative self-esteem and body image among women and girls, and promotes acceptance of images that are either violent and/or sexually explicit.25 Sex role stereotyping is different to discrimination, which is included in the Victorian Charter. Stereotyping incorporates objectification, which occurs when:

...a woman's sexual parts or functions are separated out from her person, reduced to status of mere instruments, or else regarded as if they were capable of representing her. To be dealt with in this way is to have one's entire being identified with the body...26

The current system of self-regulation in advertising and classification does not provide an independent or rigorous approach to these issues. To address these issues in a targeted manner, Women’s Health Victoria believes that the inclusion of Article 5 in the Charter would go some way to address the absence of effective industry self-regulation, and would establish a broad social responsibility in relation to sex role stereotyping and prejudice.

3.2. Health

3.2.1. Sexual and reproductive health

Australia has an obligation to implement the principles of CEDAW. Article 12 requires that measures be taken to ensure ‘on a basis of equality of men and women, access to health care services, including those related to family planning’.27

Sexual and reproductive health form part of the right to health. The UN Committee on Economic, Social and Cultural Rights has stated in its General Comments on the Right to the Highest Attainable Standard of Health that women’s health must be promoted throughout their lifespan in an effort to eliminate discrimination against women. Sexual and reproductive health is part of that goal.28 The UN Factsheet on the Right to Health asserts that:
States should enable women to have control over and decide freely and responsibly on matters related to their sexuality, including their sexual and reproductive health, free from coercion, lack of information, discrimination and violence.\textsuperscript{20}

Women must be free to make decisions regarding their fertility, including decisions about when and whether to have children.

The Beijing Declaration, which stemmed from the Fourth UN Conference on Women in 1995, unequivocally affirms that ‘the right of all women to control all aspects of their health, including their own fertility, is basic to their empowerment’.\textsuperscript{30} This is echoed by the Public Health Association of Australia, which states that control of fertility is crucial to a woman’s ability to maintain her health.\textsuperscript{31}

Access to accurate, timely and unbiased information about sexual and reproductive health, sexual relationships and contraception is critical in supporting both women and men to make informed decisions. Evidence demonstrates that comprehensive sexual and reproductive health education and access to a variety of effective contraceptive choices help lower the rate of unplanned pregnancies.\textsuperscript{32}

4. **ESTABLISHING AN INDEPENDENT CAUSE OF ACTION**

The Victorian Charter must provide accessible, affordable and effective remedies for breaches of human rights. The mere availability of administrative mechanisms rather than binding remedies ‘cannot be considered an effective remedy’.\textsuperscript{30} There is strong community support for stronger remedies and introduction of an independent cause of action.\textsuperscript{33}

Section 39 of the Victorian Charter, which relates to legal proceedings under the Charter, is unnecessarily complex and unworkable. It should be replaced with a provision that:

- Establishes a free-standing cause of action for breaches of protected human rights which is justiciable and enforceable in the appropriate court or tribunal, including the Victorian Civil and Administrative Tribunal;\textsuperscript{5} and
- Empowers the court or tribunal to grant such relief or remedy, or make such order, within its powers, as is ‘just and appropriate’, including making an award of damages where appropriate.\textsuperscript{5}

A review of the ACT’s Human Rights Act 2004 highlighted that the introduction of a new right of action for breach of human rights by a public authority has not resulted in a flood of litigation. In 2009, there had been only one application under s 40C to the ACT Supreme Court.\textsuperscript{34}

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\textsuperscript{20} While administrative mechanisms, such as an Ombudsman, are important components of an effective framework of human rights protection, ‘hortatory’ remedies ‘cannot be considered an effective remedy’. See, for example, Brough v Australia, UN Doc CCPR/C/86/D/1154/2003, [8.7]; C v Australia, UN Doc CCPR/C/76/D/909/1999, [7.3]. Further, many non-government ‘public authorities’ bound by the Victorian Charter are not subject to the jurisdiction of the Ombudsman or other Victorian complaint and dispute resolution bodies in any event.

\textsuperscript{21} The ICCPR enshrines the right to an ‘effective remedy’ which requires the availability of accessible, enforceable, judicial remedies: ICCPR arts 2(3)(b) and (c); Arhuaco v Columbia, UN Doc CCPR/C/56/D/612/1995, [5.3]; Manfried Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (2nd ed; 2005), 64.

\textsuperscript{22} The right to an effective remedy requires and ‘generally entails’ appropriate compensation. See, for example, Human Rights Committee, General Comment 31, [16]; cf section 39(3) of the Victorian Charter.
Effective legal remedies must also remain available in relation to acts or decisions of public authorities that are made unlawful by virtue of section 38 of the Victorian Charter.

In addition to providing for judicial remedies, the Victorian Charter should be amended to empower the Victorian Equal Opportunity and Human Rights Commission to receive and conciliate human rights complaints using a similar process to that available for discrimination complaints under the Equal Opportunity Act 2010 (Vic).

This would establish the authority of the Charter in its own right and provide Victorians with stronger protections from human rights abuses.

**RECOMMENDATION:** The Victorian Charter should incorporate an independent cause of action.

**5. EFFECT OF THE CHARTER ON THE PROVISION OF SERVICES AND THE PERFORMANCE OF OTHER FUNCTIONS BY PUBLIC AUTHORITIES**

Consultation indicates that the Charter has contributed to greater transparency and dialogue in law making\(^{35}\). While the Charter provides processes that support transparency in the development and consideration of statutory provisions, it remains unclear how the Charter is implemented by the government and public authorities in some elements of their role. For example, it is not clear how the Charter is used in the development of public policy. Some policies make specific reference to the Charter, while others do not.

While the Charter is unlikely to have an impact on all elements of public policy, it is recommended that a more transparent approach is developed to make public how the Charter has been considered with reference to new policies that are developed. This would serve to maintain public confidence in application of the Charter, and bring to light the human rights considerations that Government have made during the process of policy development.

**RECOMMENDATION:** Implement a more transparent application of the Victorian Charter during the policy making process.

**6. OVERALL BENEFITS OF THE CHARTER**

**6.1. Unique approach to human rights protection**

Australia is the only liberal democracy in the world that does not have a bill of rights, charter or human rights act\(^{36}\). As such, the Victorian Charter of Human Rights and Responsibilities provides a unique and essential framework for human rights in Victoria. It instills a human rights culture in a meaningful and practical way at all tiers of Government, and throughout society.

**6.2. Public awareness and dialogue on human rights**

Part of the value of the Charter is in creating public dialogue around human rights. Consultation shows that 74% of organisations surveyed indicated there was a growing interest in a community dialogue about human rights in Victoria. This is demonstrated in initiatives like the ‘Everyday people, everyday rights’ campaign by the Victorian Equal Opportunity and Human Rights Commission\(^{37}\). This shows how human rights apply in everyday life and how subtle breaches can have devastating consequences. It provides strong evidence for the need for the Victorian Charter.
6.3. Cultural shift within government

Findings from community consultations indicate that the Victorian Charter is perceived to have helped bring about a positive cultural shift in government, especially at senior and strategic levels. Furthermore, particularly among organisations, the Victorian Charter was credited with delivering better, fairer outcomes for Victorians. The human rights approach requires a significant shift and a new way of working for Government. This will require long-term cultural change, but these outcomes demonstrate that the Victorian Charter is making real progress in the way human rights are considered and responded to.

6.4. Essential framework for human rights

We are fortunate enough to live in a country where deliberate breaches of human rights are rare. A human rights culture is encouraged by the Victorian Charter. It articulates the potential for injustice to marginalised and disenfranchised groups, it provides a language to understand that injustice, and avenues for redress. It also ensures that the principles of freedom, respect, equality and dignity are encouraged and aspired to.

References


