Submission to the Inquiry into the Charter of Human Rights and Responsibilities

INTRODUCTION
1. This submission to the inquiry into the Charter of Human Rights and Responsibilities will address the two following sections of Section 44 of the Charter which forms the Terms of Reference:
   Section 44(2)(a)
   Whether 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
   Section 44(2)(d)
   Whether 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.

THE INCLUSION OF ADDITIONAL RIGHTS IN THE CHARTER
2. The Charter should be amended to Include the human rights which Australia is obligated to respect and protect under international law. This includes, but is not limited to, the human rights enshrined in:
   (i) the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
   (ii) the Convention on the Rights of the Child (CRC); and
   (iii) the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

3. Australia has committed to respecting and protecting the human rights enshrined in the ICCPR, CRC and CEDAW by signing and ratifying these treaties. Consequently, the obligations to protect the human rights contained within these treaties is binding on Australia under international law. In good faith, as a responsible member of the United Nations, and as an important member of the international community, Australia must fulfil these obligations.

4. The Victorian Government must also, in good faith to and as a representative of the people of Victoria, seek to further the principles upon which the Charter is founded. The Preamble of the Charter states that the Charter "recognis[es] that all people are born free and equal in dignity and rights" and is founded upon the principle that "human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom". The fulfilment of these principles falls significantly short if the Charter is mainly limited to civil and political rights. For the Charter to uphold the principles upon which it is founded, the Charter must protect all human rights – civil, political, economic, social and cultural. In addition, the Charter must specifically protect those members of society who continue to face barriers to equality or are more vulnerable to human rights violations, such as women, children, Indigenous Australians, people with disabilities, refugees and asylum seekers, and gay, lesbian, bisexual and transgender people.

Economic, social and cultural rights
5. The Charter should be amended to include economic, social and cultural rights. These rights are enshrined in the ICESCR and include, but are not limited to, the right to an adequate standard of living including adequate food, clothing and housing, the right to the highest
standard of physical and mental health, the right to education and the right to take part in cultural life.

6. The reasons for incorporating economic, social and cultural rights into the Charter include the following:
   a. It has long been recognised that all human rights – civil, political, economic, social and cultural – are interdependent, indivisible and interrelated. All human rights are interdependent and interrelated. The ability to fully enjoy civil and political rights is dependent on the fulfilment of economic, social and cultural rights. For example, the right to freedom of peaceful assembly cannot be meaningfully enjoyed if one is deprived of the right to adequate food or housing. All human rights are indivisible. All human rights – civil, political, economic, social and cultural – exist together as one coherent whole and should not be placed in a hierarchical order from ‘most important’ to ‘least important’. It cannot be argued that civil and political rights, such as the right to a fair hearing, are more important than economic, social or cultural rights, such as the right to health or housing. This is because all human rights are equally needed to uphold human dignity, equality and freedom.
   b. All human rights – civil, political, economic, social and cultural – are enshrined in the ‘international bill of rights’. Australia is obligated to respect, protect and uphold all these rights under international law and to not ‘pick and choose’ which rights deserve greater promotion than others.
   c. The protection of economic, social and cultural rights is important to Victorians. For many ‘everyday’ Victorians, it is economic, social and cultural rights which impact most on their daily lives. This has been demonstrated by a number of reports, such as the consultation by the Victorian Equal Opportunity and Human Rights Commission (‘the Commission’) which found that “for a large number of participants, the core economic, social and cultural rights... sat in a special category of rights that were perceived to be ‘fundamental’ because they were felt to be ‘essential’ for survival”.¹ Similarly, the National Human Rights Consultation stated that economic, social and cultural rights were what “matter[ed] most to Australians, and they matter most because they are the rights at greatest risk, especially for vulnerable groups in the community”.²

7. It is misleading to argue that economic, social and cultural rights should not be included because the fulfilment of all economic, social and cultural rights are unachievable or place an excessive burden on the state.

8. First, it is inaccurate that the protection of civil and political rights is less resource intensive than the protection of economic, social and cultural rights. The protection of some civil and political rights requires significant economic resources and positive actions by the state. For example, the right to a fair hearing requires the establishment and maintenance of a judicial system. It requires the physical infrastructure of multiple courts, the establishments of fair legal rules and procedures, the education, training, employment and management of staff, the monitoring of the legal process to ensure fairness and consistency, and the provision of legal aid. Even examples of civil and political rights that are generally considered to be ‘cost free’ require resources and positive actions by the state. For example, the right to freedom of peaceful assembly requires the establishment of rules and regulations that enable peaceful assemblies to be organised, bureaucracies to administer the regulations (e.g. permits), the establishment and training of law enforcement agencies to support peaceful

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assemblies and to prevent others from attempting to disperse peaceful assemblies, the potential redirection of traffic or barricading of public space, and potentially, if the peaceful assembly turns violent, the use of the healthcare system, law enforcement agencies and/or the judicial systems. Therefore, the fulfilment of civil and political rights may be as resource intensive as upholding economic, social and cultural rights. Hence, this does not constitute a sufficient reason to deny including economic, social and cultural rights among the rights to be protected in the Charter.

9. Second, Australia's international obligations do not require Australia to fulfil all economic, social and cultural rights immediately. Instead, the State is required to undertake steps with a view to progressively realising economic, social and cultural rights within the maximum of its available resources and including the adoption of legislative measures. The opportunity for Victoria to easily take such a 'step' has presented itself with the review of the Charter. As the commitment undertaken concerns the progressive realisation of economic, social and cultural rights, the onus on the state is not as onerous as its critics would argue. Furthermore, as a state within a country of relative wealth, Victoria should be able to sufficiently guarantee at least the minimum international standards in regards to fulfilling economic, social and cultural rights.

**Women's Human Rights**

10. The Charter should be amended to include specific provisions which protect the human rights of women as enshrined in CEDAW. This includes the elimination of discrimination against women and the embodying of the equality between men and women in all legislative instruments and processes (Article 2); the development and advancement of women in all fields including political, social, economic and cultural fields (Article 3); taking appropriate measures to modify social and cultural patterns of conduct of men and women and the elimination of prejudices and customary practices based on the idea the inferiority or superiority of either of the sexes or on stereotypes roles for men and women, including within the family (Article 4); the ending of the trafficking of women and the prostitution of women (Article 5); the right to equality in regards to employment opportunities and job entitlements, the prevention of discrimination in employment based upon pregnancy, and supporting social services to enable women to combine family obligations and work responsibilities (Article 11); the right to healthcare including family planning (Article 13); and the equality of women and men in relation to marriage (Article 16).

11. Some of the reasons for including women's human rights in the Charter are:
   a. Women continue to be in a less powerful position compared to men in many key aspects of society — economically, politically, socially and culturally — and therefore, women are more vulnerable to human rights violations. For example, women continue to be underrepresented in government and at senior levels in many areas of employment; women are more financially vulnerable for a number of reasons, including pay inequity, traditional 'female-orientated' professions being less well remunerated, and taking time off paid work to start and care for families which affects women's short-term and long-term financial security through decreasing the accumulation of superannuation; women continue to be disadvantaged through stereotypical understandings of women and men, including the perception of women as 'weaker' and as more irrational; and the sexual objectification of women, which in its extreme forms can result in the dehumanisation of women.
   b. Women also experience specific human rights violations related to being women which men do not experience. For example, women experience discrimination based on pregnancy, and women face significantly disproportionate rates of domestic violence and sexual assault.
c. As noted by Professor Hilary Charlesworth, the historical development of human rights has been “defined by the criterion of what men fear will happen to them”. As such, human rights have mainly been concerned with rights within the ‘public sphere’ and have stopped at one’s ‘front door’. However, women have historically been confined to the ‘private sphere’ and it is within the private sphere that women have mainly experienced violations of their human rights and dignity. In addition, the interpretation of human rights has also been influenced by the public/private distinction. For example, the prohibition on torture has traditionally been understood as the actions by or at acquiescence of the state within the public sphere. The understanding of torture has not traditionally included the infliction of severe mental or physical pain or suffering within the private sphere, as may be the case for domestic violence.

12. For the reasons above, it is necessary to establish specific provisions for the protection of women within the Charter.

13. The Charter should also be amended to include provisions to specifically protect other groups in the community that are also more vulnerable to, or experience greater levels of, infringements on their human rights including:
   a. children (through the inclusion of the rights enshrined in the Convention of the Rights of the Child)
   b. Indigenous Australians (through the inclusion of the rights enshrined in the Declaration on the Rights of Indigenous People)
   c. persons with disabilities (through the inclusion of the rights enshrined in the Convention on the Rights of Persons with Disabilities)
   d. refugees and asylum seekers (through the inclusion of the rights enshrined in the Convention Relating to the Status of Refugees)
   e. gay, lesbian, bisexual, queer, transgender and intersex people (through the inclusion of the principles outlined in the UN General Assembly Statement on Human Rights, Sexual Orientation and Gender Identity)

THE AVAILABILITY TO VICTORIANS OF ACCESSIBLE, JUST AND TIMELY REMEDIES FOR INFRINGEMENTS OF RIGHTS

14. The current Charter lacks accessible, just and timely remedies for infringements of the human rights which it protects. The Charter should be amended to provide both judicial and non-judicial remedies for breaches of human rights.

15. The Charter of Human Rights and Responsibilities should be justiciable before the appropriate court or tribunal, including the Victorian Civil and Administrative Tribunal. The judicial protection and enforcement of all human rights – civil, political, economic, social and cultural – will provide an effective means through which to achieve the practical realisation of the human rights protection for individual Victorians and for individuals to seek remedies for breaches of rights.

16. In addition, non-judicial remedies should also be provided. This includes empowering the Victorian Equal Opportunity and Human Rights Commission to conciliate complaints of alleged human rights violations in a similar manner to which the Commission currently

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contributes alleged contraventions of the *Equal Opportunity Act 1995/2010* and the *Racial and Religions Tolerance Act 2001*. This would provide an economical and easy to implement solution to establishing an effective, efficient and accessible remedy to breaches of the Charter.

17. The provision of accessible, just and timely remedies is not only necessary to give real substance to the human rights protected in the Charter, it is also something that is expected by the Victorian community. It does not ‘make sense’ to many members of the Victorian community to have a Charter of Human Rights and Responsibilities if one is not able to seek remedy for violations of those rights. For example, in my current role as Complain Officer at the Commission, I frequently receive enquiries from members of the public who believe their human rights have been breached and who are seeking a remedy. Many are dismayed, disbelieving or angry when they are informed that there is currently no process through which to seek remedies to the human rights violations that they have experienced. Another example comes from my second job as a Teaching Associate at Monash University teaching ‘Human Rights Theory’. When I inform my students that currently there are no processes available for individuals to seek redress for infringements of the human rights in the Charter, many of my students are surprised and disappointed. To many Victorians, the right to seek judicial and non-judicial remedies is not an extra ‘privilege’ but is seen as part-and-parcel of the effective promotion and protection of human rights.

**CONCLUSION**

18. The Charter of Human Rights and Responsibilities has been important as it has placed human rights obligations on the executive, the legislature and the judiciary. In addition, the Charter has contributed significantly to promoting a ‘human rights culture’ in Victoria which is vital for ensuring that Victorians are able to live with dignity, freedom and equality, and to be productive and happy members of the community. The Charter should not be repealed nor should it be amended to weaken the human rights protections that it contains.

19. Nonetheless, the Charter has two main limitations – the exclusion of economic, social and cultural rights and specific human rights protections for women, and the lack of effective remedies for human rights violations.

20. The Charter holds much potential for becoming an exemplary model of human rights protection. Victoria has the opportunity with this inquiry into the Charter to further promote the human rights of Victorians and to set the standard for human rights protection within Australia. This opportunity must be seized.

Thank-you for considering my submission. I look forward to the positive changes ahead.

Kind regards,

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