RECOMMENDATIONS

1. The Right to Self-Determination should be added into the Victorian Charter of Human Rights in order to fully confirm our commitment to respecting indigenous cultures in Victoria. Self-Determination does not imply separating from the state and creating another country.

2. The Charter has been incredibly important to developing a human rights culture. The VEOHRC has established education programs, consultations and mediations that have certainly broadened the scope of human rights in Victoria. We have taken one step forward; it would be completely senseless to take two steps back.

3. The reason why the ICCPR and the ICESCR were previously separated is because of economic issues; these issues can now be controlled as the original reasons were over sixty years ago. The world has changed greatly since. Homelessness (particularly families with children) and persons with a disability will find it greatly advantageous if we were to assist them economically.

4. We have advanced Human Rights in Australia and made Victorian look advanced in comparison to other states. To go backwards would put shame on us domestically and internationally, particularly since we have already made a bad name for ourselves with Asylum Seekers and Refugees. The State Government would be remembered for these reasons.
The *Victorian Charter of Human Rights and Responsibilities Act 2006* is a charter founded on international human rights principles that all people are born free and equal in dignity and rights. Its endeavour is to build a culture of human rights, working as a legal umbrella to ensure that policies and laws are compatible with human rights obligations and standards set out in the charter. It currently protects twenty fundamental human rights visible in the International Convention of Civil and Political Rights (ICCPR), however §44 requires that the charter is reviewed four years following full effect [January 1, 2008] and must consider other relevant human rights obligations that have not yet been incorporated into the charter. These include rights set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (UNCRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the right to self-determination.

Whilst both embody similar principles, significant differences between civil and political rights (CPR) and economic, social and cultural rights (ESCR) also exist, particularly since the latter contains progressive achievements and may require gradual implementation. Accordingly, CPR can easily be protected through statutory legislation whilst ESCR requires more than law to proceed successfully; the process for ESCR to
be realised greatly differs according to the economic environment and the social system. Also, the translation of the broad language used in ICESCR vis-à-vis the economic and social conditions in Victoria is substantially difficult and may require more time and effort than the review affords. The key reason for the existence of two covenants is to avoid any mistaken application of relevant economic, social and cultural rights. In this submission, I shall attempt to highlight the problematic nature of imposing enforceable obligations of economic, social and cultural rights by means of the current review of the Charter of Human Rights and Responsibilities Act 2006.

Mutually Exclusive or Mutually Dependent?

The International Bill of Rights includes the United Nations Declaration of Human Rights (1948), the International Covenant of Economic, Social and Cultural Rights (1966) and its optional protocol, and the International Covenant on Civil and Political Rights (1966) and its optional protocol. The UNDHR is a non-binding declaration following the atrocities of World Wars I & II that recognises equal and inalienable rights of human beings and that the disregard of human rights is the cause for the outrageous acts of violence.\(^1\) Incorporating civil and political rights as well as economic, social and cultural rights, the non-binding status led to the adoption of the two conventions in 1966.\(^2\) The preamble in ICESCR states that it recognises rights derive from the inherent dignity of the

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\(^1\) Preamble, United Nations Declaration of Human Rights.

human person and therefore the right to work in just and favourable conditions, the right to an adequate standard of living, and the right to education are the groundwork reinforcing individual happiness. The ICCPR on the other hand, while containing the same preamble contained in ICESCR has detailed rights such as the right to life, right to liberty and security of person, and right to be treated equally before the court or tribunal.

At stages during the very beginning of drafting the conventions, a schism of views as to whether or not the ICESCR and the ICCPR are mutually exclusive or mutually dependent occurred and whether the two conventions should be treated as separate or remain as one treaty. As an example, the assumption that equality and freedom are both mutually dependent on one another nevertheless contains a paradox that exposes a mutually exclusive phenomenon; providing freedom may result in inequality whilst providing equality may require the sacrifice of freedom.

A strict and mechanical equal distribution between all individuals does not sufficiently take into account the differences among individuals and their situations... With simple equality, personal freedoms are unacceptably limited and distinctive individual qualities insufficiently

\footnotesize{\textsuperscript{2} Article 6 & 7 ICESCR \textsuperscript{3} Article 11 ISECR \textsuperscript{4} Article 13 ICECR \textsuperscript{5} Article 8 ICCPR \textsuperscript{6} Article 9 ICCPR \textsuperscript{7} Article 14 ICCPR

\textsuperscript{9} The drafting of the conventions had been ongoing from 1947 and took 19 years before it was ratified. See the Memorandum by the Secretary-General on the Draft International Covenant on Human Rights and Measures of Implementation, 6th Sess. UN Doc A/C.3/559 (November 5, 1955).}
regarded; in this manner they are in fact unequally regarded.\textsuperscript{10}

Human rights are essentially the adoption of the latter under the auspices that sacrificing some proportional freedoms will nevertheless provide greater individual or moral freedom through social peace and order. The chair of the Human Rights Council in 1947, Eleanor Roosevelt, influenced the decision to divide the conventions into two and provided four reasons for this division.\textsuperscript{11} 1. Time, in particular the time required to develop the economic and social conditions as they are progressive obligations; 2. Legal differences, as civil and political rights can easily be enacted in appropriate legislation; 3. Methods of implementation, for instance civil and political rights had a complaint procedure, whereas economic, social and cultural rights required a reporting procedure; 4. Drafting, whereby a broad language in economic, social and cultural rights required a broad use of language to assist broad objectives and differences in states.\textsuperscript{12}

Thus, civil and political rights can be understood as an individual exercising their right against the state while economic, social and cultural rights can be understood as rights being implemented by the state for the individual. The latter is largely dependent on the economic and social conditions of the state, whereas the former is applied no matter the

\textsuperscript{11} Statement on Draft Covenant on Human Rights, Eleanor Roosevelt, 1951.
http://www.unicode.org/history/biographies/boer.htm - please note that the United States delegation voted in 1948 in the General Assembly against the inclusion of economic, social and cultural rights in the same covenant with civil and political rights. The USA has signed but not ratified the convention of ICESCR till this day.
\textsuperscript{12} Ibid.
conditions. Theorists have often debated that economic, social and cultural rights are positive, resource intensive, progressive and vague while civil and political rights are negative, cost-free, immediate and precise.\textsuperscript{13} The economic conditions of some countries made the ideal of economic, social and cultural rights impossible to implement, however it was accepted that both ICESCR and ICCPR are binding and equally important.\textsuperscript{14} ICESCR requires adequate economic and social conditions that can assist in the realisation of the broad rights present within the convention. The preamble of ICESCR states that: "[T]he ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights."\textsuperscript{15}

Part IV of ICESCR shows that reporting on the measure of adoption and progress relating to the rights set out in ICESCR must be made to the Secretary-General of the United Nations.\textsuperscript{16} This implies that while it is generally accepted that economic and social conditions are significant for the implementation of economic, social and cultural rights into domestic legislation and thus may take time, the progress and reporting of the status of implementation demonstrates that the implementation of ICESCR is still required. It must be understood that with suitable economic and social conditions and therefore economic, social and

\textsuperscript{13} Op. Cit., \textit{Statement on Draft Covenant on Human Rights}
\textsuperscript{14} Preamble ICCPR; please note that ISECAR has the same preamble.
\textsuperscript{15} Article 16 ICESCR
cultural rights, civil and political rights will capture its actual form; protesting political conditions becomes null and void without an education or adequate housing. While ICESCR is broad and complex and certainly contains elements that require a different attitude and method of implementation, ESCR are nevertheless co-dependent on civil and political rights and vice-versa.


The inclusion of economic, social and cultural rights in the Charter was initially avoided and intentionally positioned under §44 so that an effective discussion regarding the possible inclusion could be made at a later date.\textsuperscript{17} On the 19th of April, the current Attorney-General of Victoria, the Hon. Robert Clark announced the terms of reference for the review of the charter. The coalition [Baillieu] government was [in December 2010] officially sworn into power in Victoria following over a decade of Labour governance. Clark surpassed the Hon. Robert Hulls and remains infamous for opposing the existence of the charter. On his website in 2008 whilst member for Box Hill, Clark stated that, "[t]he so-called charter makes Victoria’s legal system worse, not better."\textsuperscript{18} This is a common albeit misguided view that a bill of rights at state or federal level is unnecessary since human rights is already protected by the


\textsuperscript{18} http://www.robertclark.net/news/human-rights-charter-wide-open-to-abuse/
benevolence of parliamentary representatives and the judicial system.\textsuperscript{19} However, several problems arise with this observation. The reliance on common law traditions and the protection by parliamentary representatives may change or weaken over time and therefore without legislative protection can at a later date result in human rights violations, however strongly we deny this probability. In addition, comparisons with other nation-states may show that to a degree our human rights record is certainly good, but it does not necessarily imply that there remains no room for improvement.\textsuperscript{20} Finally, the Australian Human Rights Commission and the Victorian Equal Opportunity and Human Rights Commission prove that there certainly remains not only a deficient culture of human rights in both Victoria and Australia as a whole, but that much more is required in order to really apply human rights both socially, legally and politically. If there is a congestion of issues in the legal system, that is not the fault of the Charter and it is fallacious to state that the Charter is making the system “worse”.

In 2010, VEOHRC held consultations across Victoria through Colmar Brunton Social Research to discuss the review of the Charter and whether the implementation of economic, social and cultural rights should be implemented.\textsuperscript{21} Using the identical treatment model,\textsuperscript{22} the


\textsuperscript{20} For instance, the treatment of Refugees and Asylum Seekers; M61/2010E v Commonwealth of Australia & Ors; M69 of 2010 v Commonwealth of Australia & Ors held that off-shore processing failed to observe the requirements of procedural fairness as set out in the provisions of the Migration Act 1958 (CTH). Also see the “Review of the Power to Proscribe Organisations as Terrorist Organisations” Submission of the Office of the High Commissioner for Refugees, 16\textsuperscript{th} April 2007 relating to anti-terror legislation and proscribing terrorist organisations.


\textsuperscript{22} The model assumes that ESCR and CPR are identical rather than mutually exclusive.
report found that a majority of participants preferred the inclusion of ESCR into the Victorian Charter as “legislative holes” exist without the tools to ensure accountability and transparency. The rights include, “adequate healthcare, adequate housing, adequate education, just and fair conditions of work, and adequate standard of living (particularly with reference to adequate food and clothing).”

Roughly 1/3 of the participants stated that ESCR were already protected by existing safety net mechanisms. Yet, according to a report by the University of Canberra, Australians from a socially and economically disadvantaged position are least likely to enjoy good health. A 2001 population census by the Australian Bureau of Statistics showed that 99,900 persons were homeless in Australia with 23% being families; this has grown in 2006 to 105,000 persons of which 7,483 are families with children. In 2004, only 39.5% of indigenous students completed year 12 compared to 76.8% of non-indigenous. Australia is a country with a high GDP rate per capita yet has an inequitable wealth distributive system.

"Australia is among the 20 countries that spend the most on healthcare relative to Gross Domestic Product (GDP)... measures of health for Indigenous Australians on average sit at the bottom of this scale, below populations from very

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24 Ibid.
25 Ibid., 21
26 Professor Laurie Brown and Doctor Binod Nepal, “Health Lies in Wealth: Health Inequalities of Australians of Working Age,” NATSEM University of Canberra, 2010
poor countries like Guatemala in Latin America, or India and Mongolia in Asia. On average, Indigenous Australians will die 20 years earlier than non-Indigenous Australians. Indigenous women live 65 years on average, while men's life expectancy is only 59 years.\textsuperscript{29}

The broader dimensions of human development and rising income inequality is clearly visible in the United Nations Human Development Report and confirms that the implementation of economic, social and cultural rights is exceptionally slow and perhaps not taken seriously.\textsuperscript{30}

For instance, the United States has continuously attacked the second-class status of economic, social and cultural rights and remains the key western state that has not ratified the convention.\textsuperscript{31} Australia, on the other hand, has signed and ratified the ICESCR yet has never been incorporated into domestic legislation [due to being dualist rather than monist]. Whilst institutional machinery through statutory legislation has been implemented in state and federal law,\textsuperscript{32} statistics show that there still remain many gaps and outdated legislative ambiguities.\textsuperscript{33}

\textsuperscript{29} Ibid. This is vastly different to the panel presentation written by Dr. Sev Odowski “Economic, social and cultural rights in Australia - the roles of HREOC and the corporate sector” at the Australian Human Rights Commissioner to the Asia Pacific Forum meeting in 2001, Hong Kong, Wednesday 11 July 2001 whereby he failed to state the massive difference between universal education between indigenous and non-indigenous persons, even though ABS data was used in his report. This was published in the Australian Human Rights Commission’s website stating that Australia already applied economic, social and cultural rights:


\textsuperscript{33} Victorian Law Reform Commission’s review of the Guardianship Administration Act 1986 shows that processes of implementation are outdated.
The original fears and assumptions that the method of implementation differs between economic, social and cultural rights and civil and political rights have greatly changed in time. The Committee on Economic, Social and Cultural Rights was established in 1985 to carry out the monitoring functions and in 2008 obtained the power to receive and consider communications.\textsuperscript{34}

**Right to Self-Determination and Indigenous Persons**

The right to self-determination is visible in both the ICCPR\textsuperscript{35} and ICESCR\textsuperscript{36} and may be the crucial right that will amalgamate both conventions into the Charter. Article One of both conventions state that, "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."\textsuperscript{37} This is particularly relevant amongst Indigenous Australians who have lobbied for this right since the indigenous civil rights movements in the 1970's.\textsuperscript{38} The United Nations Declaration on the Rights of Indigenous Peoples only recently adopted in 2007 with Australia being one of only four voting against the declaration (only later to reverse their decision following 144 states being

\textsuperscript{34} ECOSOC Resolution 1985/17 and Optional Protocol (GA resolution A/RES/63/117)
\textsuperscript{35} Article 1 ICCPR
\textsuperscript{36} Article 1 ICESCR
\textsuperscript{37} Article 1 ICCPR
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in favour of the declaration), following the mandate in ECOSOC in 2000 that sought to discuss indigenous issues.³⁹

One of the problems facing the right to self-determination is what the process entails when applying this right.⁴⁰ The French, Russian and American revolutions shed light – and instil fear – as to this very process. Only recently, thousands have been killed across the Middle East and North Africa for attempting to initiate the process of self-determination.

"Self-determination is a complex right entailing an internal and an external form... The important point here is that, despite scare-mongering by our political leaders, self-determination does not require political dismemberment of a nation."⁴¹

Martti Koskenniemi states that two different views regarding self-determination are available, the first being classical and the second secessionist.⁴² The former can be applied procedures and institutions of government as a rational choice without necessarily dismembering the society as a whole, whilst the latter is more ideological in nature and expresses its own desire for governance.⁴³ For instance, in 1933 Australia held a referendum so that Western Australia can secede from

³⁹ Resolution 2000/22
⁴³ Ibid.
the Federation of Australia, which ultimately failed though a 2/3 majority of votes had been made,\textsuperscript{44} similarly the 1999 republic referendum as to whether or not Australia should amend the constitution. These can be considered secessionist. Classical examples can be seen through the *Aboriginal Affairs Planning Authority Act 1972 (WA)*.

Once again, the Victorian Equal Opportunity and Human Rights Commission undertook a consultation with the indigenous communities of Victoria regarding the right to self-determination.\textsuperscript{45} It exposed that the right to self-determination was important for most indigenous persons and that the Charter is neither well known nor even applied in Victorian indigenous communities.\textsuperscript{46} The preceding thought relating to the unsuccessful application of indigenous rights is where the relevance of economic, social and cultural rights comes to the fore.

\textquotedblleft The review should acknowledge the level of importance given to the holistic references made to the practice of self-determination in communities and the relevance of the role that potential inclusion in the Charter may fulfil in Indigenous communities across Australia.\textsuperscript{47} \textquotedblright

The principle of self-determination was seen as a process toward decolonisation where marginalised and mistreated communities dominated by a violent colonial regime can finally return to their original

\textsuperscript{44} Susie Ashworth, Rebecca Turner, Simone Egger, *Western Australia*, Lonely Planet, 2004, 20
\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid., 7
social order and determine a life for themselves and their community without interference.\textsuperscript{48} In the concluding observations by the United Nations Human Rights Committee, the statement said: "[t]he Committee is concerned at the situation of homeless persons, in particular indigenous people, who as a result of that condition are not able to fully exercise their rights enshrined in the covenant (arts 2, 26 and 27).\textsuperscript{49}

According to Jayantha Perera, the most common characteristic amongst indigenous communities is their relationship with the land and the centrality of their connection to their territory.\textsuperscript{50} The application of the ICESCR and in particular the right to self-determination confirms the relativism and appreciation of governments that value the culture of the indigenous people and this relationship with the land, assisting with the indigenous relationship to prosper.\textsuperscript{51} Native Title and legislation such as Aboriginal Land Rights Act 1976 (NT) is essentially this, and following the landmark high court case of Mabo v Queensland that rejected the notion of terra nullius or "land belonging to no one" established the Native Title Act 1993 that protects traditional laws and customs particularly with land and water. The Wik decision\textsuperscript{52} shows that native title could co-exist with pastoral leases; however should any inconsistencies arise the grant of the pastoral lease would prevail, leading to the Native Title Amendment Act 1998 (Cth). This created a Native Title Tribunal and changed the provisions on the 1993 act instead promoting 'co-existence' and permits the government to manage land,

\textsuperscript{48} Op. Cit., Self-Determination, Indigenous Peoples and Minorities
\textsuperscript{49} Concluding observations of the Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, CCPR/C/AUS/CO/5 2 April 2009
\textsuperscript{50} Jayantha Perera, International Law and Indigenous Peoples' Rights, Asia Development Bank.
\textsuperscript{51} Ibid.
\textsuperscript{52} Wik Peoples v Queensland (1996) 167 CLR 1
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water and air issues.\textsuperscript{53} It confirms that common law processes, while often supporting the advancement of human rights can, without codification, result in the failure of upholding human rights.

The \textit{Limburg Principles} regarding the implementation of the ICESCR discusses the significance and violations of ICESCR and the equal interdependence with human rights.\textsuperscript{54} It said: "As in the case of civil and political rights, the failure by a State Party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty."\textsuperscript{55} Thus, violations of the covenant occur when human rights are deprived of essential healthcare, shelter and education which are all necessary for one to apply their human rights.\textsuperscript{56} It is for this reason that the consultation undertaken by the Victorian Equal Opportunity and Human Rights Commission with the Indigenous community to apply the right to self-determination as part of the Charter of Human Rights and Responsibilities in order to ensure the inherent cultural respect Victoria has for its indigenous peoples.

\textbf{Conclusion}

It is well known that Australia is the only democratic State in the world that does not have a Bill of Rights. The \textit{Human Rights and

\textsuperscript{54} The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).
\textsuperscript{55} Ibid.
\textsuperscript{56} Ibid.
Responsibilities Charter 2006 is the first in Australia’s history to be enacted and ensure that a culture of equality and rights are established upon the principles of international human rights law. While many declare that human rights in Australia already exists through parliamentary representatives and common law processes, concerns relating to the reliability of good-will without codification of rights or other forms of accountability may lead to an abuse of human rights. The charter has enacted twenty civil and political rights while leaving the possible implementation of economic, social and cultural rights as part of the four-year review. Since the beginning of the establishment of the ICCPR and ICESCR, questions relating to whether both are either mutually exclusive or interdependent have been raised. The differences include the manner in which CPR and ESCR are applied, the latter dependant on the societal structure and economic conditions of the country. Economic rights such as housing does not exist in the charter but it can be useful in establishing better models and policies; rather than a person being forcefully evicted, for instance, a mediator, financial advisor or a social worker can intervene first to establish a positive resolution.

ICESCR stated that, “States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognised herein.”\(^{57}\) This implies that while the implementation of economic, social and cultural rights is gradual, it

\(^{57}\) Article 16 ICESCR
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still requires that the implementation be made and reported accordingly.

If we hold the opinion that the Victorian Charter of Human Rights and Responsibilities is similar to the Universal Declaration of Human Rights [the latter containing both ESCR and CPR], than a combination of both ICESCR and ICCPR can be made to assist in the development of economic, social and cultural rights. However, with the review underway by an Attorney-General who is vocal about his dislike of the charter, perhaps the survival is first required

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United Nations Declaration of Human Rights

International Covenant of Economic, Social and Cultural Rights

International Covenant of Civil and Political Rights


Memorandum by the Secretary-General on the Draft International Covenant on

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ECOSOC Resolution 1985/17 and Optional Protocol (GA resolution A/RES/63/117)