30th June 2011

Mr. Edward O’Donohue, MLC
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002    charter.review@parliament.vic.gov.au

Dear Mr. O’Donohue

I write to make a submission to the SARC on the Reference regarding the review of the Charter of Human Rights and Responsibilities. (The Charter). This submission deals only with aspects of the operation, background and broader context of the Charter and then its prospects for its future. It does not seek to deal with the full terms of reference.

I make this submission as the Member for district of Albert Park. I do not suggest this reflects the position of the State Labor Opposition nor the Australian Labor Party. I make these comments without limiting my role as a Member of the Victorian Parliament or subsequent consideration by the Parliament of any possible future Bill dealing with the Charter.

I do so on the basis of my consultations and experience with those locally in my community and those more broadly who look to the Charter as mechanism to ensure all levels of Government work in a manner that respects the diverse backgrounds, issues, recognized and works to overcome disadvantages and problems that people in Victoria increasingly look to the Charter to assist in.

My experience is that it is the members of the community who are on the margins of accessing government services, who are subject still to having their lifestyle, sexuality or gender identity preferences challenged, who have their physical or social different abilities questioned or those facing lack of access or opportunities as others in the community through to those who are in frequent contact with the Justice system are the ones best able to benefit from the changes in the operation of the government services and systems that the Charter seeks to promote.

In this respect the Charters transformational role to ensure the goals of the justice system and of government services should increasingly be accessible, effective and timely in its operations should not be underestimated. This is particularly the case when it come promoting the issues of our local culturally and linguistically diverse communities, our LGBTIQ communities, older persons, women, those experiencing homelessness and those dealing with the Justice system. It is these groups in particular that the Committee should focus its attention on for reform to the Charter so as to improve and extend its effectiveness as a tool of delivering on its purpose of building a rights cultural in government and delivering better, more accountable and fairer government services.

My experience has also shown that the benefits the Charter can bring to the operation of local services and agencies in ensuring they are aware and responsive to the needs of these marginalized groups. To this end the one clear example in my community is to be found in the efforts of the Victoria Police.
The efforts of successive Inspectors and senior officers through to the ranks locally to be aware of the different rights and contexts of diverse and marginalised groups that make up our community is instructive. That this has been done in the context of a clear recognition of the Human Rights framework in how Police go about building better policing outcomes and safer communities has been a quite success story. This does not mean that Policing has suffered. Indeed the opposite. On any measure the results of Policing locally have been successful. With reduced crime reporting and resource increases and other legislative changes Policing has become more effective through applying a human rights frame to their activities. The role of the Charter in building, informing and guiding the efforts of the Victoria Police locally has been one significant factor.

Based on this experience I support the current Charter. I support its expansion to cover new rights and responsibilities beyond those currently provided for. Specifically I support the extension to include the rights and responsibilities as set out in the legislative review process.

My limited role in exposure to the Act and its consequences, benefits have me convinced that there is much benefit to be gained by the Parliament, to the service and policy arms of Government and to the Courts in having at the forefront of our collective consideration the impact of institutional and operation of the individual and collective rights of their fellow Victorian.

I do so with a firm view that the current Charter has improved the focus and attention of State and Local Governments and their agencies on the idea, application, culture and promotion of Human Rights. Such a reaffirmation of our democratic values is important. This high level commitment to practical measure against which government and institutional activities of Government can be judged is a significant development in the Victorian community. More over it highlights where the Charter can do even better through its expansion and enhancement rather than its winding back.

That this review occurs against the background of the State Government being seemingly determined to wind back the human rights and equity framework of this State should be of concern to the Committee and the Parliament. On the basis of the public comments of the Chairperson of the Inquiry, the stated historical position of the Attorney General and other members of the Government when in Opposition to the existing Charter I trust that the Committees report and the subsequent Government consideration of the Charter will be one that is based on evidence and outcomes rather than the clearly expressed and pre-determined ideological positions of the members of the Government.

The role of SARC in ensuring this occurs is critical. I thank the Committee for its consideration of this matter.

Yours sincerely,

Martin Foley MP
State Labor Member for Albert Park.

Enc.
SUBMISSION TO SARC.

By:

Martin Foley MP   State Labor Member for Albert Park.


The current Charters legislative basis requires it to be reviewed after four years and that such a review is tabled before Parliament by 1 October 2011.

The review is to consider, among other things, whether the Charter should be amended to: include additional human rights, including the right to self-determination and also human rights contained in the International Covenant on Economic Social and Cultural Rights,1 the Convention on the Rights of the Child, and the Convention on the Elimination of all Forms of Discrimination against Women; whether there should be a requirement for mandatory periodic auditing of public authorities to assess compliance with human rights; and include a provision to create an independent cause of action and entitlement to remedies in relation to acts or decisions of public authorities that are incompatible with human rights.

The current reference to SARC reflects that legislative requirement— if a less than complete on in that it opens itself to the accusation of bias and lack of independence from the political debate around the Charter.


I am also indebted to arrange of organizations— including the Human Right and Equal Opportunity Commission of Victoria, the Public Interests Law Clearing House (PILCH), the Law Institute, The Parliamentary Library, Liberty Victorian and others for their material available on the Charter and the current review.

I urge the Committee to maintain the existing rights in the Charter. I urge the committee to expand the rights (where applicable as State jurisdiction) to include all those listed in the Act and the Terms of Reference. I urge the committee to place strong emphasis on the continued expansion in the area of practice change and educative roles associated with Victorian Government and Agencies services.

The Human Rights Charter makes up an important part of the Human Rights and Equal Opportunity Framework of the State and for the people of Victoria. It reflect the role of successive Governments in progressively building a fairer, more equitable and just community, particularly for those who operate on the margins of the community or whose rights are arguably not recognized currently (such as the homeless, members of the LGBTIQ community, CALD groups, the disabled and those generally operating on the powerless margins of our community). If “rights” in the Victorian context mean anything then the efforts to ensuring these groups are treated as fairly and as equally as possible to improve their life choices and outcomes is a worthy goal that the Charter as one instrument should support.

Based on the material made available by the HREOC and those groups consulted listed above this has— despite a number of more limited failings— largely been the case. Ensuring those limited failing are addressed and that the resourcing of broader programs occurs the role of the Charter in ensuring a rights framework and cultural in this State is important. The continuation of the Charter to that as both a practical tool and as a community wide statement of values and standards should not be underestimated.

In so far as the Charter makes a contribution to the affirmation, promotion and obtainment of these goals then it should be supported, enhanced, resourced and expanded.
By international comparison the Charter reflects well on a best practice model of how to achieve the goals of its prescribed rights being addressed across government in a manner that is fair and respects the complexities and at times conflicting nature of building the cultural of “human rights” across the State. That it reflects a common sense and practicable approach to promotion and adaption of rights in practice rather than a legislative or judicial activist approach then it should be particularly supported by the Committee and the Parliament.

The Committee should seek to expand and improve the Charter. It should not seek to wind back this rights framework more generally and in regards to the Charter in particular.

The Victorian Charter of Human Rights and Responsibilities strength is that it establishes a ‘dialogue model’ to ensure that human rights are taken into account when developing, interpreting and applying Victorian law and policy without displacing current constitutional arrangements. This aim has been important in focusing the nature and culture of the application of law and government activity around a Human Rights Framework. It is the Charters strength. It needs to be reaffirmed and built on through this review.

It deliberately does not seek to be the ‘activists’ legislator or judicial model as is regularly and incorrectly suggested by the opponents (including some Conservative Members of this Government) of developing a Human Rights Framework in Victoria.

The dialogue between the various arms of government — namely, the legislature, the executive (which includes ‘public authorities’) and the courts — is facilitated through the following mechanisms:

+ Prior to introduction to parliament, bills must be assessed for the purpose of consistency with the human rights contained within the Charter, and a Statement of Compatibility tabled with the Bill when it is introduced to Parliament;

+ All legislation, including subordinate legislation, introduced to Parliament, must be considered by the Scrutiny of Acts and Regulations Committee for the purpose of reporting as to whether the legislation is incompatible with human rights

+ Public authorities must act compatibly with human rights and also give proper consideration to human rights in any decision-making process

+ So far as possible, courts and tribunals must interpret and apply legislation consistently with human rights

+ The Courts may have regard to relevant international, regional and comparative domestic human rights law and jurisprudence in the interpretation and application of human rights

+ The Supreme Court has the power to declare that a law cannot be interpreted and applied consistently with human rights and to issue a Declaration of Inconsistent Interpretation

+ The Government must respond to a Declaration of Inconsistent Interpretation within six months and

+ The Victorian Equal Opportunity and Human Rights Commission has responsibility for monitoring and reporting on the implementation and operation of the Charter

The Charter came into force on 1 January 2007. The obligation of public authorities to consider and act consistently with human rights and the powers of the courts to interpret and apply legislation in accordance with the Charter and to issue Declarations of Inconsistent Interpretation where this is not possible became effective on 1 January 2008.
Contrary to many predictions the sky and our legal system did not collapse on any of these dates or as the result of the practical application of the system.

The Charter is based on the principle that human rights are essential in our parliamentary representative democratic society where we respect the rule of law, individual human dignity, and the notions of equality and freedom. Whilst we as a Parliament and as a society acknowledge these rights as the foundation to our political system there is little beyond the Charter to demonstrate a real world commitment to rights.

Accordingly the Human Rights considered by the Charter under review by the Committee should be interpreted broadly as the basis for our political democratic system so as to reaffirm and expand the notions of rights. The Committee should approach its work on the basis that such a broad approach to the existing rights needs to be supported as part of our political system and architecture of Government.

The Committee should note the advice of the Human Rights and Equal Opportunity Commission in its recent (May 2011) Position Paper (on which I draw directly in the following material) that their research support the ideas that:

A) Victorian want Human Rights Protected and they want them protected in laws. The research available to the Commission demonstrates that the Charter puts the issue of rights at the forefront of the activities of many arms of Government service and policy delivery where otherwise they might not.

The Charter currently protects in different ways some 20 rights and freedoms, including the right to vote, freedom of assembly, freedom of religion, protection of children and protection of the family.

Based on the material available on the Public record the Charter should be expanded to include:

* All civil and political rights that Australia has signed up to under international treaties, unless the issue is a purely federal matter, such as immigration.  
* The right to self-determination. (Noting that in 2010 the Commission conducted a statewide consultation about the issue of Aboriginal self-determination, which is to be included as part of the review, and based on that evidence the right to self determination should be included in the Charter.  
* The protection of economic, social and cultural rights should be included in the Charter as they provide access to essential services such as adequate education, housing and health. Many people in the community consider these rights to be the most basic needs for people to participate fully in the community, particularly for indigenous people, older people, children and families, and people with disability.

B) The Charter should look to improving service delivery through transparency and accountability of public authorities operations as it focus.

I concur with the Commission that the Charter review should include amendments to 
* Mandatory compliance reporting to help track the progress of government and ensure transparency. Mandatory reporting exists for other laws concerned with better government such as multiculturalism, freedom of information legislation, occupational health and safety, and environmental laws. An integrated reporting framework would not be an additional burden on government but would ensure accountability and transparency to the community.

* Continued annual report to the Attorney-General on the operation of the Charter should be maintained to ensure transparency, oversight and a consistent vehicle by which systemic issues can be highlighted to parliament.
C: A human rights audit function which allows the Commission to review public authorities for human rights compliance should be supported by the Committee.

D. Strengthening the role of Parliament
The community wants human rights protections, but does not want the role of the Parliament to be watered down. As a Member of Parliament I believe this aspect of the Charters operations to be part of its success. This will be an important check and a vital balance in continuing community support for developing a Human Rights Framework in Victoria.

An important part of the Charter is the requirement that when the Government wants to bring legislation to Parliament it must first make sure that it meets human rights standards. Where it doesn’t do so it needs to be clear as to why it does not and set out the reasoned argument as to why on balance the legislation is being sought. This is reflected in a ‘statement of compatibility’ provisions which are now part of the architecture of decision making by Government and the Parliament.

The right of the Parliament to deliver an over ride declaration should therefore be maintained and to continue to be accompanied by a recognition that recognise (even if as future Parliament cannot be bound) that some rights under international law, such as the right to life and the freedom from torture, can never be suspended.

When an override declaration is made, the Government should also be required to report back to Parliament on the reasons for its continuation. Such a common sense provision allows consistent and meaningful review by the Parliament of the evolving Rights framework of this State.

In maintaining and enhancing the role of the Parliament in the oversight of the Charter and the notion of Parliament’s role as the guardian of Rights there should be a provision for SARC to deliver an oversight on statements of incompatibility which indicate that some elements of a law are incompatible with Charter rights. I note that SARC increasingly plays this role – but it needs to be resourced adequately and to have this recognized within the formal review of the Charter.

E. Ensuring resolution of issues for Victorians
I support the timely, accessible and effective mechanisms to raise concerns about breaches of human rights with Government and to have those concerns addressed. The Charter is a key tool in achieving this.

Conciliation of complaints about alleged breaches of the Charter by the an established dispute resolution service for equal opportunity matters such as the HREOC should be provided for and expanded. This would allow for coverage of all public authorities and help people whose rights are not observed to get quick resolution of their problems. There should be a right of action for citizens so they have recourse against Government when it breaches their human rights.

The Charter should inform the development of accreditation schemes, service standards and other measures to improve the quality of services, but it should also be enforceable to ensure compliance and provide an opportunity for breaches to be addressed where individual citizens are adversely impacted. There are numerous models in place now where Governments demand accreditation and evidence of compliance in an appropriate and sensible manner so as to reflect community demands around workplace safety, compliance with a range of social, economic and community goals.
As it is Government entities that are the subject of the Charter then it is reasonable to require these public bodies attention to the rights of the citizens when they encounter, for instance, the health system, the education system, the community support services, the age care system or whatever other arm of government that they run up against in the course of their lives.

There should be an improved commitment for financial support from Government for education and advocacy work so that individuals and the community can get the most out of the Charter in practical and common sense outcomes.

Opportunities for resolution of rights disputes need to be appropriately targeted and formatted to the needs of communities and individuals who seek to enforce them. That is why agencies such as Victoria Police, Corrections Victoria and their contractors and others who come into direct and frequent contact with groups and individuals who see their rights either not respected or breached need to develop appropriate mechanisms to engage and maintain a good relationship with such groups and individuals. For instance the recent decision of Victoria Police to wind up their Gay and Lesbian Liaison Officers and to not replace the functions in a suitable manner that ensures dialogue and understanding by both the LGBTI community can be seen as a backward step – unless accompanied by an understood, supported and clear alternative.

Similar approaches to the Indigenous communities’ interaction with the Justice system are easily identified through efforts such as the Korrie Justice Working group and other community based efforts. These are the sought of practical and common sense arms through which a Human Rights culture can be developed.

Such efforts not only enhance rights and mutual understanding they are also a sensible investment by the State in prevention and rights protection.

**F: The role of the Courts and helping develop the law.**

As with other areas of law, the Courts have an essential role in developing the Charter and in applying the will of the Parliament.

The Courts role in interpreting legislation by hearing and determining matters that raise Charter issues, and deciding when government authorities have breached a person’s human rights has operated to date in accordance with the provisions of the law. This long held and common sense position that has underpinned our legal system for centuries should be continued. The Charter should continue to ask the Courts to interpret legislation consistently with human rights to the extent that is it possible to do so on the ordinary common sense meaning of the words that the Parliament has resolved on.

**Conclusion:**

I would urge the SARC to ensure that it continues Victoria’s leadership role in the building of human rights framework that will make this State a fairer and more just place for us all.

I would urge the SARC to adopt the proposals and actions I advocate in this submission.

Martin Foley MP.