A. Introduction

The Governor in Council, by referral of terms of reference under the Parliamentary Committees Act 2003, has required the Scrutiny of Acts and Regulations Committee (Committee) to conduct a review of the Victorian Charter of Human Rights and Responsibilities Act 2006 (Charter). 1 Section 44(2) of the

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1 See notice issued on 19 April 2011 published in the Victoria Government Gazette.
Charter requires a review of certain matters which have been included in the Committee’s terms of reference.

The Committee has invited written submissions from the community. In calling for public comment it has welcomed submissions addressing one, multiple or all terms of reference of its inquiry.

The Committee will then conduct hearings in late July and early August. It has been asked by the Governor to report to Parliament no later than 1 October 2011, by which date the required review of the matters mandated by s.44(2) of the Charter is to be completed.

B. About the International Commission of Jurists

The ICJ is an international non-governmental organization, dedicated to the primacy, coherence and implementation of international law and principles that advance human rights and the defence of judicial independence through the rule of law.

The ICJ Victoria is pleased to make this written submission to the Committee and would be pleased to give evidence at the Committee’s hearings in late July and early August.

C. ICJ Victoria’s submission

The ICJ Victoria’s written submission to the Committee addresses a number of principal matters and its recommendations are highlighted with accompanying commentary below.

In doing so it draws attention to the recent significant inquiries and reports concerning human rights and responsibilities in Australia, namely:

- The Report of the National Human Rights Consultation (2009);
- The five-year review of the ACT Human Rights Act (2009); and

In Victoria, the ICJ Victoria also draws attention to:

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2 Appendix A is SARC’s advertised request for submissions.
- Items 1, 2, 3 and 4 are mandated by s.44(2) of the Charter.
- Terms 5, 6 and 7 are additional issues the Governor in Council required SARC to review.

3 Appendix B is section 44 of the Charter.

4 About the ICJ: The International Commission of Jurists was founded in Berlin in 1952 and has received a number of leading international human rights awards recognising its legal contribution to the promotion and development of international human rights standards and practice. These include the first European Human Rights Prize by the Council of Europe in 1980, the Wateler Peace Prize by the Carnegie Foundation in 1984, the Erasmus Prize by the Paremiun Erasmianum Foundation in 1989 and the United Nations Award for Human Rights in 1993. The ICJ was designated in 1987 as a Peace Messenger by the United Nations General Assembly as part of its International Year of Peace. The ICJ holds consultative status with the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organisation, the Council of Europe, and the African Union. The ICJ also maintains cooperative relations with various bodies of the Organisation of American States.

The Australian section of the International Commission of Jurists was founded in 1958 by eminent jurists including Victorians Sir Owen Dixon (Chief Justice of Australia), Eugene Gorman QC, Maurice Ashkanasy QC, Richard Eggleston QC & Keith Aickin QC. Membership is open to all lawyers subscribing to its tenets.

5 The ICJ Victoria notes that all submissions are public documents unless confidentiality is requested. ICJ Victoria makes this submission available as a public document.
The Annual reports on the Charter prepared by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC); and

The catalogue of Case Studies from Victoria, prepared by the Human Rights Law Centre on how human rights legislation can promote dignity and address disadvantage.

Those submissions and reports are commended to the Committee, all of which show not only the need for but, importantly to the Committee’s review, the public benefit in proper legal protection of human rights. In the short period since it has been in legal force the Charter has made a significant impact both culturally within Victorian public administration and also in terms of the rights that people can actually enjoy.

The Charter has begun to demonstrate in practice the importance, in a modern democratic society, that as a community the rights of all people in society are recognised and protected by the law. Even in a democratic society that has a strong commitment to the ideals of rights and freedoms under the rule of law, the Charter has shown to have advanced the public benefit by guiding the organs of government, the Legislature, the Executive and the Judiciary in the discharge of their important responsibilities.

Without a form of legal instrument, like the Charter, which firstly sets out what those rights are and then contains mechanisms for protecting them that apply to each organ of government according to the function that it performs in society:

- The real risk exists that people’s basic rights are neither recognised nor adequately protected when they are overlooked by those in positions of responsibility and authority; and
- Neither the law nor the institutions of democratic government provide a secure means for remedying problems which do arise for people whose basic human rights are impacted by the actions (or inactions) and decisions of government.

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Terms of Reference 1: Inclusion of additional human rights in the Charter

The rights currently protected by the Charter have already had real life benefits to many people in Victoria. The Charter should be expanded to positively include all the internationally accepted human rights to which Australia is bound.

Commentary

Presently, the Charter does not positively include economic, cultural or social rights or all rights that are recognised and accepted as “human rights” under international law. There are many reasons why the inclusion of all human rights in the Charter is desirable for an advanced modern democracy.

(a) Economic, cultural and social rights and the other human rights recognised under international law are just as important to enable people to live with dignity and participate fully as members of a community as the civil and political rights currently included in Part 2 of the Charter.

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6 These include (in addition to those rights and freedoms that are recognised by customary international law) the following:
(a) the International Convention on the Elimination of all Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40);
(b) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5); (ICESCR)
(c) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23); (ICCPR)
d) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9);
(e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 ([1989] ATS 21);
(f) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4);
(g) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12).

7 Although the Charter does not in any way undermine them it does not positively protect them. The human rights included in the Charter are largely derived from the International Covenant on Civil and Political Rights (ICCPR) but the Charter does not presently include all ICCPR rights. The omission of the right to birth registration protected under ICCPR, Art. 24(2) is a clear example of how the failure to include a recognised human right can lead to real life shortcomings in the protection of human rights in different segments of a community. The ICJ Victoria notes the submission to the Committee by the Castan Centre calling for its inclusion in the Charter. Case studies and research by the Castan Centre at Monash University (which ICJ Victoria has previously drawn to the attention of the Victorian government) has already shown that Aboriginal people in Victoria face numerous difficulties attempting to obtain copies of birth certificates and register their births. This has created obstacles in doing things that others in the community take for granted, such as obtaining a driver’s licence (to get to a job interview or work) or opening a bank account or obtaining a passport or even tax file number (so that tax is not required to be withheld by an employer). These obstacles have had serious consequences for people affected. Dr Paula Gerber, ‘Making Indigenous Australians ‘Disappear’: Problems Arising From Our Birth Registration Systems’ (Paper presented at the Indigenous Birth Registration and Birth Certificates Symposium, Melbourne, 1 December 2009) has observed:

“The failure to translate the right set out in article 24(2) of the ICCPR, into the Charter, in the belief that there are no issues surrounding birth registration in Victoria, is an error of judgment, to the detriment of the Indigenous population in that state.”

Only with their inclusion in the Charter can the Charter contribute to their practical realisation. Of course the Charter is not the only means of realising these rights, and it is not intended that the Charter should be the only means of protecting and promoting human rights in Victoria. A custom of respect for human rights within the institutions of government is also necessary together with a strong internal culture of respect within democratically elected governments. It is a mistake, however, to confuse democratic stability with respect for human rights. Amongst the world community, the recognition of human rights as being a matter of state responsibility has developed significantly since the United Nations Universal Declaration of Human Rights. And the short history of Australia in regard to its treatment of its Aboriginal and Torres Strait Islander population and the rights for women are two obvious examples where Australian society is still continuing to overcome its previous lack of awareness and understanding about, and respect for, human rights.

The inclusion of all human rights in the Charter is important to the achievement of just and fair outcomes. Their inclusion assists in identifying what is actually going on under laws and policies in the lives of people. They serve an important role for all governments, both present and future. Most importantly, they assist an incumbent government to act responsibly to sort out the best way forward to help people in our community.

As an instrument of government the Charter speaks to all arms and branches of government - the Parliament, the executive and various departments and administrative agencies, and Victoria’s tribunals and courts. The Charter assumes each organ in the entire Victorian governmental system has the specific functions it is there to perform within the system. As a law, the Charter applies to each in the performance of its specific governmental functions whatever they may be. Rights should not be left out that are highly relevant to the functions each performs in Victoria’s system of government.

The demonstrated experience of comparative common law countries that give legal protection to human rights in addition to civil and political rights shows that these human rights do have a certain content. Further, it is open for each society to express these rights in their domestic human rights laws in a way that gives them contemporary expression that is appropriately adapted to the institutions of law and government that operate in the society. Indeed it is desirable that this occurs to make the rights expressed in international treaties meaningful to the particular society. This further contributes to their practical realisation. The issue of uncertain content of human rights is misplaced.

Courts are not called upon to make decisions about allocation of resources of government because that is not part of their judicial function. Likewise, nor are courts called upon to make policy choices about what government services are to be delivered because that is not their role. Comparative experience in other common law countries shows that a large degree of institutional respect and deference is given to the proper branch of government in whose domain particular rights fall to be protected within a given system of government. This “margin of appreciation” accords with international legal principle. There is no reason to suppose Victorian courts have or are likely to behave any differently. Australian courts including the High Court itself, acknowledge, time and again, the limits of the role that courts and judges play within a common law, adversarial system of justice. 8

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8 In the common law system, courts adjudicate on matters of legality and not policy, and only on the justiciable matters actually in dispute between parties in cases brought before them for resolution. Courts do not initiate cases for resolution.
There is nothing novel in courts adjudicating upon standards. What courts are required to do under human rights laws like the Charter is to determine (in the comparatively rare case that they may be required to adjudicate) the standards a law or government activity must adhere to in order to be compatible with a human right that is actually engaged by the law or activity of government. Those determinations by the independent judicial branch of government actually assist the political branch of government and the other organs of public administration of the state to discharge their difficult and important responsibilities to the members of the community and to the government of the day and the Parliament. The adjudicative role that the independent courts play in this process is important in safeguarding both the rights of the citizen and person and the authority of the state. This distinct role served by the independent judicial branch recognises and respects the institutional function of each branch of government and, by adherence to the rule of law, serves to reinforce the roles of each.

Under a statutory Charter like that in Victoria, which respects and preserves the ultimate legislative supremacy of the Parliament, there is no danger of so called “unelected judges” overstepping their judicial role. The very strength of the Australian democratic system is that judges are independent. Judges are required by law and by their oath of office to make decisions independently and impartially according to law. If errors occur in the trial or decision making process, appeal rights exist that enable parties (including the state) to have them corrected by superior courts, again independently and impartially according to law.

The benefit that comprehensive human rights protection confers is to protect societies against the real risk that exists within all systems of government, of people or bodies within public administration who are responsible for formulating law and policy and delivering services for the public good not being accountable for human rights compliance within their areas of responsibility. Strong human rights laws enable the elected members of the Parliament and the appointed ministers of the Government to get on with their difficult jobs. Embedding human rights institutionally within the system of government creates checks and safeguards that (a) require a rights-based rationale to decision making which prevent error and (b) provide a mechanism to correct errors when they do occur.

The additional benefit of having all human rights collected in the one Victorian law is that it helps to achieve greater clarity of understanding on the topic of human rights for people whose roles impact the human rights of others. It provides a focal point for that understanding rather than (by necessity) having to have recourse to international instruments and decisions in other jurisdictions. Having this legislative point of reference provides for greater efficiency and, ultimately, better laws, better decision making and better government.

A benefit which is often overlooked in the discussion about human rights laws is that it brings the development of a society’s legal and political system (and those who participate in it) into
contact with advances in understanding taking place in the rest of the world. Through a legal instrument like the Charter, people responsible for making policies and laws are able to learn and benefit from these advances. Laws and policies can be developed with principled understanding of how communities grappling with the challenges of the modern world have been able to deal with the same issues occurring in their communities.

Including all human rights in the Victorian Charter creates greater coherence in law and policy. By avoiding the situation of sectors of public administration not being explicitly accountable under Victorian law for respecting and safeguarding basic rights that fall within their specific domain, it reduces burdens on other sectors. It helps to avoid inefficiencies and inconsistencies too. The regrettable situation is also avoided where whether a person can gain protection under human rights law depends upon the fortuity of whether the civil and political rights currently contained in the Charter extend far enough. Human rights are mutually self-supporting. Civil and political rights can provide a measure of protection for economic, social and cultural and other rights in some cases but not always. This problem is overcome where all relevant human rights are protected by the Charter.

Conclusion

It goes without saying that democratic societies are complex and made up of people of many different ideas, beliefs and generations. Instruments of government and law, like the Charter, are significantly important instruments and their consideration and design requires depth and breadth of vision. For each community this requires a historical depth of field of how the long-standing democratic and legal institutions of government have actually served the whole community. It requires contemporary debate and discussion that removes party or other allegiance that is respectful, measured and thoughtful, for the good of the whole society. It requires quiet reflection on the way people holding positions of power and authority actually behave, and recognition of inherent human failing.

Bi-partisan political support to strengthen human rights within a community is one way that governments can show themselves to deserve the respect of people within the community.

It sends a strong message of leadership to the community that it is a society that cares about people and, in particular, those less fortunate or who experience disability or are subject to discrimination or confront other serious problems in their lives. It sends a strong message to those who are elected to public office or who serve in the public service or who enforce and administer the community’s laws the society is one that is concerned with justice and fairness.

Because of the infancy of human rights understanding and jurisprudence under the Charter, this may be seen as a reason to defer the specific inclusion of economic, cultural and social rights or other human rights in the Charter until the community’s knowledge base is more mature on the topic of human rights. The temptation to defer inclusion should be resisted. Victoria has done very well working under the Charter in its first four years of operation and there is no reason to suppose differently if the Charter is expanded to include all recognized human rights.

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9 For example, in the area of business responsibility for human rights, it avoids the situation where a society’s investment laws may compel businesses to behave in a way that is inconsistent with the way that other sectors in public administration addressing economic, cultural or social policies would want them to behave. See Prof John Ruggie, paper delivered to The Royal Society for Encouragement of Arts, Manufacturers and Commerce (Sir Geoffrey Chandler Speaker Series), London, 11 January 2011, p5-6. (Referred to below).
**Terms of Reference 2: Inclusion of the right to self-determination**

The right to self-determination is contained in both the ICCPR and the ICESCR and should be included in the Charter.

**Commentary**

(a) Currently the Charter gives express recognition to the importance of the “diverse, spiritual, cultural and economic relationship” that the “Aboriginal people of Victoria, as descendants of Australia’s first people” have with their “traditional lands and waters.” The Charter is unique in regard to legislation of an Australian State because it gives statutory recognition in Part 2 (as defined “human rights” to be protected and promoted by the Charter) both to the cultural rights held by all people of particular “cultural, religious, racial or linguistic background” (s.19(1)) and also to the “distinct cultural rights” held by Aboriginal persons (s.19(2)), which must not be denied.

(b) However the human right to “self-determination” contained in both the ICCPR and the ICESCR has not specifically been included in the Charter and should be. In international law it is categorised as both a “civil and political right” and an “economic, social and cultural right” and it derives from respect for the inherent dignity of the person.

(c) The right to self-determination is regarded as a “foundational” human right in international law by art 1 of both the ICCPR and ICESCR.

(d) For Indigenous people in Australia (and other countries) the right to self-determination has been confirmed by the UN Declaration on the Rights of Indigenous Peoples. The Preamble to the United Nations Declaration on the Rights of Indigenous Peoples acknowledges:

> “…that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental

10 The definition of an Aboriginal means “a person belonging to the indigenous peoples of Australia, including the indigenous inhabitants of the Torres Strait Islands, and any descendants of those peoples”: s.3(1). It is the same as the definition in s.4(1) of the Aboriginal Heritage Act 2006 (Vic).

11 See Preamble.

12 Section 19(2) states:

**19 Cultural rights**

(1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.

(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—

(a) to enjoy their identity and culture; and

(b) to maintain and use their language; and

(c) to maintain their kinship ties; and

(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.”

13 It is also informed by ICCPR art 2 and 3 (non-discrimination and equal enjoyment of rights), art 26 (equality before the law and equal protection of law) and art 27 (minority rights).
importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development”.  

(e) The right has been described by the UN Human Rights Council as an “essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.”

(f) Inclusion of the right to self-determination in the Charter provides an opportunity for Victoria to renew relations between Aboriginal and Torres Strait Islander peoples, and Victoria’s non-Indigenous peoples and to work together to create a basis for future relationships founded upon principles of equality and consent.

(g) In early 2010, the Report on Australia by the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Professor James Anaya, commended the Australian Government on its stated intention “to ‘reset’ the relationship with Australia’s Indigenous peoples”, and the commitment to work together “in close collaboration and partnership within a context of mutual respect and understanding”. It noted:

“14. Indigenous peoples have called for reforms to deliver constitutional recognition of Aboriginal and Torres Strait Islander peoples, provide guarantees of non-discrimination and protect their rights in a charter of rights to be included in the Constitution or other legislation.”

and recommended:

“75. The Government should pursue constitutional or other effective legal recognition and protection of the rights of Aboriginal and Torres Strait Islander peoples in a manner providing long-term security for these rights.”

(h) Within Australia’s federal system, the Australian States have distinct political and legislative power and authority within their territory under the Australian Constitution. The 2010 Report by Professor Anaya drew particular attention to the inherent importance of self-determination for Australia’s Aboriginal and Torres Strait Islander peoples within this federal system. In making his independent expert observations to the UN HRC he stressed its central role in achieving self-empowerment and securing equal opportunity and non-discrimination and equal enjoyment of


See in particular art 1, 3, 4, 5, 18, 19, 31, 32, 33, 34 and 46 of the UN Declaration (extracted in the commentary in Appendix D) which are of importance to the practical achievement of self-determination for Indigenous populations in colonized countries like Australia.


other human rights. He regarded it as being of critical practical importance in closing the gap of Indigenous disadvantage in Australia:

40. The Special Rapporteur would also like to emphasise that increasing indigenous peoples’ control over their lands and resources, self-determination, and self-government, is an essential component of advancing economic development and employment opportunities.

...  

54. The right to self-determination, which is affirmed for indigenous peoples in the Declaration on the Rights of Indigenous Peoples (art. 3), is a foundational right, without which indigenous peoples’ other human rights, both collective and individual, cannot be fully enjoyed. Enhancing indigenous self-determination is also conducive to successful practical outcomes. As noted in the Overcoming Indigenous Disadvantage Report, “[w]hen [indigenous peoples] make their own decisions about what approaches to take and what resources to develop, they consistently out-perform [non-indigenous] decision-makers.

(i) The Special Rapporteur made specific and separate recommendations regarding Australia about the right to self-determination:

**Recommendations relating to self-determination**

74. The Commonwealth and state governments should review of all legislation, policies, and programmes that affect Aboriginal and Torres Strait Islanders, in light of the Declaration on the Rights of Indigenous Peoples.

75. The Government should pursue constitutional or other effective legal recognition and protection of the rights of Aboriginal and Torres Strait Islander peoples in a manner that would provide long-term security for these rights.

...  

77. The Commonwealth Government should ensure that state, territory and local governments are aware of their obligations to promote and protect the human rights of indigenous peoples. The Government should promote a consistent approach to these rights across all levels of government authority.

78. The Special Rapporteur considers the position of Aboriginal and Torres Strait Islander Social Justice Commissioner within the Australian Human Rights Commission to be an exceptional model for advancing the recognition and protection of rights of indigenous peoples. The Commissioner’s reports should be given greater attention in government administration to promote a higher level of accountability and sensitivity to human rights commitments.

79. All efforts should be made to increase the number of indigenous peoples’ representatives in legislative, executive, and judicial institutions at all levels. The Special Rapporteur welcomes the Government’s support to establish a national indigenous representative body and emphasises the importance of indigenous participation in the ongoing design, development, and functioning of this mechanism.
80. The Council of Australian Governments should look to integrate the proposed national representative indigenous body into its structure for decision-making and design of strategic initiatives, for the purpose of coordinating policies and strategies relating to Aboriginal and Torres Strait Islander peoples.

81. The Commonwealth and state governments should, in cooperation with the indigenous peoples concerned, enhance efforts to strengthen Aboriginal and Torres Strait Islander peoples’ own governance structures, and increase the capacity of indigenous leadership at all levels.

82. Any government decision that has the effect of limiting or removing indigenous decision-making authority should be reconsidered and evaluated in light of Australia’s human rights obligations.

(j) In February 2010, the Law Council of Australia issued a Policy Statement on Indigenous Australians and the Legal Profession, which recognises inter alia:

“9. that Indigenous Australians have the right to self-determination and to recognition and protection of their distinct culture and identities, as provided under inter alia the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations Declaration on the Rights of Indigenous Peoples.”

Conclusion

In Victoria (as in the rest of the country) there remains an ongoing and lasting need for realisation of the foundational human right of self-determination. This must occur through proper consultation in partnership and working together with Aboriginal and Torres Strait Islander peoples and communities in order to obtain free, prior and informed consent to proposals for reform (consistent with Articles 18 and 19 of the UN Declaration on the Rights of Indigenous Peoples).

Part of this requires renewed commitment by the governments to major public awareness programs to create an environment for change and understanding.

Inclusion of the right to self-determination in Victoria’s Charter is a step along the path together towards reconciliation and understanding.

17 In March 2011 the Law Council of Australia released a detailed Discussion Paper on Constitutional Recognition of Indigenous Australians. In addressing the need for the Australian Constitution to formally recognise the distinct identities of Aboriginal and Torres Strait Islander peoples as Indigenous peoples and secure to them “equality before the law”, the discussion paper catalogues a number of the flawed provisions in the Constitution as well as other legal factors that have contributed to the position of disadvantage in which Indigenous Australians have been placed since Federation. The Law Council expressed continued support for “the development of lasting and equitable settlements between Indigenous Australians and Australian Governments.”
The ICJ Victoria draws the Committee’s attention to the work commenced in Victoria by the Victorian Equal Opportunity and Human Rights Commission, which has begun working together with Aboriginal people in Victoria to consider the question of what self-determination means for them. It has convened a steering committee of Indigenous Community representatives who commenced by overseeing the development of a “framework for discussion” paper to explain what the human right to self-determination means in practical terms so that it can be used as a resource for wider community consultation. The paper examines the meaning of self-determination under international law. It highlights that treaty-monitoring bodies have developed key principles to help define what self-determination means in practice. It refers to examples of different models that have been adopted at a systemic level of government in other jurisdictions (including the USA, Canada and New Zealand). It notes that:

"Experiences in other countries highlight that the establishment of a framework for self-determination is not divisive and has been achieved to a greater extent than in Australia. In those countries, greater protection of the rights of Indigenous people has been achieved through mechanisms such as government policy, constitutional protection, treaties and legislation."

It also makes the observation that:

"There has been a mistaken tendency to equate self-determination with secession or with the right to form an independent State, which has led to its rejection by some States. That secession is not the general aspiration of Indigenous peoples is clarified in article 46 of the Declaration on the Rights of Indigenous Peoples ...

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18 See note 15 above.
19 These key principles have:
- emphasised the essential requirement for Indigenous participation in decisions that affect them (CERD [International Convention on the Elimination of All Forms of Racial Discrimination] requires informed consent)
- called for increased Indigenous participation in State institutions
- criticised the lack of forums for consultation with governments
- recommended the strengthening of existing self-governance programs
- cautioned that, rather than trying to assimilate Indigenous peoples, State parties should endeavour to protect their cultural identity
- repeatedly emphasised the role of Indigenous peoples in decision making on issues affecting their traditional lands and resources, and economic activities
- criticised natural resource concessions granted without full consent of the communities concerned
- supported rights to develop language and culture and, in particular, the right to communicate with government authorities in their native language
- urged the adoption of measures to safeguard Indigenous communities’ rights and freedoms to which they are entitled individually and as a group.
**Term of Reference 3: Mandatory Regular Auditing of Public Authorities**

The experience of the Charter after four years of operation in the public service has begun to show positive changes. It will be assisted by auditing.

**Commentary**

(a) Mandatory regular auditing and reporting is not merely a good way to promote compliance. It is also a good way to identify systemic problems that otherwise might go unnoticed. It is also a helpful tool in evaluating corrective action that is taken. Businesses that engage in good business practices recognise the benefits of proper auditing. Government regulation in many other areas recognises this too.

(b) It would be desirable for auditing processes to be made part of the Charter and to require regular reporting by public authorities. Because of the newness of the Charter there may be good sense in a pilot auditing and reporting program being commenced in specific sectors of government, the design of which can be improved upon in light of the experience gained from it before it is put in place across the whole of the public sector or to apply to all public authorities.

(c) It should not be overlooked that most people in Victoria have (still) not received education about what human rights are, although intuitively people understand what they are when they are properly explained. A guiding idea that underpins the effectiveness of human rights principles is the idea of standing in another’s shoes and understanding matters from another’s perspective. It informs the true application of human rights. It is a concept of responsibility that has clear synergies with the traditional principles of public service which underpin good public administration. Auditing of government agencies for human rights compliance is a further way of assessing whether government agencies are being effective in fulfilling their role in public administration and service delivery in Victoria.

(d) Auditing helps identify gaps in education and training. When people are educated about basic human rights it helps people in positions of responsibility and authority, who have power over the welfare of others, to remind them of the fundamental importance of why they are there and what their proper job is. It is human nature for people to forget and to make mistakes and systems need to be in place to assist people to do their job well. Responsibility for human rights helps people understand that whatever role they play in the community, but particularly the role people serve within the system of government, they have a basic responsibility towards others. All societies require that those who work in areas of law and public administration understand the responsibility they have to ensure that human rights are not breached by their actions and decisions.

(e) Auditing also helps public authorities identify which human rights are of particular relevance to different areas of government. Some human rights are more relevant to one sector of public administration or area of law than others. Properly understood and applied they provide principled content to the responsibilities of each sector of government. In a very practical way, as a tool of public administration, the application of human rights principles enables people to

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20 It is also an idea embodied in the Australian ideal of “a fair go” and underpins many religions.
identify important matters to the task at hand that can be overlooked. It assists people to perform their functions responsibly. **It enables people to identify and correct mistakes occurring in the application of laws and policies and to do so early.**

(f) Early identification of mistakes not only prevents harm to people, it **avoids later public cost and unintended and damaging political outcomes.** It is human nature to not always want to accept responsibility or to admit mistakes. When human rights are entrenched within institutions of public administration they serve to help people in positions of authority or exercising power over others to discharge their functions responsibly. Auditing assists in monitoring the behavior of sectors within public administration. Regular reporting and auditing of practices helps to identify the things that cause error, before they happen, and avoid errors occurring in the future.

**Conclusion**

Whether the area is public housing, welfare or disability assistance, healthcare, education, family assistance, planning and development, employment programs, indigenous development or cultural education, youth programs, or law and justice, human rights are a **principled tool for good public administration and good government.** Over time as the culture of public service delivery gets used to working with human rights principles, compliance becomes a learnt behavior. There are teething issues with all new requirements. Like any new performance standard, it takes time (often longer than four years) for processes and procedures to adapt. **The Charter should be allowed to continue to work according to the various mechanisms contained in it. The Charter’s operation would benefit from the staged introduction of reporting and auditing.**

It is desirable that the **auditing body** be both **independent from the relevant department being audited** and a **single expert body** responsible to audit the whole of the public sector, so as to **promote uniformity of approach** and of **understanding** and **identify when education and training may be needed**. Again, this will assist government identify structural issues that may be attributing to non-compliance and inefficiencies in service delivery.

The **Victorian Equal Opportunity and Human Rights Commission** might sensibly be vested with the **auditing function** and be **resourced accordingly**. It should also have a **statutory power to inquire** into the human rights compliance of a public authority’s policies, programs and practices.
Term of Reference 4: Access to effective remedies under the Charter

Victorian law should provide effective legal remedies for breaches of human rights. The Charter should be amended to contain a specific cause of action for breach and flexible remedies providing power to grant appropriate relief.

Overview

(a) **Administrative mechanisms** that do not provide binding legal remedies, although also important are **not an effective remedy**. They lose their effectiveness without the potential sanction of a legal remedy.

(b) A clear legal remedy, by its very availability, **assists in promoting compliance** and can avoid resort having to be had to litigation.

(c) It is axiomatic that “**where there is no remedy, there is no right**”. If a person has a right, he or she must have a means to vindicate that right and to maintain it, and an effective remedy if injured by its breach and to prevent breach occurring.

(d) The ICJ Victoria draws the Committee’s attention to the **requirement under ICCPR, art 2(3)(a)** to:

> “ensure that any person whose rights or freedoms herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”.

The current Charter mechanisms for promotion and protection of human rights within the branches of Victorian government do not meet this standard of being an “effective remedy”. The current mechanisms are not an effective remedy because breaches of fundamental human rights can still occur without a remedy being available under law in Victoria.

(e) The experiences in other common law jurisdictions with statutory human rights protections (including New Zealand, the United Kingdom and the Australian Capital Territory) have shown that “effective legal remedies in the courts are a necessary part of ensuring government accountability for breaches of human rights”.

(f) There can be misinformation and misunderstanding in the debate about the issue of human rights remedies. It is therefore important for the debate to take place on an informed basis with proper understanding of the role that institutions of government perform in Victoria’s democracy. It is to be observed that in a common law democracy which respects the rule of law (like that in Australia), courts cannot usurp their judicial role. The experience in comparative common law

21 Spurgeon v Collier (1758) 1 Eden 55, 61.

22 See Ashby v White (1703) 92 ER 126, 137-9 (per Lord Holt CJ, upheld on appeal in the House of Lords).

23 The role of the courts is judicial. Courts act independently from the elected political branch of government and the public service and numerous agencies of the state. Their role is limited to adjudicating, through the judicial process of a trial, upon questions of rights, liabilities and responsibilities (both of the state and of people) according to the law. The role of the courts is then to grant such relief and remedies that the law permits them to grant. This is dictated by the Rule of Law itself. Like comparative human rights instruments, the Charter respects “the structure and practice of the existing court system and the exclusive role of Parliament and the legislatures in prescribing the jurisdiction of courts and tribunals”: Persaud v Donaldson, [1997] O.J. No. 542 (Q.L.)(Ont. Div. Ct.) (discussed further below).
jurisdictions with statutory human rights laws has itself shown that the availability of effective legal remedies has not led to any explosion of litigation. The role of courts is recognised as being separate from the political process and is limited to the traditional functions of adjudication that courts perform in individual cases brought before them for determination according to law.

(g) In other common law jurisdictions which allow for damages for human rights breaches by state agencies, the remedy of damages is not treated in the same manner as the common law remedy. Limits and conditions are placed on the awarding of damages for human rights breaches which are typically modest sums to vindicate the breach of what is essentially a public right belonging to all people.

(h) The ICJ Victoria endorses a focus of any new remedial provision within the Charter being on the granting of “appropriate relief” and also the idea of both complaint and conciliation powers being conferred on the Victorian Equal Opportunity and Human Rights Commission.

(i) What the Charter currently lacks to make its working more effective is “a clear simple and effective set of remedies” for those whose human rights under the Charter have been violated. This would send a “clear directive to public authorities to take their obligations seriously” under the Charter. It would show a strong commitment to the protection of human rights by government.

(j) Providing for a clear remedy within the terms of the Charter itself would also assist people to take affordable and readily accessible steps to safeguard their human rights. It would give people whose rights have been violated greater confidence when dealing with relevant government officials and provide a clear path for resolution of issues and complaints. It will serve not only to educate but contribute to a greater culture of respect for human rights and compliance, in turn reducing complaints or recourse to legal remedies for redress.

(k) The drafting of the provision should make clear that it is not the only avenue for legal relief but that it is a discrete avenue for relief to a court or tribunal and one that does not require the existence of any other pre-existing cause of action.

(l) Section 39 has resulted in a degree of misunderstanding and confusion about how human rights protected under the Charter can be protected under the law. This is undesirable and may have led to inefficiency in the legal operation of the Charter.

(m) Acts or decisions of public authorities that are made unlawful by reason of s.38 should be open to be challenged in the appropriate court or tribunal.

(n) In the remedies under consideration for inclusion in the Charter, these should include courts and tribunals being empowered by the Charter to make specific orders that bind a public authority and which are appropriately adapted to protecting the human rights affected by the actions or decisions of the public authority concerned.

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25 It would also assist lawyers who are asked by their clients to help them, for there to be a clear legal avenue for remedying human rights breaches specifically available under the Charter. Discussed further below.
“Where there is no remedy, there is no right”

It has been observed that a government “and Parliament that take rights seriously and engage in sustained self-scrutiny to ensure they comply with basic human rights has the potential to be far more effective than does a system that relies on ad hoc judicial review.”

A “clear, simple and effective set of remedies for those whose Charter rights have been violated” not only gives a strong and clear directive to public authorities to take their obligations seriously, a set of direct remedies also avoids convoluted paths to redress that can otherwise occur.

As has been observed, the ICCPR, (the international instrument upon which the Charter is based), obliges states to provide effective remedies for non-compliance with protected rights. The current absence of a direct legal remedy in the Charter does not meet the standard of providing an effective remedy. Whilst the ICCPR is not abrogated by the Charter, neither does the Charter directly implement ICCPR art. 2(3). Without a real and effective remedy, there is no right.

The right of an effective remedy properly includes a right to monetary damages in certain cases.

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27 Ibid.
28 See Article 2(3):

Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.

The ICCPR is one of the “international” laws which can be used when interpreting the Charter itself under s 32(2). See also Arhuaco v Columbia, UN Doc CCPR/C/56/D/612/1995, [5.3]; Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (2nd ed; 2005), 64. The right to an effective remedy requires and “generally entails” appropriate compensation: see e.g. Human Rights Committee, General Comment 31, [16]; in contrast to s 39(3) of the Charter.

29 ‘Hortatory’ remedies “cannot be considered an effective remedy”: Brough v Australia UN Doc CCPR/C/86/D/1184/2003, [8.7]; C v Australia, UN Doc CCPR/C/76/D/900/1999, [7.3]. N.B. many non-government bodies are not subject to either the Charter or the jurisdiction of the Ombudsman or other complaint and dispute resolution bodies.
30 Sections 5, 32(2).
32 See Ashby v White (1703) 92 ER 126, 137-9 per Lord Holt CJ (upheld on appeal in the House of Lords): “If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and, indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal”; Spurgeon v Collier (1758) 1 Eden 55, 61 per Robert Henley, the Lord Keeper of the Great Seal: “Where there is no remedy, there is no right”.
33 UNHRC General Comment No 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant CCPR/C/21/Rev.1/Add.13 (29 March 2004) at [16]; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human rights Law and Serious Violations of International
As has been noted in the summary above, the experience in other common law jurisdictions with statutory human rights laws is that effective legal remedies in the courts are a necessary part of ensuring government accountability for breaches of human rights. The availability of the broad remedies powers in other jurisdictions has not led to an explosion of litigation. Statutory limits (and conditions) have been placed on the awarding of damages.

An express statutory focus on the provision of appropriate relief would serve to give the most effective protection for human rights and it also avoids the nervousness that can sometimes exist regarding allowing awards of damages for breaches of human rights laws. It is to be observed that in contrast to the remedy of damages at common law which is regarded as the primary remedy in some legal contexts, damages permitted under statute for breaches of human rights protected by legislation need not be a primary remedy or entitlement. This is borne out by experience in other common law jurisdictions which shows that where damages are available, the awarding of damages is circumscribed and damages awards are not proving to be a bonanza. Damages awards are only one type of remedy that is given.

A review of the cases where the Charter has been argued and reported (see e.g. that generated by the Law Institute of Victoria) shows very few would have added a claim to damages based on the Charter even if it had been available. This is because most concern other types of relief such as:

- Overturning a decision;
- Affecting sentencing or incarceration;
- Affecting evidence;
- Seeking information;
- Exercise of freedoms;
- Interpreting legislation; or
- At most seeking damages based on other existing causes of action available under the general law.


35 See s 40C Human Rights Act 2004 (ACT) which allows a Court to grant any remedy except damages; s 8 Human Rights Act (UK) which includes a right to damages. For a discussion on the cases in which damages have been sought or awarded under the UK Act see Clayton R, “Damages under the Human Rights Act”, 1 December 2003; New Zealand Bill of Rights Act 1990 impliedly gives a right to remedies including compensation: see Simpson v Attorney General [1994] 3 NZLR 667 (Baigent’s case). See also Evans S, and Evans C, “Legal redress under the Victorian Charter of Human Rights and Responsibilities” (2006) 17 PLR 264 at 265 and 281.


37 See, for example, s 40C(4) Human Rights Act 2004 (ACT). See also s 8(1) of the UK Human Rights Act which confers power to “grant such relief or remedy, or make such order, within its powers as it considers just and appropriate”.

38 E.g. Damages, at common law, arises as an entitlement to compensate for loss and damage suffered when there has been a breach of contractual obligation or relevant duty in tort. A plaintiff “is entitled to such sum as will as far as possible, put him in the same position as he would have been but for the tort or breach of contract”: Johnson v Perez (1988) 166 CLR 351 at 371 per Brennan J; Mason CJ at 356.
In many cases, compensation is not what is sought and not the appropriate remedy in the circumstances and wronged parties would be satisfied with corrective orders, or a revision of procedures or even an apology.

An express statutory focus on awarding *appropriate* relief would allow for the remedy to fit the infraction.

Stand-alone remedies and complaints and conciliation procedures would give people whose rights are violated greater confidence when dealing with the relevant government official when making complaints and a clear path to pursue. This promotes administrative efficiency and the existence of clear remedies may deter public officials from acting in gross violation of the Charter.

The existence of stand-alone remedies is also something that contributes to a culture of compliance, thus reducing the need for complaint or redress.

**The experience of other jurisdictions with stand-alone remedies**

Three common law jurisdictions with a statutory human rights system having express or implied stand-alone remedies are:

(i) the United Kingdom (UK);
(ii) New Zealand; and
(iii) the Australian Capital Territory (ACT).

The **UK Human Rights Act (HRA)** confers express power on a court to award damages and other relief arising from an unlawful act of a public authority. However, the UK Parliament has been astute to place limits on the award of damages. For example, no damages are to be awarded unless “the court is satisfied the award is necessary to afford just satisfaction” to the aggrieved person. Courts have interpreted these provisions as meaning that damages are a last resort and that the violation must be sufficient serious to attract damages.

The UK experience has been that very few cases have involved damages being sought or awarded under the HRA. Where damages have been awarded, they have tended to be relatively modest.

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40 See s 8.

41 See s 8(3).

42 See Anufrijeva v Southwark LBC The Times, 17 October 2003.


44 In *R (Bernard) v Enfield LBC* [2003] HRLR 4, an award of £10,000 was ordered. In *R (Mambakasa) v Secretary of State for the Home Department* [2003] EWHC 319, Richards J said that damages of £1,000 to £2,000 would be appropriate. In *R (KB) v Mental Health Review Tribunal* [2002] 2 All ER 209 modest damages for distress were awarded in the range of £750 to £4,000. These cases are discussed in Clayton R, “Damages under the Human Rights Act”, 1 December 2003.
In New Zealand, a right to compensation has been implied under the Bill of Rights Act (BORA). Since Baigent’s case, New Zealand courts have awarded damages for BORA breaches. Controversial awards of damages have been limited to a small number of cases. In fact the remedy has been criticised as inadequate.

The ACT Human Rights Act confers power on a court to grant any remedy except damages. In this regard, the statute does not go as far as the UK HRA. The express exclusion of damages would appear to preclude the implication of Baigent-type compensation as exists under the New Zealand BORA. The new ACT remedy provisions were only introduced on 1 January 2009. Therefore, it is too early to determine their impact and how they will operate and be applied in particular cases.

Other jurisdictions have their bills of rights as part of their constitutions. This is the case, for example, in U.S.A (Bill of Rights 1791), Canada and South Africa.

Canada’s Charter of Rights and Freedoms (1982) was enshrined into its Constitution after its initial ‘trial run’ as a mere piece of legislation from 1960. Section 24(1) of that Charter gives a claimant the right to apply for “such remedy as the court considers appropriate and just in the circumstances”. However, “good faith” requirements have meant damages awards are rare. This has been reviewed in the recent case of Vancouver (City) v. Ward but even in light of that decision the quantum of damages will still be assessed by reference to the seriousness of the breach, all the while keeping in mind the requirement for the award (and the remedy as a whole) to be "appropriate and just". It remains the case that “[b]eneficial government policies and programs should not be jeopardized in the process of awarding damages to an individual... While it is important to compensate the losses caused by the Charter breach, society as a whole should not have to suffer from the diversion of large sums from public purposes to private interests.”

45 See Baigent’s case.
46 See, for example, Attorney-General v Upton (1998) 5 HRNZ 54 (CA); Innes v Wong (No 2) (1996) HRNZ 247 (HC).
47 See, for example, Taunoa v Attorney-General [2004] BCL 968 (HC) where an amount in excess of $130,000 was awarded.
48 See generally Canadian Legal Information Institute website commentaries at http://www.canlii.org/en/ca/charter_digest/s-24-1.html# Toc68429843 and e.g. Persaud v. Donaldson, [1997] O.J. No. 542 (Q.L.) (Ont. Div. Ct.). It is generally thought that “Section 24 of the Charter does not require the wholesale invention of a parallel system for the administration of Charter rights over and above the machinery already available for the administration of justice. ... The task of the court in interpreting s. 24 of the Charter is to achieve a broad, purposive interpretation that facilitates direct access to appropriate and just Charter remedies under ss. 24(1) and (2), while respecting the structure and practice of the existing court system and the exclusive role of Parliament and the legislatures in prescribing the jurisdiction of courts and tribunals.”
49 2010 SCC 27
51 Ibid.
South Africa’s Bill of Rights is contained in Chapter 2 of its Constitution of 1996. Section 38 thereof grants a right “to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.”

Hong Kong introduced its Bill of Rights Ordinance (Cap.383) in 1991. This puts into effect the ICCPR and can be used to invalidate legislation. Section 6 of the Ordinance gives courts the power to grant “such remedy or relief, or make such order, in respect of such a breach, violation or threatened violation as it has power to grant or make in those proceedings and as it considers appropriate and just in the circumstances.”

**Conclusion**

Having regard to the experience of other jurisdictions, the ICJ Victoria favours a model in which stand-alone remedies including damages may be granted but within clearly defined situations such as those set out in the UK HRA and Canada. This enables damages to be awarded but only where it is just and appropriate to do so. That way, an appropriate balance is struck between the competing public interests and those of particular victims.

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**There should be stand-alone remedies for breaches of Charter rights**

The ICJ Victoria submits that the Charter should be amended to include:

(a) stand-alone remedies for breaches of a person’s human rights protected by the Charter with an amendment that provides for:

- (i) a specific cause of action for breach of the Charter; and
- (ii) flexible remedies giving power to grant appropriate relief; and

(b) complaint and conciliation powers in the Commission.

Consideration should be given to making damages an available remedy under the Charter.
Term of Reference 5 (a) and (b): Impact of the Charter on the development and drafting of statutory provisions and consideration of statutory provisions by Parliament

(5)(a) and (b) The scrutiny of legislation provisions contained in ss. 28 and 30 have served to ensure that all new laws are assessed against human rights standards. This has been a positive development for Victorian law, as it has been in the ACT.

Commentary

(a) With greater familiarity with and education on human rights, one can expect that there is likely to be improvement in Parliamentary debate which will be aided by the scrutiny provisions and the role of the Committee.

(b) In light of the anticipated Commonwealth legislation concerning review of legislation for compliance with human rights, there is a strong benefit to be gained in Victorian law being subject to the same level of scrutiny as Commonwealth legislation will be. This is a further reason for including all human rights in the Charter.

(c) Scrutiny for human rights compliance by the Parliament results in Victoria being more advanced in its legal developments than other State jurisdictions and keeping pace with legal developments in other parts of the world. Further, if Commonwealth laws are going to be subject to scrutiny for human rights compliance it is desirable that Victorian laws are equally compliant.

(d) Sometimes overlooked in local debate about human rights is that there is a strong public benefit to Victoria in its laws developing compatibly with human rights in a way that is consistent with the rest of the common law world. At present, due to the absence of any regional human rights treaty (as there is in Europe), and due to Australia’s distance from other countries and the comparative lack of trans-border movement, the experience Australians have gained working with human rights principles is limited by these factors. There is therefore a systemic risk that Australian laws will not only not develop with the benefit of developments in legal understanding in jurisdictions similar to Australia but that they will contravene accepted human rights principles. International human rights law links Australian jurisprudence to other parts of the world as well as providing access to a vast body of learning that assists in dealing with the complex problems facing the modern world. It also helps overcome the risk of Australian laws falling out of step with the rest of the world’s common law democracies.

(e) Having laws that are compliant with international human rights standards also assists businesses who do business with Australia’s trading partner countries. It assists the Australian business community to have governments and departments that are conversant with human rights to help them in meeting the requirements now being placed on business to respect human rights obligations under international human rights standards. Having governments and laws that are aware and take account of human rights helps businesses with their own

53 In this regard the ICJ Victoria notes the observations of the Committee (see for example SARC’s Alert Digest 11 (14 September 2009) p 3) and in the statements of compatibility that record that particular provisions have been drafted to comply with human rights.

54 The matters raised in argument in the pending Momcilovic appeal in the High Court have shown the potential difficulties with State laws being inconsistent with similar laws at a Commonwealth level. Scrutiny for human rights compliance places Victoria well to avoid federal inconsistencies arising in the future.
understanding of human rights obligations and helps business to achieve compliance.\textsuperscript{55} The recent \textit{UN Guiding Principles for Business and Human Rights}\textsuperscript{56} are designed to set a “global standard” for preventing adverse human rights impacts in business activity. They were recently unanimously endorsed by the UN Human Rights Council on 16 June 2011\textsuperscript{57} to implement the groundbreaking \textit{2008 UN “Protect Respect and Remedy” Framework on Business and Human Rights}.\textsuperscript{58}

The 2008 UN Framework on Business and Human Rights represents an extremely important development for \textit{Australian companies} regarding their human rights responsibilities. It affects their operations both here and overseas. The 2010 Guiding Principles highlight the importance of governments in each jurisdiction performing their role to protect human rights and provide appropriate remedies.

The scrutiny mechanisms in the Charter help people working in Victoria’s institutions of government, the public servants and politicians elected to the Parliament, to understand Australia’s distinct treaty obligations which “require States to protect against business-related human rights abuses within their territory and/or jurisdiction”.\textsuperscript{59}

The ICJ Victoria observes that a wide range of countries acted as co-sponsors of the UNHRC’s resolution endorsing the Guiding Principles, including several from the Asia-Pacific region and also the United States,\textsuperscript{60} whose Deputy Assistant Secretary of State, Dan Baer observed that:

\begin{quote}
Having human rights contained in and protected by the Charter also helps lawyers to become educated about human rights principles and to advise business clients in Victoria about their human rights obligations.
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The UN Framework was developed by the UN Secretary General’s Special Representative for Business and Human Rights, Professor John Ruggie, (a political scientist and Harvard University Professor in Human Rights and International Affairs at the Kennedy School of Government) after years of consultation with governments, companies, business associations and societies worldwide.

The UN Framework’s three pillars require that:
1. The state has a duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication;
2. Business has a corporate responsibility to respect human rights and to act with due diligence to avoid infringing on the rights of others and to address any adverse impacts that do occur;
3. The law provide greater access by victims to an effective remedy, both judicial and non-judicial.

The Guiding Principles are designed to “operationalise” that framework. The method for achieving this has been worked out with business and governments and NGO’s after further and extensive consultation. They now form the new international benchmark for business compliance with human rights around the world.
\end{quote}

\begin{quote}
Professor John Ruggie, paper delivered to The Royal Society for Encouragement of Arts, Manufacturers and Commerce (Sir Geoffrey Chandler Speaker Series), London, 11 January 2011, p5-6.
\end{quote}

\begin{quote}
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“it is important for States to govern justly and effectively, such that individuals are protected not only from misconduct by the State but also from non-State actors, including business enterprises.”

In making this statement at the UNHRC he said:

In highlighting the importance of the Guiding Principles, we ... take this opportunity to emphasize the essential foundation of the human rights system that remains an important backdrop for the Special Representative’s work, namely, State obligations under human rights law with respect to their own conduct. In States that violate human rights, it will be more difficult for businesses to respect those rights – because domestic law may require actions inconsistent with internationally recognized human rights, because State practices encourage businesses to take actions that undermine the enjoyment of human rights, or because States involve businesses in their own human rights violations. In contrast, States that respect human rights pursuant to their international legal obligations are more likely to create environments in which businesses are less likely to take actions that might undermine the enjoyment of human rights.

(f) Within Victoria’s system of business regulation the Charter also assists in overcoming “disconnect in government” (e.g. where one “branch of government charged with investment promotion is disconnected from its counterpart whose job it is to redress economic inequalities).61 As common experience tells us, Professor Ruggie is right in his observation that “[such disconnects exist in all governments, and they can severely undermine their own human rights commitments and obligations” 62

Conclusion

Scrutiny of laws and regulations for human rights compatibility is an institutional safeguard against laws being made that, in their application, might otherwise overlook important fundamental and basic rights. It has been a positive development for Victorian law and will place Victoria in a position of advantage to States that do not scrutinise their laws for human rights compliance.

Institutionalised parliamentary scrutiny and review serves to promote a healthy and vibrant democracy and is an essential systemic requirement for achieving protection and respect for human rights.

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61 Professor John Ruggie, paper delivered to The Royal Society for Encouragement of Arts, Manufacturers and Commerce (Sir Geoffrey Chandler Speaker Series), London, 11 January 2011, p5-6.

62 Professor Ruggie is also right in his observation that:

“Better connectivity is required between [government] and firms – not necessarily more regulation, but smart regulation. We are emerging from an era in which many governments assumed they were doing business a favour by failing to provide adequate guidance for managing human rights impact of business activities ... Some governments also mistakenly believed that by outsourcing the delivery of social services to the private sector they thereby outsourced any human rights obligations attached to those services. The distinctions between public and private spheres, and between mandatory and voluntary became near absolute, serving neither public nor private interests well. They need to be re-imagined and recalibrated.”
Early identification of human rights issues is critical to the avoidance of breaches of human rights occurring in the first place. In this way “policy and legislation can be developed in ways that do not impinge on human rights”. 63

It also promotes rational debate about these most important issues. Early identification of human rights issues promotes both informed debate by the Houses of Parliament and greater education of the community including those members of our community who work in public service.

In the exceptional circumstances where limitations on human rights may be determined to be necessary in the public interest, early scrutiny of policy and legislation on human rights grounds ensures that the justification to the Parliament, and thus the community, for the need for the limitation is well considered and well thought through and takes into proper consideration all relevant matters that should be considered. 64

These matters compel consideration of the reason why the policy or law is so important as to (even) justify any limitation on people’s human rights in the first place and of whether the limitation imposed is actually necessary to achieve the purpose of the law or policy. They compel consideration of whether the law or policy is reasonably and proportionately adapted to achieving its objectives through the limitations that it places on human rights of people. They compel consideration of whether the proposed law or policy imposes the minimum impairment on human rights necessary to achieve its objective and what less restrictive alternatives may be reasonably available that would better respect people’s human rights and thus preserve, for all people, the values of human dignity, equality and freedom which are so much part of contemporary society and the society that the Australian community aspires to uphold.

Scrutiny of law and policy on human rights grounds is good government and promotes a culture of regular regard to human rights compliance in the manners and institutions of government.

As a major commercial centre, Melbourne places Australian businesses in a better position to comply with the 2008 UN Framework on Business and Human Rights, simply because its system of law has domestic human rights protection. That is good for business operating in and from Victoria, not just human rights.


64 Section 7(2) include a helpful (non-exclusive) list of factors that makes clear that what is relevant to be considered. These factors require consideration of:
(a) the nature of the human right that is limited by the law or policy;
(b) the importance to the purpose of the law or policy of the limitation on the human right;
(c) the nature and extent of the limitation on human rights brought about by the law or policy (including its manner of execution and consequences);
(d) the relationship between the limitation on human rights and the purpose of the limitation;
(e) any less restrictive means reasonably available to achieve the purpose that the limitation on human rights seeks to achieve.
Term of Reference 5 (c): Impact of the Charter on the provision of services, and the performance of other functions, by public authorities

(5)(c) The experience of the Charter after four years of operation in public administration has begun to show positive changes and the Charter is improving the performance and accountability of public authorities.

Commentary

(a) Evidence from other submissions made to the Committee’s inquiry demonstrates that the Charter does make a difference to peoples’ lives. This is not to say that there is not room for improvement in the provision of services, and the performance of functions, by public authorities. However the Charter provides a principled set of ground rules for the public service and public authorities to go about the discharge of their functions in the Victorian system of public administration.

(b) The Victorian Equal Opportunity and Human Rights Commission’s 2010 report on the Charter describes that “there is a cultural change taking place within government and that, for many agencies, taking human rights considerations into account in their work is becoming business as usual”.65 Fundamentally important, the Commission’s report found that the Charter has prevented possible human rights breaches by ensuring that human rights are taken into account by government agencies when delivering services, applying laws and making decisions.66 With greater familiarity with, and education about, human rights one can expect that these developments in public administration will improve.67

(c) On the issue of whether there has been wasting of public service resources or slowing them down, it is difficult to imagine any area of activity in public administration (or indeed human endeavour) where inefficiency does not occur. As a new performance standard for the public service the Charter is no different from any other new standard to be adhered to. After initial teething issues, people adjust their behavior to the new way of doing things and get on with their jobs.

(d) More fundamentally, and to the point, human rights compliance is not something which it is appropriate to consider as discretionary or to be avoided because of cost or burden on the public sector. It is wrong to view the protection of human rights in terms of economic cost or cost/benefit. Basic human rights require the protection by governments, government departments and their agencies and through laws because of their critical importance to what it is to be a free and democratic society. Basic human dignity and wellbeing of all people demands compliance by governments with fundamental rights.


67 In this regard, attention is drawn to the Recommendation 5 of the 5-year review of the ACT Human Rights Act in 2009 (The Human Rights Act 2004 (ACT): The First Five Years Of Operation), stating that:

5. Training programs for public authorities should explicitly spell out the steps required to comply with the obligation to properly consider human rights in decision-making processes. Training programs should also include practical guidance on how to integrate proportionality in decision-making processes.
If the Committee has evidence of delay or waste occurring in a particular sector of the public service resulting from the human rights compliance requirements of the Charter, the question that might properly arise is: “Do these costs indicate that the sector has had difficulty in acting compatibly with human rights?” It may be that the difficulty is not the requirements of the Charter but rather that there is a real and pressing need for more government resources to enable the sector to do the job it is there to do and that the lack of funding for things that it needs to deliver is the real difficulty being experienced. The need for further education and training may be another factor, which the introduction of reporting and auditing, will identify.

Conclusion

In 2008 the then Victorian Solicitor-General, now Justice Tate observed:68

"It has long been understood that [i]n all developed legal systems there has been a recognition of a fundamental requirement for principles to govern the exercise by public [officials] of their powers.1

This recognition has increased in part because of the growth of government’s powers and activity. No longer can it be said, as it was in the early twentieth century that “a sensible law-abiding [citizen] could pass through life and hardly notice the existence of the state, beyond the post office and the policeman.”2 This was unlikely to be true even then. As the famous English administrative lawyer, Sir William Wade, observed,

by 1914 there were already abundant signs of the profound change in the conception of government which was to mark the twentieth century. The state schoolteacher, the national insurance officer, the labour exchange, the sanitary and factory inspectors, with their necessary companion the tax collector, were among the outward and visible signs of this change. The modern administrative state was already taking shape.3

There is no doubt that the State of Victoria in the early stages of the twenty-first century is a modern administrative state. There are few areas of activity by citizens which are not now regulated by legislation or affected by decisions or actions taken by departmental officers, agencies, boards, or specialist tribunals in the exercise of their statutory powers and functions.

In 2006 the Parliament of Victoria passed the Charter of Human Rights and Responsibilities ...

The Charter is intended to assist in providing principles to govern the exercise of power in the context of public administration. In this way, the Charter should improve the process of policy development in government and encourage consistent, fair and rational decision-making. The Charter should contribute to good public administration."

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68 Introduction to the Guidelines for Legislation and Policy Officers in Victoria Published by Human Rights Unit, Victorian Government, Department of Justice, July 2008 (First edition) at p4. The Guidelines are prepared for legislation and policy officers in the State of Victoria to assist them in the task of ensuring that policy proposals, programs, legislation, and statutory rules are compatible with the human rights protected by the Victorian Charter.


Speaking recently in Melbourne, the former UK Attorney General, Lord Peter Goldsmith, observed that in the context of a review of the UK Human Rights Act occurring in England: 69

“I am absolutely convinced that the Human Rights Act in the UK has made an enormous impact, both culturally and in terms of the rights that people can actually enforce and enjoy.”

Amongst the many examples of how the UK legislation has helped protect the rights of individuals in society in a number of different ways he drew attention to the right of elderly people not to be separated from their loved ones in old age. He also warned that “some of the myths that grow up around the way the human rights act operates are actually not true at all”.

“What is important in a modern democratic society is that we recognize the rights of all people in our society and in order to do that you actually have to have some form of enforceable Charter or statute which sets out what those rights are and a mechanism for protecting them.”

He identified that the reason why it is better to have a wide ranging Charter to protect human rights rather than to rely solely on specific laws for specific areas is that they “do not do the same job”.

“One problem is that you do not create a culture of awareness of rights and responsibilities if all you do is have a series of specific pieces of legislation that deal with specific problems. The second issue is that specific laws cannot necessarily cover all of the circumstances which arise. You cannot necessarily predict them all at the time that you are passing that legislation and as social conditions change, as problems arise, if you don’t have some broader document which protects people’s rights then you may find that they get lost.”

He also identified that in the UK “many objections are based on myths and misunderstandings on how the Act operates”.

“Recognizing the rights and respecting the rights of all the peoples within our community is the hallmark of a civilized democratic society. Democracy is strong enough to be able to respect and to allow people to be able to enforce the rights of all of the people within our territory and that is what the human rights act does.”

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Term of Reference 5 (d): Litigation and the roles and functioning of courts and tribunals

(5)(d) There is an emerging body of cases under the Charter making a beneficial difference to the rights and remedies for people in Victoria and there is no evidence of any detriment arising within the legal system of the Charter in operation. The function and role of courts and tribunals has been to apply the legal requirements of the Charter in the ordinary way according to their ordinary judicial or administrative functions (as the case may be).

The compulsory notification provisions in the Charter could sensibly be amended to make the raising of arguments based on the Charter less procedurally onerous for people seeking to protect their rights. Apart from decreasing the cost of access to justice it would also permit the law to develop under the Charter in the usual way like any other Victorian law.

Commentary

(a) The Charter should be regarded and applied as law like any other law that it is a lawyer’s role to apply to protect the legal interests of the clients they represent.

(b) The Charter is not a “lawyers’ feast” as some critics will say. Nor has there been any flood of litigation. Nor is there ever likely to be.

(c) The introduction of a new law takes time for lawyers and courts to become familiar with and adjust to. That Charter arguments may sometimes be raised and be unsuccessful is no different from any other legal argument. The Charter has not wasted court or tribunal resources. Often the availability of a legal ground under the Charter can lead to a resolution of a dispute without the need to continue with litigation before a court or tribunal. Frequently, the Charter is raised to support and strengthen arguments for legal relief that are otherwise legally available. Because the general law may provide that relief already, courts have, at times, considered there to be no need to rely on the Charter to determine the legal result. This is consistent with human rights which are intended to guide the operation of a society’s existing laws.

(d) Like any new law there are issues of breadth and scope of application but, like any new law, the resolution of contentious issues by courts will remove these questions from litigation. Decisions by Victorian courts and tribunals are developing the jurisprudence on both the content of the human rights protected by the Charter and the mechanisms for protection of human rights currently contained in the Charter. This has been progressing in the traditional way according to usual judicial method and reasoning. Where the Charter has been raised in litigation or administrative review before courts and tribunals, Victoria’s judicial and administrative branches of government have primarily performed the role directed by the Charter of interpreting Victorian laws consistently with human rights and ensuring that acts and decisions of public

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70 This line is often asserted in newspapers without substantiation.

71 If anything, lawyers have probably lost money from the Charter because those who run arguments under the Charter do so on behalf of individuals in society, often from underprivileged or marginalized sections of the community, whose ordinary and basic rights have been impacted by public administration under Victorian laws. They often (if not mostly) do so pro bono (i.e. for free) in the public interest in response to requests for legal assistance from welfare and other not-for-profit organisations working within those sectors and from the courts who find themselves with unrepresented litigants appearing before them but with a legitimate case for legal argument. Many human rights cases are resolved without the need for litigation to even occur. In the relatively infrequent cases that litigation is required to be commenced, settlement through discussion and mediation is commonplace.
authorities have given due consideration to human rights in matters where a relevant human right is engaged.

(e) That these early decisions are now available provides important guidance and jurisprudence on the practical application of the Charter to the conduct of public authorities. The availability of this guidance will continue to grow and assist public administration and the reading and understanding of Victorian laws.

Conclusion

The jurisprudence under the Charter should be permitted to develop like any other law.

It has been desirable (while the Charter has been new) for the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission to have an intervention role in Charter cases coming before superior courts in order to offer guidance to the court on the meaning and application of the Charter.

It is to be noted, however, that in many cases coming before the courts the State of Victoria is already effectively a party to the proceeding through a State agency. That agency has the ability to seek the assistance of the office of the Attorney-General and the legal advisers in the VGSO in putting together any case in regard to Charter arguments that may arise. Further, the VGSO is well placed to provide an educative role for other parts of the public administration of the State and indeed, in certain matters, may well act as instructing solicitor or appear for State agencies.

There may be scope in cases of this category to reduce the procedural costs on individuals seeking to raise a human rights argument under the Charter in having, first, to comply with the strict notice requirements contained in the Charter and, second, to deal in the litigation with not just one but two emanations of the State.

It would be of significant concern if the procedural requirements that are currently involved in bringing a Charter argument before a superior court were to dissuade people from seeking and obtaining a human rights remedy in cases where a claim under the Charter can and should properly be made in proceedings before the superior courts. The Court should also be given power to excuse parties from the notice requirements of the Charter in appropriate circumstances, particularly in cases where the requirement to give notice would interfere with the proper and efficient hearing of the case before the Court.72

In R v Benbrika & Ors (Ruling No 20),73 Justice Bongiorno noted that s 35 of the Charter contained no severance provision or urgency exception (such as that found in s 78B of the Judiciary Act 1903 (Cth)) and considered that the lack of such provisions were “major impediments to the operation of the Charter which need the urgent attention of the Legislature”.74

72 See, for example, section 78B(5) of the Judiciary Act 1903 (Cth) (in regard to giving notice to Attorneys-General in matters arising under the Constitution or involving its interpretation) which provides:

78B Notice to Attorneys-General

... (5) Nothing in subsection (1) prevents a court from proceeding without delay to hear and determine proceedings, so far as they relate to the grant of urgent relief of an interlocutory nature, where the court thinks it necessary in the interests of justice to do so.


74 In Benbrika the Court ordered a stay of the proceedings using its inherent powers. The case is an example of the fact that Charter issues can arise from matters arising during the course of proceedings and therefore need to be argued and determined as they occur during the course of proceedings. The human right in that case was the right to fair trial, but
As Bongiorno J envisaged, the Court should have the power to dispense with notice in cases where the Court thinks it necessary in the interests of justice to do so. Relief from compliance with the notice of provisions of the Charter ought not be limited to circumstances of “urgent relief of an interlocutory nature” (as in the case of s.78B(5) of the *Judiciary Act 1903* (Cth) and which is more apposite in Commonwealth constitutional matters).

The ICJ Victoria notes the observations of Bongiorno J that compliance with s. 35 can involve delay which in the context of an application before the Court might be inconvenient and perhaps even intolerable.

Processes that encourage State agencies to seek out the advice and assistance of the Attorney-General’s office and the legal advisers in the VGSO rather than necessarily have the Attorney-General as an independent litigant in the case should also be considered where it is appropriate.

This would potentially assist in harmonizing understanding about the Charter amongst State agencies and promote greater compliance with the Charter’s obligations by all “public authorities” defined under s.4. It could reduce the need for separate notification to the Attorney-General of Charter arguments to be raised in all superior courts (which currently applies to all cases at first instance) and leave it to the courts, in the context of each individual case between the parties, to regulate the procedure and giving of timely notice to the other party of the Charter issues and evidence to be relied on and to determine where the Court would be assisted by separate submissions from the Attorney-General. This may also reduce any administrative burden currently placed on the office of the Attorney-General to consider notices in all Charter cases (including first instance matters) if only to decide not to intervene.

The Charter should, however, retain a statutory right in the Attorney-General to apply to intervene in those cases where the Attorney-General considers that the matter (even at first instance) merits separate representation and submission by the Attorney-General.

equally the situation can occur in regard to many other human rights including those of children in the criminal process and rights relating to the protection of families and children.

75 Bongiorno J said:
Section 35 of the Charter contains no severance provision, nor does it contain any urgency exception such as are found in s 78B of the *Judiciary Act 1903* (Cth). These are major impediments to the smooth operation of the Charter which need the urgent attention of the Legislature. The section needs to preserve a residual discretion in the judge to relieve a party from giving notice where to do so would unduly disrupt or delay a proceeding or for other good reason. This is, for obvious reasons, particularly important in criminal proceedings. Without such a power there is a real danger that the notice provisions of the Charter will be used to delay or even disrupt the orderly conduct of criminal trials.

76 The Charter, as Victorian legislation, is an ordinary statute and does not have the legal status of a “constitutional” document. It can be amended by Parliament without referendum. Under the Charter, the Parliament can also pass laws to which the Charter does not apply by making a declaration under s.31.

77 The observation may also be made that in a case where a party is relieved from giving notice to the Attorney-General (who has then not had the opportunity to make submissions to the court on the Charter issue), if a legal error is made in regard to the meaning and operation of the Charter the consequences of legal error can be corrected. Even if no appeal is brought, if there is a perceived error the case may well be distinguished in subsequent cases, not followed or overruled. (Indeed, the situation is no different to the situation where the Attorney-General has elected not to intervene to make submissions.)

78 E.g. through pleadings or other interlocutory steps depending upon the nature of the case before the court.
Why strong human rights protections are important in a contemporary democracy

In its submission to the 2009 National Human Rights Consultation, the national body, the ICJ Australia, called for systemic human rights reform in Australia’s national democratic institutions of government. In urging the Commonwealth Parliament to enact a federal Human Rights Act for Australia it made the submission that, in a complex modern world, this is now necessary for contemporary Australian democracy: *for good government in Australia and the wellbeing of all people.*

The ICJ Australia articulated many reasons why this was considered essential, addressing key reasons from a governance perspective. At the core of its submission was that the legal protection offered by an Australian Human Rights Act would:

(a) articulate in Australian law, and in policies and practices of successive elected governments, basic principles of “fairness” and “justice”; and

(b) promote a more accountable and more robust democratic system.

It submitted that this was desirable for present and future generations of Australians, for families, children and people coming to Australia. It raised numerous examples of how the current system of human rights protection in Australia does not sufficiently protect people’s basic rights.

Unless basic rights are secured by and under law, their fragility is exposed to the worst side of politics and to the failings of basic human error and ignorance, complacency and public apathy.

The ICJ Australia also pointed to case studies and evidence from the UK suggesting that:

(a) human rights principles can help decision-makers and others see seemingly intractable problems in a new light;

(b) human rights are an important practical tool for people facing discrimination, disadvantage or exclusion, and offer a more ambitious vision of equality than simply anti-discrimination;

(c) the language and ideas of human rights have a dynamic life outside the courtroom and empower a wide range of individuals and organisations to improve people’s experience of public services and their quality of life generally;\(^79\)

(d) awareness-raising about human rights empowers people to take action;\(^80\)

(e) the most important effect of the UK HRA has been in the education of public servants. Studies by the British Audit Commission and the Department of Constitutional Affairs describe the contribution the UK HRA has made to a new approach in public servant thinking.

This experience has been mirrored in Victoria following the enactment of the Victorian *Charter.*\(^81\) The Victorian Equal Opportunity and Human Rights Commission reporting on the implementation of the Victorian Charter found that only after a short period:


\(^81\) It is to be recalled that the Victorian Charter came into partial operation on 1 January 2007 and full operation on 1 January 2008. The staged introduction into law was to enable people and government to prepare for the new responsibilities it placed on them.
the Charter is working effectively, has already achieved a great deal and is making steady progress towards building a community culture where human rights are recognised, respected and protected;

Victoria’s experiences with the Charter show very clearly the community-wide benefits from adopting human rights principles across government;

the Charter is having an impact on the operations of every government department in Victoria, on most local councils, on our courts and the legal system, and on many public sector agencies and community organizations;

these changes – from the small to the substantial – demonstrate the Charter’s potential to be a major catalyst for change, not only in the way government works but across the entire community; and

the Charter makes consideration of human rights part of the everyday operations of the Parliament, public service and legal system for the very first time. This is a significant development that offers a unique opportunity for positive change over time.

In this inquiry, ICJ Victoria understands that written submissions have been or are to be submitted to the Committee by other eminent bodies who have had considerable practical experience with the first four years of the Charter’s application in Victoria. Included amongst them are:

- the Victorian Equal Opportunity and Human Rights Commission, whose officers, ICJ Victoria observes, perform the task of helping members of the Victorian community with the difficulties that confront many people each year in their ordinary every-day lives,

- the Human Rights Law Centre, whose various supporting organisations and their case workers, ICJ Victoria observes, likewise assist people in Victoria to overcome problems of marginalisation or discrimination or disability and administrative and legal obstacles that confront them; and

- both branches of the legal profession in Victoria, namely the Law Institute of Victoria and the Victorian Bar, whose members act for people whose rights are impacted by Victorian laws and public administration, often pro bono, and assist them to enforce their rights under law.

In its Charter of Human Rights and Responsibilities Act 2006, one of the most modern human rights instruments. It is an instrument of law and government that has drawn its various statutory mechanisms for protecting human rights from the comparative experiences under legal instruments in contemporary common law democracies. What Victoria has not had to date is significant experience with the content and application of human rights within its government and legal system and this, simply, takes a little time and further education.

The benefits of strong human rights laws extend not just to adults of voting age but families and communities, the elderly, children, people with disability and disadvantage, individuals who are subjected to discrimination, people from many different backgrounds and beliefs.

The corollary of respect by laws and government for the basic rights of individuals is that people are more likely to take greater responsibility as citizens in society.
The Victorian community, like all modern democratic societies, includes people who suffer mental and physical illness, people who experience homelessness, low income families and single parents and families confronted with domestic difficulties, people who have come to the community as refugees, people who face discrimination based on their religion, race, gender, sexual orientation or because they suffer from impairment or disability. Victoria also has a large Indigenous population which, because of the displacement of their peoples by the arrival of the first European immigrants and their mistreatment under Australian laws and policies, faces especial need for the protections that human rights laws provide.

Without legislation like the Charter, respect for human rights and the legal protection of human rights under law is highly susceptible to the vagaries of the political and democratic process. Protection of basic human rights accordingly remains highly dependent upon the resolve of the elected governments of the day. Courts, tribunals and independent commissions have only a limited legal role and influence in safeguarding the protection of human rights. Courts, in particular, may only adjudicate upon and enforce people’s rights under law in cases that come before them.

The role of the Parliament and of public authorities who perform functions of a public nature for or on behalf of government in Victoria is critical in safeguarding the basic rights and interests of people and the community.

It is unsafe to view the protection of human rights in terms of economic cost or cost/benefit. Basic human rights require the protection by governments, their departments and agencies and laws. They are fundamentally important. As underpinning values of a contemporary civilized and democratic community human rights are fundamental to the human dignity of each and every person and to the type of society that people aspire to belong to. Human rights are fundamental for all people in securing equal opportunity and non-discrimination. They serve the public interest and the interests of all people, by advancing humanitarian values of mutual respect, inclusiveness and tolerance in order to promote the basic and inherent dignity of all members of the human family and the worth of each individual person. That there may not be “popular” votes in human rights protection only makes the responsibility on elected governments to strengthen them in the community greater and all the more important. It is a reason why the Charter should be strengthened. It is a reason why bi-partisan support of human rights is essential. Without strong laws and clear political commitment, human rights are all too easily overlooked, misunderstood and lost.

Yours sincerely

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## Call for written submissions – Inquiry and review of the
## Charter of Human Rights and Responsibilities Act 2006

### Scrutiny of Acts and Regulations Committee

The Charter requires the Attorney-General to cause a review of the first four years of its operation to be undertaken. The Attorney-General has requested the Committee to undertake this review.

Written submissions are now invited by the Committee against the following terms of reference questions –

1. Whether the Charter should include additional human rights under the Charter, including but not limited to, rights under the –
   - (a) International Covenant on Economic, Social and Cultural Rights;
   - (b) Convention on the Rights of the Child; and
   - (c) Convention on the Elimination of All Forms of Discrimination against Women?

2. Whether the right to self-determination should be included in the Charter?

3. Whether there should be mandatory regular auditing of public authorities to assess compliance with human rights?

4. Whether the Charter should include further provisions with respect to legal proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful by the Charter?

5. What have been the effects of the Charter Act on –
   - (a) the development and drafting of statutory provisions;
   - (b) the consideration of statutory provisions by Parliament;
   - (c) the provision of services, and the performance of other functions, by public authorities;
   - (d) litigation and the roles and functioning of courts and tribunals; and
   - (e) the availability to Victorians of accessible, just and timely remedies for infringements of rights?

6. What if any, have been the overall benefits and costs of the Charter?

7. What options are there for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria?

Submissions should be addressed to Mr Edward O’Donohue MLC, Chairperson, Scrutiny of Acts and Regulations Committee and sent to –

Parliament of Victoria,
Melbourne Vic 3002

or by email (with position, name and address) to:

charter.review@parliament.vic.gov.au

The closing date for submissions is Friday 10 June 2011.

Guidelines for submissions to this inquiry are available from the Committee’s website: www.parliament.vic.gov.au/sarc

Further information is available from the Committee’s Senior Legal Adviser, Mr Andrew Homer on (03) 8682 2891 or the above email.
Appendix B – Charter of Human Rights and Responsibilities Act 2006 (Vic) – section 44

PART 5—GENERAL

44 Review of Charter after 4 years of operation

(1) The Attorney-General must cause a review to be made of the first 4 years of operation of this Charter and must cause a copy of a report of the review to be laid before each House of Parliament on or before 1 October 2011.

(2) A review under subsection (1) must include consideration as to whether—

(a) 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

(b) the right to self-determination should be included in this Charter; and

(c) regular auditing of public authorities to assess compliance with human rights should be made mandatory; and

(d) 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.
Appendix C – Further commentary on the UN Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295 on 13 September 2007 and which Australia has since adopted, stresses:

“the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources”.

Articles 1, 3, 4, 5, 18, 19, 31, 32, 33, 34 and 46 of the UN Declaration (set out below) are of importance to the practical achievement of self-determination for Indigenous peoples.

Articles 3, 4 and 5 are of central importance, providing:

**Article 3**

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

**Article 4**

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

**Article 5**

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Articles 18 and 19 state that:

**Article 18**

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.

**Article 19**

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Articles 31 to 34 state that:

**Article 31**

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 46 clarifies:

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.