
Submitted by Keith Wolahan

Overview

1. The purpose of this submission is to advocate the full repeal of the Charter of Rights and Responsibilities Act 2006 (the Charter) and to critically analyse various proposals to expand the Charter through the inclusion of additional rights and expanded enforcement provisions.

2. This submission is focussed on Term of Reference 4, which seeks submissions on "options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria."

3. It is my submission that the Charter:
   • has had little or no tangible influence in better protecting rights in Victoria;
   • has been ineffectual in protecting against certain infringements of rights; and
   • does nothing to uphold responsibilities, given that, in spite of its title, it includes not a single responsibility.

4. Furthermore, proposals to expand the scope of the Charter will, if implemented, have serious negative repercussions for the Victorian legal system. These particular proposals are the major focus of this submission and are considered in turn below.

5. In considering proposals to expand the Charter, this submission considers two of the most substantial proposals that have been put forward by two pro-Charter advocacy groups, namely the Human Rights Law Centre (HRLC) and the Victorian Equal Opportunity and Human Rights Commission (VEOHRC). Because many of the proposals of these bodies are the same I have referred to them in tandem. References to the proposals advocated by these bodies are taken from the following documents:
• HRLC: Review of the Victorian Charter: HRLC Position Paper


Proposals to include additional rights

6. A number of Charter advocates have proposed expanding the rights covered by the Charter to include those rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR). The HRLC and VEOHRC proposals are as follows:

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<td>&quot;All civil and political rights that Australia has signed up to under international treaties, unless the issue is a purely federal matter, such as immigration&quot;</td>
<td>&quot;... the Victorian Charter should be amended to enshrine all fundamental civil, political, economic, social and cultural rights.&quot;</td>
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What this would mean

7. This would mean extending the Charter to cover a wide range of rights included in treaties such as the International Covenant on Economic, Social and Cultural Rights and the United Nations Declaration on the Rights of Indigenous People. Some of these rights include the following rights:

• United Nations Declaration on the Rights of Indigenous People:
  o The right to "self-determination", which potentially includes a recognition of "customary law" giving it a status that prevails over national law;
  o "legal recognition and protection" to lands, territories and resources traditionally "owned, occupied or otherwise used or acquired";

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unlimited rights to compensation for "lands and resources which have been confiscated, taken, occupied, used or damaged" without indigenous peoples' "free, prior and informed consent".

• International Covenant on Economic and Social Rights

  o the "right to work" and the right to "just and favourable conditions of work" (Article 7)
  o "the right of everyone to social security, including social insurance" (Article 9)
  o Paid maternity leave or "adequate social security benefits" to mothers (Article 10)
  o "an adequate standard of living ...including adequate food, clothing and housing, and to the continuous improvement of living conditions" (Article 11)
  o "the highest attainable standard of physical or mental health" (Article 12)
  o The right to education, including:

    i. education to "further the activities of the United Nations for the maintenance of peace" (Article 13)

    ii. the right to higher education, including "the progressive introduction of free education" (Article 13(2)(b))

    iii. "the material conditions of teaching staff shall be continuously improved" (Article 13(2)(e))

8. The set of rights outlined above deals largely with questions of social and economic policy across a range of Government responsibilities. If they were incorporated into the Charter Act of Rights, almost every decision by the Government and Parliament (including the Budget) could become a question of "human rights".

9. Furthermore, many of the rights are aspirational goals that cannot be clearly defined (e.g. "continuous improvement in living conditions" and "just and favourable conditions of work"). It would be left to courts to determine how these rights are to be defined in particular circumstances.
10. Conceivably, even negotiations over teachers' pay and conditions could become issues of human rights to be determined by courts, in light of the "human right" for teachers to have "continuously improved" conditions.

**Rights to "self-determination"**

11. Charter advocates have also argued for a right of "self-determination" to also be included in the Charter:

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<td>international treaties, unless the issue is a purely federal matter,</td>
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<td>such as immigration&quot;</td>
<td>Covenant on Economic, Social and Cultural Rights (ICESCR), <strong>including</strong></td>
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<td><strong>the right to self-determination,</strong> would contribute to the conditions</td>
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<td>necessary for all people to live with dignity and participate fully and</td>
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<td>equally in our community.&quot;</td>
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**What this would mean**

12. The meaning of the right to "self-determination" is highly contested. Were it to be included in the Charter, this would lead to a high amount of uncertainty and disputation as to how the right should be interpreted.

13. In practice, each State party to the Declaration of the Rights of Indigenous People has the flexibility to determine what this right means. Human rights organisations have aired three radical views of the right:

- **Independent Indigenous State**
  - Self-determination could allow for the creation of a separate
    Indigenous state. The right has been described as "a vital step in a
    legal process of decolonising the relationship of Indigenous peoples
    and States".³

• Separate legal system
  
  o Tom Calma has said that Indigenous self-determination involves "the need for recognition of distinct systems of law".⁴
  
  o Self-determination could promote the development of a separate legal system of customary law, which could:
    
    • undermine the rule of law, which requires that all Australians are subject to the law that is established by the elected parliaments and enforced by independent state and federal courts; and
    
    • generate a cultural tension for Indigenous people who want to enter transactions with non-Indigenous bodies under law.

• Positive obligations on the existing government
  
  o Self-determination may require the existing government to facilitate (and possibly fund) the development and subsistence of the separate state and legal system.

  o The UN has described the right as an obligation to "take positive action to facilitate realisation of and respect for the right of peoples to self-determination ... States must refrain from interfering in the internal affairs of other States".⁵

  o According to the Human Rights Law Resource Centre, there is a positive obligation on government to promote the right.⁶

Economic, Social and Cultural Rights

14. Charter advocates have also called for the Charter to include greater coverage of economic, social and cultural rights in order to promote access to such services:

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<td>&quot;The protection of economic, social and cultural rights should be included in the Charter as they provide access to essential services such as adequate education, housing and health.&quot;</td>
<td>&quot;... the Victorian Charter should be amended to enshrine all fundamental civil, political, economic, social and cultural rights.&quot;</td>
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What this would mean

15. The rights under *International Covenant on Economic and Social Rights* extend beyond merely “adequate” public services and demand much higher standards, such as “the continuous improvement of living conditions” and the “highest attainable standard of healthcare”.

16. All decisions of governments and public authorities on the allocation of resources in such areas could be challenged on the grounds that they fall short of these very high goals. It would be up to the courts to determine what is the “highest attainable standard” in these areas.

Auditing of Public Authorities

17. Charter advocates have also called for greater monitoring and compliance of public authorities in relation to service provision in accordance with Charter rights.

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<td>“Mandatory compliance reporting to help track the progress of government and ensure transparency.”</td>
<td>“The Victorian Charter should mandate regular reporting by public authorities on steps they have taken to monitor and evaluate their processes for ensuring that their decisions and actions are compatible with human rights.”</td>
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What this would mean

18. If this proposal was to be implemented, *all* government decisions and any potential inconsistencies with *any* human right would have to be recorded in a register and then gathered into a compliance report. VEOHRC overlooks (or is unconcerned by) the impracticality of this project.

19. This would mean a bloating of the public service. "Statements of compatibility", which must be provided with every bill introduced to parliament setting out whether the bill is compatible with human rights and the nature and extent of any incompatibility, have already led to a 30% increase in staffing at the Victorian
Government Solicitor.⁷ Seemingly unaware of this, VEOHRC has without justification claimed that “an integrated reporting framework would not be an additional burden on government”.

20. The Charter established a balance between rigid adherence to its rights and the practical need to deviate from those rights in limited circumstances, in accordance with clause 7(2) of the Act. Mandatory compliance reporting sidesteps this legislative arrangement, requiring all government action to be justified by reference to the Charter Act rights.

21. Mandatory reporting is also likely to encourage litigation to enforce rights where such reports disclose that rights have been breached.

**Increased powers to VEOHRC**

22. In addition, Charter advocates have also called for the VEOHRC to be given additional powers to audit public authorities.

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<td>“A human rights audit function which allows the Commission to review public authorities for human rights compliance.”</td>
<td>“The Victorian Charter should also vest [VEOHRC] with an own motion power to inquire into and audit the compliance of a public authority’s policies, programs and practices with human rights.”</td>
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*What this would mean*

23. Under the Charter, VEOHRC already has the ability to review a public authority’s programs and practices for compatibility with human rights, but only at the request of that authority (section 41).

24. This expanded power for VEOHRC is not tied to an enforcement mechanism and has no stated limits. Where the Charter provides that a public authority may deviate from human rights in certain circumstances, there is no such exception under VEOHRC’s proposed audit power.

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⁷“Rights work fuels Vic Government Solicitor’s Office”, Angela Priestley (Lawyer’s Weekly, 1 August 2008).
25. The purpose of the regime is presumably to “name and shame” public authorities that do not comply with human rights to the extent arbitrarily deemed reasonable by VEOHRC.

Coverage of all public authorities

26. Furthermore, Charter advocates wish to remove the current exemptions from Charter-compliance for certain public authorities. VEOHRC submits: “Coverage for all public authorities. The law should no longer allow some organisations, such as the Parole Board, to be excluded from the Charter Act’s operation.”

What this would mean

27. Three bodies exempted from obligations arising under the Charter Act are the Adult Parole Board, the Youth Residential Board and the Youth Parole Board. These bodies deal with sensitive areas of criminal justice.

28. For example, the Adult Parole Board has responsibility for supervising serious sex offenders who are subject to extended supervision orders (ESOs) and for determining appropriate instructions and directions in respect of those orders.

29. The Commission’s recommendation could give serious sex offenders who are subject to ESOs the right to argue that the Adult Parole Board is infringing their privacy or right to freedom of movement.

30. Recent judgments have shown that these kinds of arguments are gathering momentum. The British Supreme Court recently held that serious sex offenders may not be placed on the sex crimes register for life because of human rights legislation. The Victorian courts have followed a similar trend, deciding in 2009 that ESOs were incompatible with the Charter Act\(^8\) and in 2008 re-interpreting relevant legislation to rule that a court may only grant an ESO where it is satisfied that the offender is more likely than not to commit an offence.\(^9\)

Additional Parliamentary human rights monitoring

31. Charter advocates also propose additional Parliamentary oversight to promote Charter-compliance of legislation. VEOHRC proposes “establishing a specialist human rights sub-committee.”

What this would mean

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\(^8\) AB [2009] VC 1132.

\(^9\) RJE v Secretary to the Department of Justice [2008] VSCA 265.
32. Although playing to the tune of respect for a “dialogue model” of parliamentary review of human rights issues raised by new legislation, VEOHRC does not view the Scrutiny of Acts and Regulations Committee as sufficient for that purpose.

33. This proposal would result in a new parliamentary committee finding more inconsistencies between draft legislation and human rights, whether or not those inconsistencies are significant or relevant. Naturally, the committee would need to find inconsistencies to justify its existence.

34. The change would lead to delays in the passage of legislation for the unnecessary end of multiple-committee handling.

Enhanced VEOHRC powers to handle complaints

35. Charter advocates also propose an expanded role for VEOHRC to consider and rule on complaints of breaches of the Charter.

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<td>&quot;The Charter should allow for conciliation of complaints about alleged breaches of the Charter by the Commission, as the authority with expertise in the Charter and an established dispute resolution service for equal opportunity matters.&quot;</td>
<td>&quot;In addition to providing for judicial remedies, the Victorian Charter should be amended to empower [VEOHRC] to receive and conciliate human rights complaints using a similar process to that available for discrimination complaints under the Equal Opportunity Act 2010 (Vic).&quot;</td>
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What this would mean

36. It is the responsibility of courts and tribunals – not a statutory body – to interpret the law. Former Attorney General Rob Hulls made this point to the Parliament when the Charter Act was passed when he said: "Involving the commission in complaints handling would conflict with the primary responsibility of the courts and tribunals to interpret Victorian law." This is even more important in relation

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to the Charter Act because there is very little certainty about the meaning of the rights it contains. The rights in the Charter Act are generally-worded and there have been few cases that have shed light on their meaning.

37. The role of a conciliator is to suggest options for resolving a dispute and help the parties assess the merits of each option. VEOHRC-led conciliation would lead to VEOHRC-centric interpretations of the Charter Act with little or no public accountability, because:

- Decisions made by private parties following conciliation led by VEOHRC are likely to be entirely private and confidential. Unlike judicial decisions (where reasons are published) VEOHRC would have free reign to interpret the Charter Act; and
- Given that VEOHRC publicly supports a more far-reaching Charter Act, it is unlikely that it would be objectively assessing the merits of a solution that did not apply the Charter Act rights in a way that maximises their impact.

Stand-alone cause of action for breaches of the Charter

38. Charter advocates have also proposed a stand-alone cause of action to be available to individuals to seek relief for breaches of rights under the Charter.

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| "Victorians should have a right of action so they have recourse against government when it breaches their human rights, similar to other circumstances where the government has not met its duties such as in contract, negligence or occupational health and safety. The Charter should ... be enforceable to ensure compliance and provide an opportunity for breaches to be addressed where individual citizens are adversely impacted." | "Section 39 ... should be replaced with a provision that:  
- establishes a free-standing cause of action for breaches of protected human rights which is justiciable and enforceable in the appropriate court or tribunal, including the Victorian Civil and Administrative Tribunal; and  
- empowers the court or tribunal to grant such relief or remedy, or make such order, within its powers, as is "just and appropriate", including making an award of damages where appropriate." |

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assesses it is an appropriate remedy."

What this would mean

39. The Charter does not currently include damages and new causes of action for breaches of human rights. This reflects the former government’s expressed view that “any available remedies should focus on practical outcomes rather than monetary compensation”.¹¹

40. The possibility for an award of damages would inevitably mean that complainants would focus on monetary compensation rather than practical outcomes.

41. Individual Charter claims are not comparable with individual claims for negligence or breach of contract. In negligence and contract, remedies and litigants are identifiable from the clear obligations established in the relevant contract and by the law of negligence.

42. Under the VEOHRC and HLRC proposals, an individual could potentially bring a class action on behalf of a group affected by a public decision: for example, a decision setting the rate for a welfare payment.

43. All rights covered by the Charter could conceivably be litigated and courts determine damages where they are “breached”. This could include the right to the “highest attainable” standard of healthcare and “continuous improvement” in teacher conditions. Government decisions on matters such as funding of rural hospitals or class sizes in state schools could conceivably be challenged in this way.

44. Claims raised by individuals in other jurisdictions where such a cause of action exists have led to many surprising results. Two recent examples include:

- an injured territorial officer successfully claiming that injury sustained in battle violated the right to life (UK Supreme Court);¹²

- litigation asserting that the German protection of human dignity assures a new welfare rate for children, as determined by the courts (German Constitutional Court);¹³

¹¹ Second reading speech, as above.
¹³ “Verfassungsrichter bringen Regierung in Erklärungsnot,” SPIEGEL online (21 October 2009).
45. Even without a private cause of action, cases in Victoria that have used Charter Act arguments have led to:

- a taxi driver who had killed his wife and been convicted for manslaughter (reduced from a conviction for murder on grounds of insanity) successfully appealing a decision that he was unfit to be granted a licence to drive a taxi including on the basis of Charter Act considerations;\(^{14}\)

- a 45-year old female prisoner (sentenced for welfare fraud) successfully gaining access to government-funded IVF treatment while serving her prison sentence;\(^{15}\)

- a finding that supervision orders to monitor sex offenders who pose a risk to others are incompatible with the Charter;\(^{16}\)

- an ex-lawyer whose partner was found in possession of drugs successfully arguing that the "reverse onus of proof" for possession of drugs found in one's accommodation, was inconsistent with the Charter Act.\(^{17}\)

Additional government funding for VEOHRC to promote the Charter and intervene in litigation

46. VEOHRC has also called for additional government funding to support its activities. It proposes "a continued commitment for financial support from Government for education and advocacy work".

47. It is debatable whether such funding is required. The Commission currently fulfills this role through a devoted Advice Line, which in 2009/10 received a total of 148 calls.\(^{18}\) There is no evidence that additional funding is needed.

48. VEOHRC also proposes an expanded scope for it to intervene in Charter-related litigation and has stated that its own review of its intervention function "revealed that the courts have found this role to be useful and have benefited from the Commission’s specialist knowledge".

49. Interventions by VEOHRC have continually raised principle-over-practice reasoning, including:

\(^{14}\) \textit{XFJ v Director of Public Transport} (Unreported, VCAT, Deputy President Macnamara, 31 October 2008), [2008] VCAT 2303.


noting that the Supreme Court must take account of human rights under the Charter Act in an appeal from a VCAT decision granting a man the right to be considered a reasonable candidate for a taxi licence despite his previous conviction for manslaughter. The Court duly thanked VEOHRC for raising the point and noted that these issues had already been considered by VCAT;\(^{19}\)

- drafting submissions on the content of rights to family and liberty that were adopted in their entirety by a 45-year old female prisoner (sentenced for welfare fraud) who argued successfully that she had a right to government-funded IVF treatment;\(^{20}\)
- drafting submissions to prevent the government from monitoring a convicted serious sex offender following his release from prison.\(^{21}\) (The existence of these arguments was noted by the court but the arguments were not relied on to any extent.)

50. I note that interventions of the VEOHRC have often directly opposed the arguments put by the Attorney-General when the Attorney-General has also exercised the right to intervene (eg. The Momcilovic and Castles cases). It is questionable whether the court process is assisted by having two government bodies presenting opposing submissions on questions relating to the appropriate interpretation of the Charter. This appears to be a recipe for even more delays and complexity in proceedings.

*What the Parliament should do*

51. I respectfully submit that the Victorian Parliament should resist somewhat self-interested calls to expand the Charter and instead repeal it completely.

*Keith Wolahan*

*30 June 2011*

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