SARC INQUIRY INTO THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

1 July 2011

VCOSS Submission
ABOUT VCOSS

The Victorian Council of Social Service (VCOSS) is the peak body of the social and community sector in Victoria. VCOSS works to ensure that all Victorians have access to and a fair share of the community’s resources and services, through advocating for the development of a sustainable, fair and equitable society. VCOSS members reflect a wide diversity, with members ranging from large charities, sub-sector peak organisations, small community services, advocacy groups and individuals involved in social policy debates.

VCOSS is committed to living out the principles of equity and justice, and acknowledges we live in a society where people are interdependent of one another. VCOSS respects the land we live in and recognises the Aboriginal custodians of the country. VCOSS is committed to reconciling all injustices with Aboriginal Australians. The VCOSS vision is one where social well being is a national priority, and:

- ensures everyone has access to and a fair share of the community’s resources and services;
- involves all people as equals, without discrimination; and
- values and encourages people’s participation in decision making about their own lives and their community.

Authorised by:
Carolyn Atkins, Acting Chief Executive Officer

© Copyright 2011 Victorian Council of Social Service

Victorian Council of Social Service
A: Level 8, 128 Exhibition Street
Melbourne, Victoria, 3000
T: +61 3 9654 5050

For inquiries:
Carolyn Atkins
Acting Chief Executive Officer
E: carolyn.atkins@vcoss.org.au
CONTENTS

About VCOSS ................................................................................................................... 1
Introduction ...................................................................................................................... 3
  VCOSS submission coverage and structure ............................................................. 5
  Other organisations’ submissions ........................................................................... 6
TOR 1 & 2 - Inclusion of additional human rights in the Victorian Charter ............... 7
TOR 3 - Mandatory regular reporting of public authorities to assess compliance with human rights ................................................................................................................................. 12
TOR 5(a) – the development and drafting of statutory provisions; and 5(b) the consideration of statutory provisions by parliament ................................................................. 13
  Development and drafting of statutory provisions ................................................. 13
  Consideration of statutory provisions by Parliament ........................................... 14
TOR 5(c) – Effect of the Charter Act on the provision of services, and the performance of other functions, by public authorities ................................................................. 15
TOR 6 – The overall benefits and costs of the Charter Act .......................................... 21
TOR 7 – Options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria ................................................................. 23
References ..................................................................................................................... 26
INTRODUCTION

VCOSS welcomes the opportunity to respond to the Scrutiny of Acts and Regulations Committee (SAR Committee) inquiry into the Victorian Charter of Human Rights and Responsibilities Act 2006 (the Victorian Charter). VCOSS acknowledges the efforts of the SARC in engaging the Victorian community in consultations, including the extension of the closing date for submissions. The review process has provided the opportunity for range of stakeholders to provide their feedback on the operation of the Victorian Charter.

VCOSS believes that the review of the Victorian Charter Act is a significant opportunity to strengthen the legal protection and practical realisation of human rights in Victoria.

VCOSS has been active in the area of human rights for over ten years, and is committed to promoting the understanding, engagement and protection of human rights in Victoria. Stemming from this commitment is a responsibility to ensure that those Victorians who experience disadvantage and/or who are marginalised are able to both fully their human rights and engage in processes and decisions which impact on their lives.

VCOSS has been actively involved and engaged in the development and implementation of the Victorian Charter.

Development of the Victorian Charter & VCOSS

In 2005, the Victorian Government appointed a Consultation Committee to inquire into Victorians’ views on the protection and promotion of human rights. The Committee’s mandate included adopting strategies to engage with marginalised and disadvantaged communities, which they did partly through devolved consultations. VCOSS and the Federation of Community Legal Centres (the Federation) together were funded to conduct 15 community consultations with the most marginalised and disadvantaged Victorians as part of this process, and to prepare a final report to the Consultation Committee expressing these views. The final report is appended to this submission for your consideration.

VCOSS and the Federation spoke with people living with an intellectual disability; mental health service users and advocates; people on low incomes in rural Victoria; drug and alcohol users, ex-users, and their families; Muslim women; young people from culturally and linguistically diverse backgrounds; newly arrived African women (both Arabic- and Somali-speaking); women in prison; rooming house residents; Indigenous people in regional Victoria; single mothers; and community workers. The project also generated over 140 individual submissions.

All the participants supported the introduction of stronger human rights protection. Every consultation drew out stories of everyday violations of peoples’ rights – situations where people felt their rights were not adequately protected, where they felt they had not been treated with respect, and where they felt they had no recourse.

Implementation of the Victorian Charter & VCOSS

Since the introduction of the Victorian Charter of Human Rights and Responsibilities Act 2006 (the Victorian Charter) in January 2007, VCOSS has been working intensively with community sector organisations on its implementation, and has also been actively engaged in human rights discussions. This has included providing input into a range of
In 2006 and 2007, VCOSS completed a preliminary audit and needs analysis of Victorian human rights education and training needs for community sector organisations, *Audit and Needs Analysis: Human Rights Education and Training* Report, as well as a follow up report, focusing on the ways in which community sector organisations are using the Victorian Charter Act in policy and practice – *Using the Charter in Policy and Practice*. This was a seminal report that provided an overview and case studies examining how community sector organisations had implemented these changes. A copy of the report is provided with this submission and is available on the VCOSS website: www.vcoss.org.au.

Between August and November 2007, VCOSS worked with the Victorian Equal Opportunity and Human Rights Commission and the Department of Human Services to provide 19 training forums for community sector organisations across metropolitan and regional Victorian around the Victorian Charter, and in a number of sessions with the Department of Justice.

VCOSS also published a special, dedicated human rights edition of its [then] social policy journal, *Just Policy*, in 2007 to contribute to the debate around using human rights frameworks for social policy development and implementation.

In 2009, VCOSS was funded by the Department of Justice for a twelve month Human Rights project aimed at engaging community sector organisations with human rights, particularly in terms of how a human rights framework is relevant to their everyday work. There were two key parts to the project:

1. Four human rights forums; and
2. A report, based on a survey, to capture how community sector organisations are using the Victorian Charter.

The four forums focused on supporting practice change and moving towards a human rights-based framework being applied in policy and practice in community sector organisations in light of the introduction of the Victorian Charter. The forums focused on four key areas:

- Self Determination and Human Rights;
- Mental Health and Human Rights;
- Children’s Rights in Victoria; and
- Homelessness and Human Rights.

A report from each of the forums is provided with this submission.

The report was a follow-up to the 2008 VCOSS report, *Using the Charter in Policy and Practice* (noted above). The intention of this report, *Victorian community sector: Engaging with and implementing a human rights framework*, was to document and evaluate further changes made by community sector organisations since 2008 to implement a human rights framework in policy, service delivery and organisational culture more broadly, and the extent to which this has been achieved. There are two main aspects to this report:

1. Determine and document the extent to which community sector organisations have assessed whether their policies and practices were Charter compliant and whether they supported human rights more broadly, and to what level they had implemented changes where identified as necessary; and
2. Collate case studies outlining the way in which organisations had implemented changes in order to share further practical suggestions and inspiration to other organisations.
A copy of the survey report is provided with this submission.

**VCROSS submission coverage and structure**

This submission has been informed by the experiences of VCOSS with the development of the *Victorian Charter of Human Rights and Responsibilities* and the subsequent implementation of the Victorian Charter within the community sector.

The VCOSS submission primarily focuses on the experience of the Victorian community sector in relation to the implementation of the *Victorian Charter of Human Rights and Responsibilities Act 2006*, and addresses the following areas of the Terms of Reference (TOR) for the Inquiry by SARC:

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? (Inclusion of additional human rights in the Victorian Charter);
3. Whether there should be mandatory regular reporting of the public authorities to assess compliance with human rights?
5.(a) What have been the effects of the Charter Act on the development and drafting of statutory provisions?
5.(b) What have been the effects of the Charter Act on the consideration of statutory provisions by Parliament?
5.(c) What have been the effects of the Charter Act on the provision of services, and the performance of other functions, by public authorities?
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?

As part of its submission, VCOSS has provided copies of a range of reports it has completed around the implementation of the Victorian Charter:

- Reports of four forums held during 2010:
  - Self-determination and human rights: Aboriginal and Torres Strait Islander Peoples - ‘Participants Not Recipients’, 12 May 2010;
  - Mental Health and Human Rights;
  - Children’s Rights in Victoria; and
  - Homelessness and Human Rights.
Other organisations’ submissions

VCOSS has collaborated with a number of organisations in developing its response, and has actively encouraged and resourced its members to contribute to the SARC Inquiry into the Victorian Charter.

VCOSS commends the responses of the following organisations to the Panel:

- Federation of Community Legal Centres;
- Youth Affairs Council of Victoria (YACVic);
- Vicserv;
- Human Rights Law Resource Centre;
- Homeless Person’s Legal Clinic;
- Victorian Aboriginal Legal Service; and
TOR 1 & 2 - INCLUSION OF ADDITIONAL HUMAN RIGHTS IN THE VICTORIAN CHARTER

The National Human Rights consultation found that economic and social rights, such as the rights to the highest attainable standard of health, adequate education and housing, ‘matter most to Australians, and they matter most because they are the rights of greatest risk, especially for vulnerable groups in the community.’

VCOSS strongly supports the protection of all human rights, including social, cultural, economic, civil, political and specific rights, such as Indigenous’ rights, women’s rights and children’s rights.

All human rights enshrined in international instruments which Australia has ratified should be protected. These are obligations which Australia has voluntarily undertaken and which we are obliged to give full effect. They represent an agreed national and international minimum safeguard of human dignity and humanity. As such, the Victorian Charter Act should include at a minimum those additional rights identified in the terms of reference: the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CROC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the right to self-determination.

Human rights are indivisible, both in international law and in practice. The current trend in statutory bills of rights appears largely to protect only civil and political rights. VCOSS believes that this model is limited.

Using a ‘dialogue’ model, the Victorian Charter involves a process of balancing competing rights by imposing obligations on ‘public authorities’ to act in a way that is compatible with human rights and to give proper consideration to human rights when making a decision. In practice this requires the relevant public authority to make an assessment of which human rights enshrined in the Charter are engaged in any given situation, whose rights they are, whether those rights are being limited, and if so, whether that limitation is reasonable, necessary, proportionate and justified. The conclusion as to whether a limitation to a right is justified will be heavily influenced by which other rights (or whose rights) are in conflict.

If some rights are included (such as the right to liberty, or freedom of religion) while excluding others (for example housing, health, education, or an adequate standard of living), then the balancing act becomes skewed. Few legislators would expect a ‘happy’ or satisfactory result by protecting freedom of expression without also protecting the right to privacy and reputation, for example, and yet a blindness persists towards the potential effect of excluding economic, social and cultural rights. In the Victorian Charter, economic, social and cultural rights do not have to be taken into account.

To illustrate, there is a strong link between women experiencing family violence, and homelessness. If a woman is made homeless through violence, it is likely to have
ramifications not only for housing and property rights, but also potentially to her children’s education, to her ability to maintain stable employment, to her participation in social and cultural life, and to extended family relations. Under the current Victorian model, if a woman and her children are attempting to stay in the family home which is in her partner’s name, then her right to safety and her partner’s right to property would be need to be considered, but not her right to housing or employment, her children’s rights to education, or their right to an adequate standard of living. VCOSS notes that the recent amendments to the Family Violence Protection Act 2008 (Vic) have in fact recognised the importance of keeping women and children in the family home in situations of violence, and have now made it a presumption that the violent partner will leave.

VCOSS believes that excluding economic, social and cultural rights while giving protection to civil and political rights effectively protects liberty over equality, disrupting the subtle balancing act required and can result in unsatisfactory outcomes. Further, there is strong evidence that the legal protection of human rights is an important factor contributing to their practical realisation. The Australian Public Service Commission has highlighted that ‘carefully planned, comprehensive, long-term approaches encompassing education and information, legislation and restrictive measures’ are the most effective in producing normative and behaviour change.”

VCOSS supports the inclusion of the proposed rights endorsed by the Victorian Equal Opportunity and Human Rights Commission’s (VEOHRC) report, Talking rights: Consulting with Victorians about economic, social and cultural rights and the Charter, of access to:

- adequate healthcare;
- adequate housing;
- adequate education;
- just and fair conditions of work; and
- an adequate standard of living (with reference to adequate food and clothing).

VCOSS supports the findings of the VEOHRC Report that in the event of a public debate on the equal status of economic, social and cultural rights with civil and political rights, to present: a draft of the minimum standards for each proposed economic, social and cultural right so that their scope and limitations can be understood and assessed, as well as a clear articulation of the role of the courts in the enforcement of these minimum standards.

Accordingly, these rights need to be articulated in the Victorian Charter to provide a framework to address poverty and disadvantage in Victoria; as well as providing an avenue for discourse if these rights are violated or challenged. VCOSS supports the findings of the VEOHRC Report for the inclusion of economic, social and cultural rights in the Victorian Charter Act to be accompanied by an independent cause of action in order to increase accessibility and usability of the legislation for those accessing support services.
Self-determination

The recent United Nations report, *State of the World’s Indigenous Peoples*, stated that:

> ‘Human rights and fundamental freedoms can only exist truly and fully when self-determination also exists. Such is the fundamental importance of self-determination as a human right and as a prerequisite for the enjoyment of all the other rights and freedoms.’

VCROSS believes that it is imperative that the right to self-determination should be included in the Victorian Charter.

The right to self determination is a fundamental concept in international law and is known as a ‘foundational’ right of all people.

VCROSS believes that when engaging in dialogue about human rights and Aboriginal self determination, it is fundamental to acknowledge at the outset that self determination is an inherent right, not one which is ‘given’ to an individual or community. This has been highlighted by Aboriginal people and is reinforced by international law.

The UN Declaration on the *Rights of Indigenous Peoples* is the key document which sets out the ‘baseline’ of acceptable rights. The Declaration brings together pre-existing rights relevant to Indigenous people into one document and:

> ‘...catalogues the kinds of violations that have historically plagued and, sadly, continue to plague Indigenous Peoples around the world. In particular, there are attacks upon their culture, their land, their identity, and their own voice... In short the Declaration lays out the minimum standards for the ‘survival, dignity and well being of Indigenous Peoples’. That, itself, is language taken from the Declaration and is proof enough of the practical value of the instrument.’

The right to self determination is also included in other international human rights instruments including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ISESCR).

The concept of self determination is analogous to that of sovereignty for Aboriginal people. It describes the right to manage their own lives- social, economic, cultural, spiritual and political. There is no precise definition of Aboriginal self determination and it holds diverse meanings and interpretations for each individual and community. However, a central element of this right is the ability to exercise self management.

VCROSS acknowledges that the needs, goals and aspirations of Victorian Aboriginal peoples are diverse, extend across many sectors and vary in priority. Similarly, VCROSS notes that the concept of self-determination is not simple to define; and whether it be an individual or communities interpretation is it generally interpreted and depend on the aspirations of the individual or group involved (Behrendt and Vivan, 2010). VCROSS supports the findings of the VEOHRC Report, *Talking Rights: Consulting with Victoria’s Indigenous community about the rights to self determination and the Charter*, that providing a definition of self determination for Indigenous people in Victoria must allow for individual perspectives in its application.

VCROSS supports the findings of the VEOHRC Report that the United Nations Declaration on the Rights if Indigenous peoples is the appropriate benchmark for inclusion of self-determination in the Victorian Charter and the Victorian human rights framework.
Indigenous people 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.

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.

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

The need for Australia to take action to comply with its international human rights obligation has been highlighted most recently in the United Nations Report on the Status of Australia’s Indigenous People: Protection and Promotion of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the right to development. The Report highlighted the need for a holistic approach to Indigenous rights which recognises the interdependent character of human rights, and with regard to the rights of Indigenous peoples to self-determination and freedom from racial discrimination.

In 2006 the Victorian Aboriginal Child Care Agency (VACCA), Victorian Community Controlled Health Organisation (VACCHO), Victorian Community Service Association Ltd (VACSAL), Victorian Aboriginal Education Association Inc (VAEAI) and Victorian Aboriginal Legal Service (VALS) produced a document titled, A Fairer Victoria for Indigenous Communities: A Framework for Action – A proposal for building the capacity of community-controlled Aboriginal organisations in Victoria, in response to the then Victorian Government’s social policy framework, A Fairer Victoria. In his opening address at the joint VCOSS, VACCA, VACCHO, VACSAL, VAEAI, VALS forum, Self determination and human rights: Aboriginal and Torres Strait Islander Peoples - ‘Participants Not Recipients’ on 12 May 2010, Frank Guivarra then CEO of VALS, noted that the aim of the peak and statewide Aboriginal organisations producing a ‘Framework for action’ was to:

- inform the Government, amongst other things, of the value of Aboriginal and Torres Strait Islander organisations;
- place self-determination and culture as a central focus.

Frank Guivarra outlined that self-determination is internationally recognised as a human right, and that it is fundamental to building the capacity of their communities to overcome disadvantage:

‘We believe that Indigenous Victorian communities are best-placed to work together to achieve positive outcomes for our people. The framework also states that “we believe that culturally-centred approaches to overcoming Indigenous disadvantage are the most effective. Australian Indigenous cultures are the longest continuing cultures in the world: sophisticated and holistic, linking spirituality with politics, education, economics, ecology and law”.

Professor Larissa Behrendt provided the keynote address at the joint VCOSS, VACCA, VACCHO, VACSAL, VAEAI, VALS forum, Self determination and human rights forum, and outlined the key ‘components’ of self determination, noting that each requires a different and appropriate response:

a. Access, non-discrimination and equality rights: These rights relate to access to services and opportunities, including in education, health, employment and housing. It also encompasses the right of Aboriginal peoples to live free from
racial discrimination and freely express Aboriginal identity (‘integrity of identity’). Despite the existence of anti-discrimination law federally and in all states and territories, discrimination is still pervasive and an everyday reality for Aboriginal people.

b. Aboriginal rights: These rights relate specifically and fundamentally to Indigenous people, and refer to elements such as land, culture, language and heritage. These rights are more difficult to achieve given their specificity and uniqueness to Aboriginal people.

c. Empowerment rights: These rights refer to the aspiration of Aboriginal self-government and the right of Aboriginal people to govern and direct their own communities. This includes political, economic and (possibly) legal self-sufficiency. For example, legal self determination could involve Aboriginal courts and the application of customary law. Empowerment rights require full access and control of natural resources, and require specific protection for areas not already legislated for. They require governments to give power back to Aboriginal people and recognise the sovereignty of Aboriginal tribal areas.

These concepts are further explained in Professor Behrendt’s book, Achieving social justice: Indigenous rights and Australia’s future, in which she highlights five areas central to self determination:

1. Recognition of past injustices;
2. Autonomy and decision making;
3. Property rights and compensation;
4. Protection of cultural practices and customary laws;
5. Equal protection of rights (constitutional protection/treaty).

Following Professor Behrendt’s keynote address, roundtable discussions were held with the 80 participants at the forum. In response to the question, ‘What does self-determination mean to you’, the following responses were given:

- Choice;
- Control;
- Cultural identity;
- Inclusion; and
- Rights.

In response to the question, ‘Are human rights and the Victorian Charter useful?’, the following responses were given – that it was useful when:

- Acts as a protective mechanism;
- Can be utilised collaboratively;
- Can protect culture;
- Holds government accountable;
- Is easily available and accessible to the individual;
- Use to ‘shame’ government internationally;
- Transparent; and
- When enforced.

VCOSS also refers the SAR Committee to the submissions of the Victorian Equal Opportunity and Human Rights Commission and the Victorian Aboriginal Legal Service; as well as to the valuable VEOHRC report, Talking rights: Consulting with Victoria’s Indigenous community about self-determination and the Charter.
TOR 3 - MANDATORY REGULAR REPORTING OF PUBLIC AUTHORITIES TO ASSESS COMPLIANCE WITH HUMAN RIGHTS

Reporting and auditing frameworks are important to identify systemic and structural issues and to monitor and evaluate the effectiveness of actions taken to address such issues.

VCOSS believes that reporting requirements for the Victorian Charter need to be linked to the full range of reporting and accreditation requirements that are currently in place for community sector organisations in Victoria, such as the recently developed One DHS Standards, which are the integrated service delivery standards for Department of Human Services funded organisations. The role of standards review bodies, who are already undertaking accreditation processes with a large number of funded sector organisations, should also be explored in relation to Victorian Charter compliance and auditing.

Any Victorian Charter compliance and auditing requirements also need to be informed by the current reducing red tape and regulatory burden agenda at both a state and Commonwealth level. There also needs to be a relationship with between the Victorian Charter and funding eligibility and funding and service agreement terms and conditions.

It is important, from the perspective of community sector organisations and peak organisations, that Victorian Charter compliance requirements are not just another auditing and reporting process, or replicate existing reporting requirements, but rather that they complement existing requirements and focus on best practice and reinforcing organisational commitment to the rights of service users through, for example, the development and implementation of organisational policies and guidelines.
TOR 5(A) – THE DEVELOPMENT AND DRAFTING OF STATUTORY PROVISIONS; AND 5(B) THE CONSIDERATION OF STATUTORY PROVISIONS BY PARLIAMENT

Development and drafting of statutory provisions

The Victorian Charter has played an important role in ensuring that all new laws are assessed against fundamental human rights standards through the scrutiny of legislation provisions contained in sections 28 and 30 of the Victorian Charter.

VCOSS believes that it is of substantial benefit to the Victorian community and in informing parliamentary debate that all new Bills must be accompanied by statements of compatibility, which contain consideration as to whether the Bills are compatible with the human rights contained in the Victorian Charter and the ‘nature and extent of [any] incompatibility.’

As the Scrutiny of Acts and Regulations Committee has previously noted:

The requirement that all Bills be accompanied by a statement explaining whether and how they are compatible with human rights has the purpose of both informing parliamentary debate and ensuring that human rights are properly considered when Bills are developed.

This is reflected in the content of many Statements of Compatibility, which identify that particular provisions have been drafted for the express purpose of ensuring compliance with human rights.

The Victorian Equal Opportunity and Human Rights Commission has noted that Statements of Compatibility have had the further benefit of enhancing transparency and accountability in policy making and legislative development. There is also evidence that the requirement to prepare Statements of Compatibility has been a catalyst for increased community consultation and engagement in the formulation of legislation – which in turn enhances the parliamentary democracy of Victoria.

In the 2010 VCOSS report, community sector organisations indicated disappointment at the lack of enforcement of Charter rights and responsibilities, and the perceived lack of effect of ‘Statements of Incompatibility’ which are issued by Parliament when assessing new Bills for human rights compatibility. These perceptions create negative community perceptions...
of a lack of legitimacy and transparency around Charter processes. One organisation noted that:

‘there must be greater emphasis on ensuring that legislation is truly mindful of the Charter and increased participation from the Scrutiny of Acts and Regulations Committee (SARC) and the Supreme Court as to how a piece of legislation holds up.’

The Victorian Charter has also been a catalyst for a number of major law reform inquiries and amendments to legislation, including the review of the Mental Health Act 1986 – including the new Mental Health Bill, the Equal Opportunity Act 2010, the Victorian Law Reform Commission’s review of guardianship and administration laws, its inquiry into Surveillance in Public Places and its Civil Justice Review, and the new Corrections Regulations 2009. These significant law reform inquiries and amendments have contributed to ensuring that Victorian law, policy and practice is more compatible with human rights. For example, in the Exposure Draft Mental Health Bill 2010, steps were taken to ensure the new Act is more consistent with the Victorian Charter of Human Rights and Responsibilities alongside a number of other key human rights instruments.

Consideration of statutory provisions by Parliament

The Commonwealth Human Rights Initiative has identified that parliaments, including through the work of parliamentary committees, have a critical role to play in promoting and protecting human rights. Within this frame, there is strong evidence that the Victorian Charter Act has increased and enhanced parliamentary dialogue in Victoria about human rights.

The VEOHRC has noted that the review and reporting function vested on the Scrutiny of Acts and Regulations Committee under section 30 of the Victorian Charter ‘provides a sensible, balanced and transparent mechanism for accessing the human rights impacts of proposed laws and informing parliamentary debate. VCOSS supports the view of the Human Rights Law Centre in its submission to SARC, the consideration of statutory provisions by the Victorian Parliament could be further strengthened by amending section 30 of the Victorian Charter to:

- Expand the size of SARC and establish a specialised Human Rights Sub-Committee:
  - The United Kingdom’s Joint Parliamentary Committee on Human Rights, which operates on similar lines, has been recognised as central and influential to the parliamentary protection of human rights; and has been described as an example of best practice in parliamentary engagement with human rights;

- Provide that, other than in exceptional circumstances, legislation is not to be passed before SARC has provided its human rights report; and

- Require the responsible Minister to respond substantively to any concerns raised by SARC prior to the passage of a Bill.
TOR 5(C) – EFFECT OF THE CHARTER ACT ON THE PROVISION OF SERVICES, AND THE PERFORMANCE OF OTHER FUNCTIONS, BY PUBLIC AUTHORITIES

‘[Our organisation has] adjusted our services with regard to including the Charter in our support to clients to ensure that decision making, organisational processes and outcomes are compatible with human rights’. 26

‘Community members and advocates are clearly becoming familiar with the language of human rights in their efforts to hold government accountable and secure improvements to services and policies.’27

The Victorian Charter’s ‘dialogue’ model of human rights protection is intended to ensure that human rights are given proper consideration at the ‘front-end’ of legislative and policy development and decision-making.

The Victorian Equal Opportunity and Human Rights Commission’s (VEOHRC) 2010 report on the operation of the Victorian Charter outlines 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’.28 This has also been identified in the two VCOSS reports outlined earlier: Using the Charter in Policy and Practice and Victorian community sector: Engaging with and implementing a human rights framework.

The VEOHRC’s report also identifies that where it has been well used, the Victorian Charter has prevented possible human rights breaches by ensuring that human rights are taken into account by government and its agencies when delivering services, applying laws and making decisions.29

A range of evidence exists as to the important role the Victorian Charter has played in supporting policy and practice change within public authorities – including community sector organisations – to ensure they are implementing both the human rights outlined in the Victorian Charter as well as a broader human rights framework. Alongside the VEOHRC’s valuable annual reports on the implementation of the Victorian Charter, the two VCOSS reports Using the Charter in Policy and Practice and Victorian community sector: Engaging with and implementing a human rights framework have also documented the significant steps of community sector organisations to implement the Victorian Charter and the positive outcomes that have flowed from these actions. The following comments are informed directly by these reports.
‘The main changes [in relation to the implementation of the Victorian Charter] are a stronger focus on equity and removing discrimination in policy and service delivery...our Cultural Action Plan refers to the Charter as do some policies.’

‘[The Victorian Charter] is referenced at the commencement of our new policies and procedures....it provides a legislative framework for some of our principles like dignity and respect.’

‘The development and implementation of the Victorian Charter has lead [the organisation] to articulate the language of rights in [their] Strategic Plan.’

‘[The organisation] intends the Strategic Plan to be binding on all of the organisation’s employed staff and committees and to form the basis of all [its] work in policy and advocacy...’

‘[The organisation] initiated a campaign on issues of ... discrimination and services or lack thereof, using the Charter’.

‘We have developed a “Rights Annual Report” for our organisation about the services for the people we work with.’

For many community sector organisation (CSOs), the Victorian Charter has encouraged them to implement and strengthen a human rights based approach across all policy and practice areas. The Victorian Charter has also emphasised the importance, legitimacy and improved outcomes which are achieved by adopting a human rights framework across the organisation.

Community sector organisations that had not adopted a rights based approach in their work prior to the enactment of the Victorian Charter reported that it provided an impetus for change to policy and practice. Case studies illustrating changes made by CSOs to organisational policy, practice and service delivery are outlined in the VCOSS 2010 report, Victorian community sector: Engaging with and implementing a human rights framework, and some are provided below.

Community sector organisations have also experienced a range of challenges and barriers to the implementation of the Victorian Charter across policy and practice. One of the key issues has been the need for further education and training. The most common areas identified through the work of VCOSS as in need of more training were:

- Basic Introduction to the Charter; and;
- Implementing the Charter in Policy and Practice.

Many Aboriginal community controlled organisations have reported that there has been a lack of education and training directly tailored for their organisations.

The 2010 VCOSS report highlighted a varying level of awareness and understanding of the Victorian Charter by CSOs, and that CSOs believed more is required to improve the level of knowledge regarding the Victorian Charter. The lack of implementation by some CSOs can also be attributed to a lack of resourcing, both financial and staff.

Many community sector organisations have reported that although they are implementing Victorian Charter rights and responsibilities in practice, achieving cultural change to imbed a human rights focus in practice across their organisation may take some time.
‘Change of culture is always difficult. Moving from a service/welfare model to an empowerment is not an easy shift...’

It is important to highlight that many CSOs have also embraced the opportunity to initiate cultural change, with a number of CSOs reporting feeling ‘inspired’ to make changes to implement the human rights of the Victorian Charter, and in many instances a broader human rights framework.

‘[The Charter] is providing a lens for our approach to our service.’

Similarly to the findings of the Using the Charter in Policy and Practice Report in 2008, the 2010 report, Victorian community sector: Engaging with and implementing a human rights framework, identified that the ambiguity of the definition of ‘public authority’, and its policy and legal implications, was a primary area of concern for CSOs. This is discussed in greater detail below.

Case studies – Effect of the Charter Act on the provision of services and other functions

Community Connections (Warrnambool and region): ‘Consumer Rights and Responsibilities’ brochure


Inner South Community Health Service – Client Rights and Responsibilities

Inner South Community Health Service (IHCHS) has incorporated the Victorian Charter principles into its client rights and responsibilities brochure and service delivery policies. Prior to the implementation of the Charter, IHCHS advised that it already applied a human rights approach and framework, however further refined and incorporated Charter principles into its Client Rights and Responsibilities brochure and service delivery policies. However, at this stage, it has no way of tracking the impact of these changes.

Crisis Help Network Website: supported by www.homeless.org.au – Referencing the Universal Declaration on Human Rights, Crisis Help Network is a project of Ian Archibald, separate from, but supported and hosted by www.homeless.org.au.

The Crisis Help Network is the response to an individual trying to access current and reliable information that would help with such issues as accommodation, food, and agencies relevant to his needs, and other problems he found while homeless in a system where information is either out of date, hard to find or was not considered relevant to him. Crisis Help Network is an up-to-date and regularly up-dated web site dedicated to providing information about organisations able to help people in crisis. It is compiled and
maintained by people who are or have been in crisis, and whose experiences are invaluable to the worth of this resource.

The web directory addresses several issues surrounding the lack of continuity and access to up-to-date information available to individuals who are homeless, in crisis or at risk. Currently, information on services in the market place is fragmented or obscured to individuals who are not confident in navigating the internet. This web directory seeks to address these issues by offering information in a user-friendly cohesive platform. The website quotes the Universal Declaration of Human Rights on the front page of its website in relation to social, economic and cultural rights, thereby incorporating human rights into its public and community profile:

Everyone has the right to a standard of living adequate for the health and well-being of themselves and their family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond their control.

Universal Declaration of Human Rights

Inner South Community Health Service – Human Rights Action Group

Since the implementation of the Victorian Charter, the Inner South Community Health Service (ISCHS) has developed a ‘Human Rights Action Group’. The Human Rights Action Group is a small group of local young people who have been working together over the past 2 years looking at ways to address Human Rights issues among young people and the community. The group has decided to focus on the issues of Domestic Violence as a significant Human Rights issue effecting young people and their relationships.

The group holds regular meetings to develop education sessions for young people around the issues of domestic violence, gender and healthy relationships which they will now be delivering high schools and alternative learning programs. The young people lead these sessions themselves and are eager to practice their presentation on an audience before heading into their first sessions at Elwood Secondary College. They have also organised forums to educate the community about their work and activities, and a Facebook page to engage more broadly with the community.

Facebook page at: http://www.facebook.com/group.php?gid=92477727384

Women’s Health Goulburn North East- A case study highlighting a challenge to the right of freedom of movement

An emerging issue for women is the restriction that Courts may place on their location of residence when there are issues of the father’s access to children after separation. This can cause women in rural areas great disadvantage because of lower employment prospects and access for their older children to tertiary education. Our organisation has heard from one woman that she is restricted from moving more than 30km from her current small town. Another could not move 110 km away despite having organised a new job there and agreeing to drive her children to her ex-partner for his access visits. Both men were violent towards their partners. These women have told us they feel trapped in poverty in small, isolated towns that hold traumatic memories and no future prospects regarding housing or employment.
Yet the Charter states that:

“People who are in Victoria lawfully have the right to enter and leave the State, to move around freely within it and to freely choose where they live”.

Both women in this case study are denied this human right by the judicial system but have no recourse. The Victorian Charter states that there is no right to legal action because of breaches of the Victoria Charter, and that its focus is to get things ‘right at a planning and policy stage, rather than awarding compensation’. At the Federal level too, a High Court ruling in December 2009 upheld a woman’s appeal against a Federal Magistrate’s Court decision to disallow her from moving from Mt. Isa to Sydney with her daughter. Yet this precedence is of no value to these two women who do not have the financial resources to take this issue back to Court, nor access to legal aid.

Women’s Health Goulburn North East- A case study highlighting a positive result in violence against women

A report published by Women’s Health Goulburn North East in 2008, *Raped by a Partner: A research report* took the position that partner rape is an abuse of women’s fundamental human rights. It states:

By silencing women through undermining their experience or disbelieving them, or by regarding the institution of marriage as more worthy of our respect than an individual’s human rights, we conspire with the men who rape their partners.

Under the heading, ‘Protection from torture and cruel, inhuman or degrading treatment’, the Victorian Charter states that:

A person must not be tortured, treated or punished in a cruel, inhuman or degrading way, or subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

The research involved interviews with 21 women and 23 health, community and legal workers and was launched publically in June 2008. A front page article in the Border Mail on 2 April 2010 explicitly linked the *Raped by a Partner* research and launch with a woman’s decision to charge her ex-husband with rape. He was found guilty by the Wodonga County court and imprisoned, sending a powerful message about women’s human right to be free from cruel, inhuman or degrading treatment:

No-one has the right to be abusive. Especially in a marriage [...] I want to see other women come and stand up for what is right.” Mrs Holmes said attending a partner rape seminar last year and support from her domestic violence case worker had been instrumental in her decision to go public.

Public authorities

As noted briefly above, in relation to community sector organisations there continues to be a lack of clarity around as to which CSOs are deemed to be public authorities under the Charter. This uncertainty, particularly for Victorian Government funded organisations, needs to be clarified.

The two reports by VCOSS both identified that community sector compliance with the Victorian Charter is confusing, particularly considering the plethora of legislative and reporting requirements, with many organisations unsure that if they comply with one reporting requirement (for example formal accreditation processes) that they are compliant with another (the Victorian Charter). The ambiguous nature of the definition of
public authority was also noted as a ‘flaw’ by respondents in the Law Institute’s 2010 Charter survey.

VCOSS refers the SAR Committee to the submissions of Vicserv and the Youth Affairs Council of Victoria for further discussion and examples of how the Victorian Charter has impacted on the provision of services, and the performance of other functions, by public authorities.
TOR 6 – THE OVERALL BENEFITS AND COSTS OF THE CHARTER ACT

It is clear that the Victorian Charter has had a positive impact across a range of areas, despite it being in operation for only four years. Public authorities, including community sector organisations (CSOs), have invested in building human rights processes across policy and practice within their organisations and they have become more accountable in relation to human rights, both of which have enhanced the outcomes achieved for the people their organisations work with. The Victorian Charter has also allowed for greater transparency of process and decision making by public authorities.

The Victorian Charter has made a valued difference in how legislation and policy is drafted and applied. As noted earlier the Charter has been the impetus for major legislative reviews, including the drafting of the new Mental Health Act and the Victorian Law Reform Commission’s review into guardianship and administration laws.

The Victorian Equal Opportunity and Human Rights Commission’s (VEOHRC) 2010 report on the operation of the Victorian Charter outlines 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’.  

This has also been identified in the two VCOSS reports outlined earlier: Using the Charter in Policy and Practice and Victorian Community Sector: Engaging with and Implementing a Human Rights Framework. The VEOHRC’s report also identifies that where it has been well used, the Victorian Charter has prevented possible human rights breaches by ensuring that human rights are taken into account by government and its agencies when delivering services, applying laws and making decisions.

Further, the VEOHRC has undertaken community consultations that demonstrate strong support for the protection of human rights in Victoria through a mechanism such as the Victorian Charter. The consultations highlighted that the Victorian Charter:

- is perceived to have helped bring about a positive cultural shift in government in the way that policy issues are analysed;
- has made government more transparent and accountable, although this positive impact has not necessarily fully flowed through to frontline functions; and
- is credited with delivering better, fairer outcomes for Victorians.

The Victorian Charter provides a necessary complimentary and supplementary layer of accountability. For example, the Victorian Charter has been central to a number of recent Ombudsman Victoria investigations and reports, including in relation to child protection – Investigation into the failure of agencies to manage registered sex offenders, and youth justice – Investigation into conditions at Melbourne Youth Justice precinct. The recommendations of these reports are driving improvements in responses by agencies that will directly result in improved outcomes.

The Victorian Charter also serves to address gaps in human rights protections in an efficient and cost effective way. The National Human Rights Committee – based on the operation of
the Victorian Charter and the ACT Human Rights Act, and an analysis by The Allen Consulting Group – found that a human rights act can ‘provide a resilient thread in the ... quilt of human rights protection’ and can ‘be useful and cost effective’.  

For many community sector organisation (CSOs), the Victorian Charter has encouraged them to implement and strengthen a human rights based approach across all policy and practice areas. The Victorian Charter has also emphasised the importance, legitimacy and improved outcomes which are achieved by adopting a human rights framework across the organisation. A fuller discussion and specific examples of how the Victorian Charter has positively impacted on the policy and practice of CSOs and the challenges and barriers to the implementation of the Victorian Charter by CSOs is provided in this submission under Terms of Reference 5(c) – page 15.

VCOSS also refers the SAR Committee to the submissions of the Victorian Equal Opportunity and Human Rights Commission, the Youth Affairs Council of Victoria, Vicserv, the Federation of Community Legal Centres, the Human Rights Law Centre, and the Homeless Person’s Legal Clinic for further discussion regarding the overall benefits and costs of the Victorian Charter.
TOR 7 – OPTIONS FOR REFORM OR IMPROVEMENT OF THE REGIME FOR PROTECTING AND UPHOLDING RIGHTS AND RESPONSIBILITIES IN VICTORIA

VCOSS strongly supports the strengthening of the Victorian Charter. As discussed earlier, it needs to be a comprehensive instrument which will give effect to all our international obligations, particularly in relation to ICESCR, CROC, CEDAW and the right to self-determination. The Victorian Charter also needs to consolidate existing human rights protections in Commonwealth and Victorian State legislation, common law and the Australian and Victorian Constitutions.

The Victorian Charter also has symbolic value beyond the value of the actual rights enshrined. The mere fact of having a human rights law signals to people that they are valued and creates an expectation that they will be treated with dignity. It provides Victorians with a framework for understanding their place in society as inherently rights-bearing. This can be an extraordinarily empowering and enabling act, particularly for people who have experienced public life largely as subjects not actors.

VCOSS believes that the value of a law is less in litigation than in its implementation, particularly for people with limited financial and social resources for whom litigation is inaccessible. The ‘dialogue model’ of the Victorian Charter, combined with public education, can help create public awareness of, and respect for, human rights. This is often referred to as creating a ‘human rights culture’, meaning that understanding which rights are protected – and how they apply broadly to everyday life – is a part of society’s shared consciousness. It also means that ordinary people see themselves as rights bearing individuals and can articulate that right.

As the peak body of the Victorian community sector, and with a range of community sector organisations, VCOSS uses rights-based language as an advocacy tool to hold the government to account by reframing the dominant welfare-based approach (of the ‘deserving poor’ receiving assistance as a charitable act for which they are expected to be grateful) within a human rights framework (assistance is provided because fundamental human dignity requires that every person is entitled to an adequate standard of living). A rights based approach can validate people’s experiences and provide a framework that is much more respectful of people’s dignity.

VCOSS strongly believes that a legislative mechanism, as the Victorian Charter is, must contain effective remedies. It is a well established legal principle that there is no right without a remedy; in practice, the absence of effective remedies substantially reduces the effectiveness of the Victorian Charter. VCOSS has conducted Charter training which has been attended by community sector organisations, advocates, individuals, local government and state government staff. A common theme emerging is that despite the
Focus on ‘dialogue’ and on creating a ‘culture of human rights’, many people (including those who are clearly ‘public authorities’) do not feel an imperative to incorporate human rights into their policies and planning because there are no repercussions if this is not done.

Even though this is not strictly true with the Victorian Charter, a legal remedy is not only an end in itself but can also provide the impetus for prioritising human rights in departmental and organisational thinking. Most public servants and community sector staff are already grappling with a range of regulatory or practice requirements. While many would like to embrace a human rights approach as best practice, it is unsurprising that a law without apparent consequences is seen as less of a priority for implementation, particularly when taking a risk-management approach to service delivery. A ‘carrot’ alone is not as effective without a corresponding ‘stick’.

The threat of possible action, whether or not it is ultimately used, is often sufficient to encourage people to ‘do the right thing’. One participant in the VCOSS and Federation Charter consultations noted that, ‘I wasn’t being charged for an account, and I just kept it open. They started slapping fees on it without telling, I warned them I’d tell the bank ombudsman, and then it was okay.’ For every case that gets to court, or is reported to the Ombudsman, or is the subject of a complaint, there will be hundreds of incidents where it was not. It is in the interests of fairness that somebody who has been harmed should be able to seek justice.

It is often argued that formal protections are unnecessary as Victorians already enjoy a high standard of human rights protection. VCOSS members work with Victorians who experience discrimination based on race, religion, sexuality, gender, age, disability, appearance or socioeconomic status (to name but a few), or who do not have access to basic services such as education and training, to good health and health services, freedom of religion and belief, freedom from discrimination, and equal access to justice.

To cite just a few examples, socioeconomic status has been cited as the most important indicator of health status among Australians, with people of lower economic status more likely to experience illness and early death than other members of the community; there has been an increased evidence of families relying on emergency relief services to fund school costs; and approximately half of all people in prison have two or more characteristics of serious disadvantage, including being unemployed, being homeless, having an intellectual disability, having drug or alcohol issues, having previously been admitted to a psychiatric institution, or being of Aboriginal or Torres Strait Islander descent.

In the consultations conducted by VCOSS and the Federation around the Victorian Charter and the ongoing work of VCOSS and its members, it is evident that Victorians daily experience examples of small and not so small violations of their rights. Furthermore, the people most likely to be denied their rights are often those who are least able to fight for them. One participant stated, ‘People like us aren’t going to complain about it.’

Ongoing funding and resources for human rights education and training
As outlined earlier in the terms of reference section, many community sector organisations indicated that they require further training in order to fully and effectively implement the Charter in organisational policy and practice. Furthermore, general training and public education which promotes a ‘human rights culture’ and awareness will allow a broader acceptance of and understanding of Victorian Charter rights and responsibilities.
Given many organisations indicated that a lack of resources prevented them from undertaking training or engaging with a rights-based framework, ongoing funding for education and training is vital to assist individuals and organisations to implement the Victorian Charter in policy and practice. The areas in need of training span from basic introductory sessions to more advanced implementation of the Victorian Charter and topics such as assessing organisations’ status as ‘public authority’.

The continuation and expansion of pro bono/free training, currently available in both central metropolitan areas and in rural and regional centres, is vital. Additionally, providing ongoing funding to peak and sub-peak community sector bodies to ‘tailor’ the content of training to the different needs of specific policy areas and organisations may deliver more effective and practical assistance for organisations.

VCOSS strongly supports continuing training and resources being made available to community sector organisations to both support CSOs’ engagement with and implementation of the Victorian Charter, and to imbed a human rights framework within their policy and practice.
REFERENCES

3 Including the rights enshrined in the International Covenant on Economic Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Declaration on the Rights of Indigenous Peoples, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Rights of Persons with Disabilities (CPD), the Convention Against Torture (CAT) and the Convention on the Status of Refugees (the Refugee Convention).
5 Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic), s38(1).
8 Extract from C Mokhiber, Declaration a historic document, out of a historic process, Panel Presentation, New York, 4 November 2006, at: http://www.ipcaucus.net/Mokhiber.html. For further information on the panel discussion see: http://www.ipcaucus.net/Panel_061026.html.
9 Article 1: The right to self determination for all peoples.
10 Article 1: The right to self determination for all peoples.
17 Scrutiny of Acts and Regulations Committee, Alert Digest 11, 14 September 2009, p.3.


Women’s Health Goulburn North East, *Raped by a Partner…*, p.52.


VEOHRC, ..., 2011, p.8.

VEOHRC, ..., 2011.


Repercussions may include internal complaints processes, internal disciplinary procedures, complaints to the Ombudsman, adverse publicity, and implications for further funding, but this is a subtlety not readily apparent on the face of the Charter.


