Submission

in response to

Inquiry into Charter of Human Rights and Responsibilities Act 2006

prepared by

Environment Defenders Office (Victoria) Ltd

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About the Environment Defenders Office (Victoria) Ltd

The Environment Defenders Office (Victoria) Ltd (‘EDO’) is a Community Legal Centre specialising in public interest environmental law. Our mission is to support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice. In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working to protect Australia’s environment through environmental law.

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Scrutiny of Acts and Regulations Committee
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1 Introduction

The EDO is pleased to provide comment to the four year review of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (Charter Act). The Review of the Charter Act presents a significant opportunity to strengthen the promotion and protection of human rights in Victoria.

As a community legal centre specialising in public interest environmental law, we provide comment to the review of the Charter Act from the perspective of community members and groups undertaking proceedings to protect the environment or to enforce breaches of environmental protection legislation. EDO focuses on facilitating community participation in environmental decision-making processes, to empower individuals and communities to protect the environment.

EDO witnesses and deals with the human rights implications of many environmental issues in our day to day work. These issues range from the exclusion of individuals and communities from participating in decision-making processes, to the detrimental environmental, health and cultural impacts resulting from development and industry on individuals and communities, in particular those individuals and communities most disadvantaged and disempowered. EDO is therefore well positioned to provide informed comment on the interaction between human rights and the environment.

EDO Victoria is a member of the Australian Network of Environmental Defender’s Offices (ANEDO) and together with EDO (NSW) prepared ANEDO’s comprehensive submission to the National Human Rights Consultation in 2009. In our submission to the National Human Rights Consultation ANEDO provided a detailed analysis of the relevance of environmental issues in the context of human rights protection in Australia.1 We reiterate and incorporate our comments with respect to the recognition and protection of rights relating to the human rights dimensions of the environment, and more particularly, of climate change, in this submission.

EDO is also a member of the Federation of Community Legal Centres (FCLCs) and we fully endorse the submissions and recommendations made by the Federation. We also endorse the submissions and recommendations made by fellow community legal centre, and leading expert organisation on domestic and international human rights law, the Human Rights Law Centre (HRLC).

1.1 Scope of this submission

We have confined our submission to issues which directly affect our practice, specifically, recognition and inclusion of rights in the Charter that would directly or indirectly protect and promote environmental rights, issues relating to enforcement and opportunities for improving the delivery of services by public authorities.

The submission addresses the Terms of Reference, specifically:

- Whether additional human rights that should be included as human rights under the Charter Act.

- Whether the Charter should include further provision 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.

The effect of the Charter Act on the provision of services, and the performance of other functions, by public authorities.

1.2 Summary of recommendations

EDO supports continued and strengthened legal protection of fundamental human rights in Victoria under the Charter.

The FCLCs and the HRLC outline in their submissions the significant achievements of the Charter to date.

EDO believes that the benefits delivered by the Charter could be strengthened by:

- Recognising the principle that all human rights are indivisible, interdependent and interrelated, and therefore extending protection under the Charter to all economic and social rights outlined in the International Covenant on Economic, Social and Cultural Rights, including those rights that would directly or indirectly protect and promote environmental rights:
  - the right to an adequate standard of living
  - the right to the highest attainable standard of health
  - the right to water
  - the right to food

- Protecting and promoting the specific right to a clean and healthy environment

- Protecting and promoting the specific right to access to information, public participation in decision making and access to justice in environmental matters.

- Including a provision in the Charter to create an independent cause of action and entitlement to both judicial and non-judicial remedies in relation to acts or decisions of public authorities that are incompatible with human rights:
  - The Charter should empower courts and tribunals to grant such relief or remedy or make such order, within its powers, as is ‘just and appropriate’, including an award of damages where appropriate.
  - The Charter should empower the Victorian Equal Opportunity and Human Rights Commission to receive and conciliate human rights complaints.

- Including a statement in the Preamble of the Charter recognising the interrelatedness, interdependency and indivisibility of human rights and including reference to the principle of intergenerational equity.

- Complementing the Charter with non-legislative measures:
  - Continuing to provide human rights education and training for the public sector and the community.
  - Ensuring legal and advocacy services are adequately resourced to enable people to understand and vindicate their human rights.
• Supporting the Charter by a range of mechanisms to better secure access to justice, in particular, providing enhanced funding to community legal centres including the EDO, and introducing public interest protective costs orders to alleviate the risks of adverse costs orders in litigation brought in the public interest.

2 Inclusion of additional rights

The Victorian Charter should enshrine all of Australia’s human rights obligations existing under the International Covenant on Civil and Political Rights (ICCPR) \(^2\) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). \(^3\)

2.1 Economic and Social Rights

The majority of human rights currently enshrined in the Charter Act are based on civil and political rights contained in the ICCPR.

While the protection of those civil and political rights is an important starting point in strengthening the rights, dignity and freedom of the people of Victoria, EDO submits that economic, social and cultural rights should be equally protected and promoted under the Charter for two principal reasons.

First, EDO considers that protection of social and economic rights are interrelated, interdependent and indivisible from civil and political rights. It is one of the fundamental tenets of international human rights law that meaningful enjoyment of civil and political rights is impossible without the enjoyment of social and economic rights. For example, meaningful exercise of the right to participate in political life and public affairs requires access to information and realisation of the right to education.

The indivisibility and interdependence of all human rights – civil, political, economic, social and cultural – has been repeatedly reaffirmed.

One of the central reaffirmations of the equal nature of these two sets of rights is to be found in United Nations General Assembly resolution 32/130 of 16 December 1977, which asserts that:

(a) all human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights;

(b) the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible..

Adopted by the World Conference on Human Rights in 1993, Article 5 of the Vienna Declaration and Programme of Action affirms:


All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

In its final report, the Victorian Human Rights Consultation Committee agreed that these rights were important, and also that the distinction between these and civil and political freedoms could be arbitrary or even non-existent.4

Second, it is widely recognised that economic and social rights are of greatest importance to the community.

In 2003, Kofi Annan (then Secretary-General of the UN) stated that:

While some wish to focus on civil and political rights, others would like to see equal attention paid to economic, social and cultural rights, complaining bitterly that the right to vote is worth little if their children are hungry and do not have access to safe water ... Human rights — whether they be civil, political, economic, social or cultural — are universal and by forging unity and determination in their defence, you can set an example of common progress for the broader international community.5

The National Human Rights Consultation Report recently acknowledged that:

[E]conomic, social and cultural rights are important to the Australian community, and the way they are protected and promoted has a big impact on the lives of many. The most basic economic and social rights — the rights to the highest attainable standard of health, to housing and to education — matter most to Australians, and they matter most because they are the rights at greatest risk, especially for vulnerable groups in the community (emphasis added).5

Indeed, the National Human Rights Consultation Committee recommended that economic, social and cultural rights be provided protection in a national Human Rights Act, albeit a protection more limited than that provided to civil and political rights.7

EDO supports the adoption of all the rights contained in the ICESCR in the Victorian Charter. In this regard, EDO endorses the submissions of the FCLCs and the HRLC. For the purposes of this submission, given EDO’s role and expertise, EDO supports the adoption of those economic and social rights specifically relating to the human rights dimensions of the environment, and more particularly, of climate change. The economic and social rights that EDO endorses include:

- the right to an adequate standard of living;
- the right to the highest attainable standard of health;
- the right to water; and

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the right to food.

Importantly, in addition to these rights, EDO supports the explicit inclusion of an independent right to a clean and healthy environment. This may be subsumed under other basic rights (such as the right to life or the right to health), however EDO favours the inclusion of this right as a stand-alone right, on the basis of growing support at international law, and in numerous domestic jurisdictions, for such a model. These rights are discussed in detail below.

The imperative for the inclusion of these rights is particularly strong following the recent Concluding Observations and Recommendations of the United Nations Committee on Economic, Social and Cultural Rights (‘CESCR’), which urged Australia to take urgent action on the human rights implications of climate change – especially in the context of the right to an adequate standard of living (encompassing the right to food, water and sanitation) for indigenous communities.⁸

2.1.1 The right to an adequate standard of living

The right to an adequate standard of living is contained in article 11 of the ICESCR and article 25 of the UDHR. It is one of the most fundamental human rights, and includes the right to food, water, sanitation, clothing, housing and a healthy environment. The right is not prescriptive and is intended to be interpreted broadly.⁹

It has been recognised at international law that poverty and the potential infringement of human rights are intrinsically linked. Poverty and environmental degradation are also linked. In this sense, it is clear that ‘human rights abuses related to poverty can be both the cause and effect of environmental problems’.¹⁰

In what appears to have been an historic first for a UN treaty body, the CESC recently urged action on the human rights implications of climate change. It stated:

‘The Committee is concerned at the negative impact of climate change on the right to an adequate standard of living, including on the right to food and the right to water, affecting in particular indigenous peoples, in spite of the State’s party’s recognition of the challenges imposed by climate change.’¹¹

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⁸ Concluding Observations of the Committee on Economic, Social and Cultural Rights on Australia, 28 June 2009. Available at: <http://www.unhchr.org/refworld/publisher,ICESCR,CONCERNSERVATIONS,AUS,4af181b00,0.html>

⁹ General comment No. 15 (2002), UN Committee on Economic Social and Cultural Rights at [3]. See also CESC General Comment No 12 which affirms that the right, which is “indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfillment of other human rights”, requires the adoption of appropriate environmental and social policies, at both the national and international levels.


¹¹ Concluding Observations of the Committee on Economic, Social and Cultural Rights on Australia, 28 June 2009, paragraph 27. Available at: <http://www.unhchr.org/refworld/publisher,ICESCR,CONCERNSERVATIONS,AUS,4af181b00,0.html>
The Committee recommended that Australia:

"take all the necessary and adequate measures to ensure the enjoyment of the right to food and the right to affordable drinking water and sanitation in particular by indigenous peoples, using a human-rights based approach, in line with the Committee's general comments No. 15 on the right to water (2002), No. 14 on the right to health (2000) and No. 12 on the right to food (1999)."

These recommendations make clear the recognition by international treaty bodies of the links between human right and environmental rights and responsibilities. They also suggest that Australia may be lacking in this area, and create an imperative for the Victorian government to address various pressing environmental problems – most particularly from the impacts of climate change through a human rights framework.

2.1.2 The right to health

The right to the highest attainable standard of health is contained in both article 25 of the UDHR and article 12 of the ICESCR. The latter explicitly requires State Parties to improve all aspects of environmental and industrial hygiene (at 11(2)(b)). The right to health is a fundamental human right and a pre-condition for the enjoyment of many other rights including the right to life.

The link between the individual right to health and the State's responsibility to maintain a clean and healthy environment is well recognised at international law. In 2001 the World Health Organisation stated that:

"human rights and sustainable development are intimately linked, especially as concerns the health aspects. The right to health and indeed to life cannot be achieved without basic rights to a safe and healthy environment, including water, air and land; and to the life-supporting systems that sustain life on earth for future generations."

International jurisprudence has made a link between the right to health and the right to a clean environment. In The Social and Economic Rights Action Centre and the Center for Economic and Social Rights v Nigeria, the state-owned Nigerian National Company and the Shell Petroleum Development Corporation (in which the former had a majority of shares) had been exploiting oil reserves with no regard for the environment or health of the local communities in Ogoniland, Nigeria. Toxic wastes were deposited into the local environment and waterways but no facilities were put in place to prevent the wastes. As a result, water, soil and air contamination brought about serious short-term and long term health problems such as skin infections, gastrointestinal and respiratory ailments, increased cancer rates, and neurological and reproductive complications.

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14 See for exemple General Comment No. 14 (2000) UN CESCR, on the right to the highest attainable standard of health (2000).

The African Commission found the military government of Nigeria in breach of, among other things, violations of the right to health and the right to a clean environment by contaminating water, soil and air, which harmed the health of the Ogoni people, and by failing to protected the community from the harm caused by the oil companies.¹⁶

This case is significant for its recognition and enforcement of ‘second’ and ‘third’ generation rights, which have commonly been dismissed as vague and unenforceable.¹⁷

Australia’s population is particularly exposed to health risks arising from climate change and other environmental degradation.¹⁶ A human rights framework would address these significant threats.

2.1.3 The right to water

The right to water is indirectly contained in articles 11 and 12 of the ICESCR. It is recognised at international law to be ‘fundamental for life’, and so a ‘prerequisite for the realisation of other human rights’.¹⁹ The right is inextricably related to the right to the highest attainable standard of health,²⁰ the right to adequate housing and adequate food,²¹ and the right to life.

The right to water has been recognised in a wide range of international documents, including treaties, declarations, and other standards.²² Further, it is commonly accepted that the right to potable water will be violated where water is polluted, unsafe, or toxic, including through omission by the State.²³

In Australia, current environmental practices, as well as climate change, are affecting the right to water: water shortages in much of Victoria are affecting the ability to grow food for production,²⁴ as well as compromising the quality and quantity of drinking water. In the north of the country, extreme weather events and sea level rises are already intruding into fresh water supplies.

¹⁶ See in particular [52]:[54]
¹⁷ The Commission stated that “these rights recognise the importance of a clean and health environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of individuals”.
¹⁸ For example, decreased crop yields will lead to food shortages, rising temperatures will lead to the spread of tropical diseases such as malaria and heat waves will threaten the life and health of large parts of the population, especially the young, the sick and the elderly. For further specific details on IPCC and Stern review projections on the effects of climate change on human health, see the International Council on Human Rights; ‘Climate Change and Human Rights: A rough Guide’ (2008), pp 99-100. Viewed at <http://www2.ohchr.org/english/issues/climatechange/docs/submissions/136_report.pdf> on 28 June 2011.
¹⁹ See CESCR General Comment No. 15 (2002) on the right to water at [1].
²⁰ See CESCR General Comment No. 14 (2000) on the right to the highest attainable standard of health, at [11], [12], [15], [34], [36], [40], [43] and [51].
²¹ See CESCR General Comment No. 4 (1991) on the right to adequate housing at [8(b)] and [8(d)]. In relation to the right to adequate food, see the report by the Special Rapporteur of the Commission on the right to food, Mr Jean Ziegler (E/CN.4/2002/58), submitted in accordance with Commission resolution 2001/25 of 20 April 2001.
²² In the environment context, see Agenda 21, Report of the United Nations Conference on Environment and Development (Earth Summit), Rio de Janeiro, 1992 (para 18:47); Protection of the quality and supply of freshwater resources; The Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment (UN, 1992); Resolution 2002/6 of the United Nations Sub-Commission on the Promotion and Protection of Human Rights on the promotion of the realisation of the right to drinking water. See also the report on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realisation of the right to drinking water supply and sanitation (E/CN.4/Sub.2/2002/10) submitted by the Special Rapporteur of the Sub-Commission on the right to drinking water supply and sanitation, My El Hadji Guisse.
²³ See CESCR General Comment No. 15 (2002) on the right to water at [8], [16], [43] and [44].
²⁴ For example, the Lower Murray River now experiences drought every second year instead of every twentieth, and the Murray River currently has the lowest inflow in recorded history. The Garnaut Review has indicated that a one percent increase in maximum temperature will result in a 15% decrease in streamflow in the Murray-Darling Basin. See R Garnaut, The Garnaut Climate Change Review, Draft report, 4 July 2008, p147.
Aside from the critical health and environmental impacts on water as a result of climate change in Australia, it is important also to recognise the cultural value that can be ascribed to water, particularly by Indigenous Australians. Article 25 of the UN Declaration on the Rights of Indigenous Peoples, to which Australia has very recently indicated its support, specifically recognises the spiritual relationship that Indigenous peoples can maintain with waters and coastal seas.

The effects on water supply and distribution as a result of climate change are likely to be particularly dire. By protecting the right to water within a human rights framework, decisions by public authorities will be required to turn not just economic imperatives but also social and environmental imperatives.

2.1.4 The right to food

The right to adequate food is subsumed under the right to an adequate standard of living. The right has been defined as ‘inherent’, extending to ‘regular, permanent and unrestricted access, either directly or by means of financial purposes ... to adequate and sufficient food corresponding to the cultural traditions of the person.’

International commentary has recognised the intrinsic link between the human right to food and the right to a healthy environment. In General Comment 12, the CESC has acknowledged that the right requires the adoption of appropriate environmental policies and hygienic practices, to be fully realised at a national level.

Soaring food prices, desertification and drought triggered by climate change, the expansion of mining to food producing regions, and growing populations are all putting pressure on the right to food. To ensure that economic and other imperatives do not overwhelm other, equally legitimate human rights and environmental imperatives, the right to food should be included in a human rights framework.

2.2 Environmental Rights

This section considers the recognition and inclusion of environmental rights in the Charter. It describes the legal foundations for environmental rights within a human rights framework and provides examples of how other countries around the world are providing legal protection of environmental rights.

As outlined by ANEDO to the National Human Rights Consultation, there is considerable, and growing, recognition at the international level and in numerous countries around the world of the interdependence of human rights and the environment and therefore the importance of protecting and promoting environmental rights within the human rights context.

Acevedo (2000) states that:

Two alternative approaches are being taken to the relationship between international human rights and environmental protection. The first viewpoint provides that the recognition of environmental rights is a necessary prerequisite for the ultimate realisation of fundamental human rights. Proponents

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27 CESC General Comment No. 12 (1999) on the right to adequate food at [4] and [10].

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of this approach reason that "[s]ince degraded physical environments contribute directly to
infringements of the human rights to life, health, and livelihood, acts leading to environmental
degradation may constitute an immediate violation of internationally recognised human rights." Thus,
supporters advocate the creation of a universal system of environmental protections as a means of
ensuring compliance with minimum standards of human rights. The second holds that international
human rights are a launching point from which environmental rights may be derived.28

The 2008 Earthjustice Environmental Rights Report on Human Rights and the Environment noted
that a review of international court decisions, treaties, resolutions, and reports from commissions
and committees shows:

"Increasing recognition that environmental harms adversely affect various individual and community
rights such as the rights to life, health, water, food, work, culture, development, and information and
participation, and that a human rights-based approach to environmental protection (e.g., right to a
clean and healthy environment, right to water, right to nature protection, and other basic procedural
and democratic rights) can provide an effective framework for addressing these issues."29

The National Human Rights Consultation Report recently acknowledged that:

"Newly emerging rights in international law - such as the right to a clean and sustainable environment
- are constantly in the Australian public's gaze."30

2.2.1 Binding international law

While Australia is not explicitly bound under international law to protect environmental human
rights, the international instruments to which Australia is bound provide a framework within which
environmental rights should be protected and promoted. Some environmental rights are
considered to be indirectly or implicitly protected through other rights contained within these
instruments. These include the right to life, the right to health, the right to adequate housing, the
right to water, the right to culture, the right to participate in public life, and the right to freedom of
speech.

For example, the Universal Declaration on Human Rights at article 25 states:

'Everyone has the right to a standard of living adequate for the health and well-being of himself and of
his family, including food, clothing, housing and medical care and necessary social services....'

Although there is no specific reference to environment, the term 'including' indicates a non-
exhaustive list of factors essential to an adequate standard of living.

Further, the ICCPR states at article 16(1):

'Every human being has the inherent right to life. This life shall be protected by law. No one shall be
arbitrarily deprived of his life'

The right to a clean and healthy environment and the right to water are often considered to be
precursors to the right to life.31 The 2008 Earthjustice report32 explains:

28 Acevedo, (2000) 'The intersection of human rights and environmental protection in the European Court of
rights-report-to-un>)
30 National Human Rights Consultation Committee, Report of the National Human Rights Consultation (2009),
346.
The right to life, perhaps the most basic human right, has extensive environmental links. The most obvious connections manifest themselves in situations such as the Chernobyl nuclear disaster and the Bhopal gas leak, each of which fouled the environment in ways that directly contributed to the loss of many lives. Less obvious but equally devastating, extractive industries such as mining, logging and oil development deprive indigenous peoples of the physical basis for their cultures and subsistence, and thereby threaten their lives.

The links between the right to health and the environment are also clear. Many health problems stem from or are impacted by environmental pollution. The right to health in the ICESR at article 12 calls on State parties to take steps for:

‘the improvement of all aspects of environmental and industrial hygiene and the prevention, treatment, and control of epidemic, endemic, occupational and other diseases.’

These rights are also relevant in the context of climate change, which is likely to lead to sea level rise and an increase in the number and severity of extreme weather events. These impacts will threaten the right to life and health among others, and therefore protection of these human rights, even though not directly related to environmental protection, can provide additional impetus for the need to act to prevent climate change.

Of all the international instruments that Australia is a party to, the most direct protection of environmental rights is found within the Convention of the Rights of the Child. The Convention refers to aspects of environmental protection in relation to the child’s right to health. Article 24 provides that parties shall take appropriate measures:

‘to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.’

Therefore, although Australia is not bound at international law to protect environmental rights, it can be argued that the treaties to which Australia is legally bound do provide a framework within which environmental rights should be protected and promoted.

2.2.2 Non-binding international law

A number of other international instruments explicitly refer to environmental human rights. These instruments, however, do not create legally binding obligations on Australia because they are draft texts, or they are not intended to be legally binding on parties, or they are instruments to which Australia is not a party. Though these instruments are not binding on Australia, they are indicia of global developments in environmental rights protection, and therefore are relevant to a possible future path for Victoria.

The 1972 Declaration of the United Nations Conference on the Human Environment33, or ‘Stockholm Declaration,’ was the first international instrument that specifically recognised the

indivisibility link between the environment and human rights. This is a non-binding instrument. It states at Principle 1:

'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.'

Similarly, the 1992 Declaration on Environment and Development\(^{34}\), or Rio Declaration, recognises the rights of humans to a healthy and productive life in harmony with nature.

The most comprehensive international text on environmental rights is the 1994 Draft Principles on Human Rights and Environment.\(^{35}\) The Draft Principles contain a number of articles which outline the important of environmental rights in the human rights context. The document, which was drafted by a group of international experts on human rights and environment protection on behalf of the United Nations Special Rapporteur for Human Rights and the Environment, however, was never formalised as an international instrument and is therefore not binding. Some key articles in the Draft Principles include:

1. 'Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible' (Article 1)

2. 'All persons have the rights to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.' (Article 2)

3. 'All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.' (Article 4)

The Draft Principles highlight the indivisibility and interdependence of human rights and environmental rights. That is, a clean and healthy environment is fundamental to the enjoyment of many other human rights such as the right to life, the right to health and food, and the right to adequate housing. This document is often quoted by human rights experts and international human rights bodies as a model text of environmental rights protection.

It is clear that there is considerable recognition of the importance and interdependence of human rights and environmental rights at the international level. It is not a new concept and not a radical concept. EDO submits that there is a strong mandate for the recognition and protection of environmental rights within a human rights framework.

2.2.3 Comparative domestic jurisprudence

The protection of environmental rights within a domestic human rights framework is not a new concept. Earthjustice summarised the constitutional recognition of environmental rights in a submission to the UN Commission on Human Rights in March 2005:

'Numerous constitutions of the nations of the world guarantee a right to a clean and healthy environment or a related right. Of the approximately 193 countries of the world, there are now 117 whose national constitutions mention the protection of the environment or natural resources. One


hundred and nine of them recognise the right to a clean and healthy environment and/or the state’s obligation to prevent environmental harm. Of these, 56 constitutions explicitly recognise the right to a clean and healthy environment, and 97 constitutions make it the duty of the national government to prevent harm to the environment. Fifty-six constitutions recognise a responsibility of citizens or residents to protect the environment, which 14 prohibit the use of property in a manner that harms the environment, or encourage land use planning to prevent such harm. Twenty constitutions explicitly make those who harm the environment liable for compensation and/or remediation of the harm, or establish a right to compensation for those suffering environmental injury. Sixteen constitutions provide an explicit right to information concerning the health of the environment or activities that may affect the environment.36

For example, South Africa has specifically protected environmental rights in its Constitutions:

36 "Everyone has the right (a) to an environment that is not harmful to their health or well being; and (b) to have the environment protected, for the benefits of present and future generations, through reasonable and other legislative measures that (i) prevent pollution and degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."37

In 2005, France amended its Constitution to include environmental provisions, known as the Environmental Charter. The Charter contains 10 articles covering rights and responsibilities of its citizens in relation to the environment. As it is incorporated into the Constitution it is legally binding and gives environmental rights and responsibilities the same status as the right to life and universal suffrage. Article 1 of the Charter states:

37 "Everyone has the right to live in a balanced environment which shows due respect for health."38

Even small developing countries such as East Timor have provided protection of environmental rights in their constitutions. Section 61 of the East Timor Constitution states:

38 "1. Everyone has the right to humane, healthy, and ecologically balanced environment and the duty to protect it and improve it for the benefit of future generations.

2. The State shall recognise the need to preserve and rationalise natural resources.

3. The State should promote actions aimed at protecting the environment and safeguarding the sustainable development of the economy."39

39 It is clear that there is significant precedent in other jurisdictions for the protection of the environment within the human rights framework.

2.2.4 The role of responsibilities as well as rights

In an environmental context, environmental responsibilities are as important as environmental rights. Numerous international and domestic human rights instruments set out the responsibilities


37 South African Constitution, s24.


of government and/or citizens to protect the environment, and sometimes to remedy environmental harm. For example, the French Environmental Charter places specific responsibilities on its citizens to protect the environment and remedy any damage caused:

'Art 2 - Everyone is under a duty to participate in preserving and enhancing the environment.

Art 3 - Everyone shall, in the conditions provided for by law, foresee and avoid the occurrence of any damage which he or she may cause to the environment, or failing that, limit the consequences of such damage.

Art 4 - Everyone shall be required, in the conditions provided for by the law, to contribute to the making good of any damage he or she may have caused to the environment.'

It is clear from the above instruments and statements that at international law and comparative domestic law, environmental rights are consistently recognised as an indivisible part of broader human rights protections.

2.2.5 The right to a clean and healthy environment

EDO believes that a healthy environment is necessary for the full enjoyment of many human rights, and conversely human rights violations can lead to the degradation of the environment. For example, a right to life or a right to health cannot be effectively maintained where the environment is heavily polluted and essential resources such as clean water are not readily available.

As discussed above, there is growing support for the concept that the protection of the environment is 'a vital part of contemporary human rights doctrine and sine qua non for numerous human rights, such as the right to health and the right to life'.40 The Office of the High Commissioner for Human Rights, together with the United Nations Environment Programme, have commented that:

'Nearly all global and regional human rights bodies have considered the link between environmental degradation and internationally-guaranteed human rights. In most instances, the complaints brought have not been based upon a specific right to a safe and environmentally-sound environment, but rather upon rights to life, property, health, information, family and home life.

Underlying the complaints, however, are instances of pollution, deforestation ... and other types of environmental harm. It may be asked whether or not a recognised and explicit right to a safe and environmentally-sound environment would add to the existing protections and further the international values represented by environmental law and human rights.41

In 2007, the Advisory Council of Jurists for the Asia-Pacific Forum on national Human Rights Institutions recommended that the right to a healthy environment should be explicitly protected by human rights law, and not just as an 'add-on' to other existing rights.42

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42 'The indivisibility and interdependence of human rights has long been recognised. In addition, ... many human rights reply on environmental quality for their full realisation... The ACJ's primary recommendation therefore is that [national human rights institutions] advocate the adoption and implementation of a specific

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Arguably, it is the many nations worldwide who explicitly recognise the right to a clean and healthy environment in their constitutions who lead the way on this issue.\textsuperscript{43}

For example, article 24 of the African Charter on Human and Peoples' Rights reads:

'All peoples shall have the right to a general satisfactory environment favourable to their development.'\textsuperscript{44}

The Protocol of San Salvador to the American Convention on Human Rights (1988) provides at article 11 that:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2. The States Parties shall promote the protection, preservation, and improvement of the environment.

Article 21 of the Netherlands Constitution (1983) provides that:

'It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.'

Such recognition demonstrates that a right to a clean and healthy environment, whether as a separate codified right or as a result of application of other human rights to environmental harms, is emerging as an important component of international law.

While there has been inaction on the issue of environmental rights in Australian jurisdictions, recently, the Tasmania government has taken a progressive stance in proposing the inclusion of a right to environmental sustainability in the Charter of Human Rights and Responsibilities for Tasmania.\textsuperscript{45} Submissions to the government's consultation demonstrated wide-spread public support for the recognition and protection of the some articulation of environmental right.

In light of the strong consensus among nations for the importance of enshrining environmental rights in human rights instruments, and the growing support at international law for a unifying right or principle, EDO supports the explicit recognition of the right to a clean and healthy environment in the Victorian Charter. The relationship between environmental problems and human rights calls for a holistic treatment of these issues. Therefore a Charter dedicated to protecting human rights must recognise the connection. EDO considers that the inclusion of the right to a clean and healthy environment in the Charter Act would serve to strengthen other fundamental rights such as the right to life and the right to health. It would also:


\textsuperscript{44} The right has been interpreted to include an obligation on the part of the State to secure ecologically sustainable development and use of natural resources; and obligation to permit independent scientific monitoring of threatened environments, and the publication of those communities for the benefit of the public; a duty to monitor and provide appropriate information to those communities exposed to hazardous materials and activities; and the provision of meaningful opportunities for individuals to be heard and to participate in the development of decisions affecting their communities. See S. T Ebobrah, ‘Towards Effective Realisation of the Right to a Satisfactory Environment on Human and Peoples’ Rights (2006) (viewed online on 28 June 2009 at <www.up.ac.za/dspace/bitstream/2263/1210/1/ebobrah_st_1.pdf>), extrapolating from the decision in The Social and Economic Rights Action centre and Centre for Economic and Social Rights v Nigeria (2001) AHRIR 51 (ACHPR 2001).

add weight to the operative provisions for the implementation of the procedural rights of access to information, participation in decision-making and access to justice by strengthening the legal and philosophical underpinning of these rights. It would indicate that these procedural rights are not ends in themselves, but are meaningful as means towards the end of protecting the individual’s substantive right to live in a healthy environment.’

Recommendations:

- The Charter should extend protection to all economic and social rights outlined in the *International Covenant on Economic, Social and Cultural Rights*, including those rights that would directly or indirectly protect and promote environmental rights:
  - the right to an adequate standard of living
  - the right to the highest attainable standard of health
  - the right to water
  - the right to food
- The Charter should specifically promote and protect the right to a clean and healthy environment.

2.3 Participatory rights

In addition to rights that directly and indirectly protect people’s right to a clean and healthy environment, recognition of ‘procedural rights’ is important to ensure environmental rights are fully realised:

No matter how strong a substantive right to a clean environment may be on paper, it would be meaningless without the procedural (and related) rights necessary to pursue respect, protection and promotion of that right.  

A number of International instruments enshrine the right to public participation in governance and legal systems, including the right to access to information, public participation in public decision-making, access to justice and the right to peaceful assembly.

The Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus Convention) is the most comprehensive international instrument on procedural environmental rights. It entered into force in 2001, is legally binding and has over 40


48 For example the ‘Rio declaration’ states: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous material and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” Principle 10 of The 1992 Declaration on Environment and Development. See also Principle 20 and 22.
parties largely in the European Union (although not Australia). It creates rights to protect the 'three pillars' of public participation: access to information, public participation in decision making and access to justice in environmental matters. The objective of the Convention contained in Article 1 states:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights to access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this convention.

The Aarhus Convention also recognises that citizens may need assistance in order to exercise these rights, and that governments should provide that assistance.

The Aarhus Convention is widely acknowledged to represent international best practice in respect of public participation in government decision making on matters that affect the environment. As the United Nations Economic Commission for Europe acknowledges:

The Aarhus Convention is a new kind of environmental agreement. It links environmental rights and human rights. It acknowledges that we owe obligations to future generations.

The subject of the Aarhus Convention goes to the heart of the relationship between people and governments. The Convention is not only an environmental agreement, it is also a Convention about government accountability, transparency and responsiveness.55

A number of international environmental treaties that are binding on Australia also specifically protect participatory rights. For example the United Nations Framework Convention on Climate Change (1994) requires parties to:

(a) Promote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities:

(i) the development and implementation of education and public awareness programmes on climate change and its effects;

(ii) public access to information on climate change and its effects;

(iii) public participation in addressing climate change and its effects and developing adequate responses.56

International jurisprudence also recognises the link between public participation, basic human rights such as the right to life, and the environment. For example, in Guerra and others v Italy, the European Court of Human Rights found that the failure to provide the local population with adequate access to information about the risks in relation to a nearby chemical factory in the case of an accident was a breach of their right to life and their right to family life.57

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As the discussion above demonstrates, international and comparative domestic law has recognised that procedural rights are fundamental to the ability of people to protect themselves from environmental harms.

While the Charter currently contains a right to Freedom of Expression, which recognises that the right to seek, receive and impart information is an aspect of the human rights of Freedom of Expression\(^{33}\), other Bills of Rights have been more emphatic, specifically enshrining the right to access information.

For example, Article 32 of the South African Bill of Rights provides:

1. Everyone has the right to access to:
   a. Any information held by the state; and
   b. Any information that is held by another person and that is required for the exercise or protection of any rights.

2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden of the state.

An example at a national level of how public participation in environmental issues can be protected is the Constitution of Finland. It provides that public authorities must:

   endeavour to guarantee ...the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment.\(^{32}\)

Ideally, EDO would endorse a stronger protection of the right to access information in the Charter, similar to the Constitution of Finland above, that goes further to specifically protect procedural rights within the context of environmental rights.

**Recommendation:**

- The Charter should specifically protect and promote the right to access to information, public participation in decision making and access to justice in environmental matters.

### 2.4 Intergenerational equity

The concept of intergenerational equity says that humans 'hold the natural and cultural environment of the Earth in common both with other members of the present generation and with other generations, past and future'.\(^{54}\) It contends that the earth is inherited from previous

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\(^{32}\) Justice Bell held in *XYZ v Victoria Police* [2010] VCAT 255 (16 March 2010) that the right to freedom of expression in the Charter incorporated 'a positive right to obtain access to government-held documents'. International jurisprudence demonstrates a similar trend in this regard with the ECHR and the Inter-American Court of Human Right both reaching similar findings (*Matky v Czech Republic; Claude Reyes v Chile*).


generations and an obligation exists to pass it on in reasonable condition to future generations. Intergenerational equity is central to the idea of sustainable development.55

This concept has been explored and litigated in various contexts internationally. For example, in the case of Oposa v Factoran,56 children from all over the Philippines filed a case to compel the Secretary of the Department of Environment and Natural Resources to cancel all existing Timber License Agreements and to prevent him from renewing or processing any new applications, on the basis of the relatively novel theory of 'intergenerational justice'. The children claimed that they represented not only their generation, but also 'generations yet unborn'.57

It is evident that environmental degradation, particularly in the context of climate change, raises significant issues on matters of equity between developed and developing nations (the former being largely responsible for climate change to date; the latter bearing the greatest burden), the rich and poor (the latter being far less equipped to adapt to, and pay for, the effects of climate change) and Indigenous and non-Indigenous Australians (the former bearing a disproportionate impact of climate change, given their relationship to the land, their cultural practices, and their relative disadvantage within the community). Further, the negative implications for future generations of a 'business as usual' approach to environmental practices are significant.

In essence, climate change and other environmental degradation in Australia and beyond undermine the human rights of those most vulnerable to its impacts - economically, geographically, and physically. Further, an irresponsible approach to addressing these issues has had, and will continue to have, significant effects on future generations of Australians. By incorporating the notion of intergenerational equity into a human rights framework in Australia, such problems may be addressed and redressed.

2.5 Broad interpretation of rights

Regardless of whether or not a stand-alone environmental right is included in the Charter Act, EDO calls for a statement to be inserted into the Preamble of the Charter that asserts that protected rights be interpreted broadly and in recognition of the interrelatedness, interdependency and indivisibility of human rights. This should include a reference to the principle of intergenerational equity. For example, as submitted to the National Human Rights Consultation by ANEDO, the preamble could include a statement that the Charter is founded on the principle that:

'all persons and communities have the right to a safe and secure, healthy and ecologically sound environment that is protected, preserved and improved both for the benefit of present and future generations, and in recognition of the inherent value of ecosystems, biodiversity and existing climate systems.'

Such an approach would still ensure that the environmental aspects of many civil and political, as well as social, cultural and economic rights are implicitly recognised. This recognition accords with the growing international human rights jurisprudence on the interaction of human rights and the environment, and the need to recognise the need to protect the interests of both present and future generations.

55 An oft-quoted definition of sustainable development is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." First coined in Our Common Future, a report from the UN World Commission on Environment and Development, 1987.
56 224 SCRA 792 (1993); reprinted in 33 I.L.M 173 (1994).
57 Ibid at 802.
Recommendations:

- The Charter should include a statement in the Preamble asserting that rights be interpreted broadly and in recognition of the interrelatedness, interdependency and indivisibility of human rights.

- The Charter should include a reference in the Preamble to the principle of intergenerational equity.

3 Further provisions on legal proceedings and remedies

3.1 Enforceability of rights

We endorse the submissions of the FCLCs and the HRLC on this TOR.

It is widely recognised that there is little point in having a right if there is no corresponding enforceable duty to uphold it.

We are strongly of the view that the Charter should include a separate, stand-alone cause of action for violation of human rights, rather than requiring human rights issues to be coupled with another action. Victims of human rights breaches should not have to rely on a separate cause of action in order to seek relief or remedy. The current approach may unduly restrict those experiencing breaches of their human rights from seeking relief or remedy.

3.2 Enforceable remedies

We endorse the submission of the FCLCs and the HRLC with respect to this term of reference.

The Charter should provide accessible, appropriate and effective remedies for violations of human rights arising under the Act. This is critical to holding public authorities accountable for their decisions and actions and ensuring observance of human rights.

EDO believes that a full range of both judicial and non-judicial remedies should be available under the Charter, including all such remedies as are just and appropriate.

Human rights treaties, including the ICCPR and ICESCR, either explicitly or implicitly require that a person have access to effective remedies, including judicial remedies, if their rights are breached.58

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According to the UN Human Rights Committee, an ‘effective remedy’ requires reparation to the person whose rights have been violated. Reparations include:

- restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes to relevant laws and practices.  

**Judicial remedies**

Judicial remedies are important in enforcing and ensuring observance of human rights.

In the case of the ICESCR, the UN Committee on Economic, Social and Cultural Rights has noted that although administrative remedies are sometimes enough, ‘whenever a Covenant right cannot be made fully effective without some role for the Judiciary, judicial remedies are necessary’.  

EDO believes that the Charter should empower courts and tribunals to grant such relief or remedy, or make such orders within its powers, as is ‘just and appropriate’, including making an award of damages where appropriate.

The Charter currently departs from the broad remedial provisions in most other jurisdictions.

Damages are currently available for breaches of the United Kingdom’s Human Rights Act where necessary to afford just satisfaction to the complainant.  While the New Zealand Bill of Rights Act 1990 does not make specific provision for remedies, the New Zealand Court of Appeal has held that compensation is available for breach of human rights protected under the Act.  

As part of the mandated one-year review of the Human Rights Act 2004 (Act), the Act introduced section 40 which provides a free standing cause of action, and with the exception of damages, gives the court a broad remedial discretion to grant ‘the relief it considers appropriate’.

**Access to Justice**

We note that a right to seek redress in the courts is largely meaningless if the costs of taking an action remain prohibitive. For example, in requiring that proceedings be brought in the Supreme Court, the Charter seems to impose unnecessarily on litigants of less ample means, who are supposed to be the principal beneficiaries of a human rights Act.

Access to justice is a critical component in promoting and protecting human rights. The case study below illustrates the constraints placed on many of our clients, seeking human rights protections in the context of environmental matters brought in the public interest.

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61 Human Rights Act 1998 (UK), s 8(3).

62 Simpson v Attorney-General (Baigent’s case) [1994] 3 NZLR 667.
Case Study 1 – Right to Privacy, Freedom of Expression, Freedom of Assembly and Association

Our clients were members of a group established to promote a new approach to sustainable water policy. The predominant focus of the group’s activities was the construction of the Victorian Desalination Plant, which the group and our clients advocated against. The group participated in the Environmental Effects Statement Inquiry for the Desalination Plant and organised direct actions to demonstrate its member’s views on water management in Victoria and to keep the issue of sustainable water use high on the agenda of the State Government. This included organising and attending a number of protests at the site of the Desalination project and elsewhere, which our clients participated in.

Last year it was revealed that Victoria Police and the Department of Sustainability and Environment (DSE) had entered into a Memorandum of Understanding (MoU) to “manage” protestors at the site of the Desalination plant. This MoU allowed for the transfer of private information on protestors collected by the government bodies to the private consortium building the plant.

Late last year, the EDO, on behalf our clients, filed an action in the Supreme Court seeking review of the decision of the Victorian Government to enter into the MoU on the basis of a number of grounds, including that:

(i) the arrangements for the release of information were in breach of

- The Commissioner for Law Enforcement Data Security Act 2005
- The Standards for Victoria Police Law Enforcement Data Security; and/or
- The Information Privacy Act 2000

(ii) in making the decision to enter into the MoU, the Victoria Police/DSE failed to comply with the Charter in that they failed to give proper consideration to:

- The right to have privacy unlawfully or arbitrarily interfered afforded by s13 of the Charter
- The right to freedom of expression afforded by s15(2) of the Charter
- The right to peaceful assembly afforded by s16(1) of the Charter; and
- The right to freedom of association with others afforded by s 16(2) of the Charter.

In bringing the proceeding, our clients did not stand to gain any benefit to their private interests, regardless of the outcome of the case. They initiated the proceeding because they believed it to be in the public interest to do so, and wished to defend the rights of protestors at the desalination plant, but also the rights of all future protesters in Victoria.

Unfortunately the case was never brought before the court as our clients were unable to obtain a court order limiting the costs payable by them in the event that the proceedings were unsuccessful. The risks of adverse costs orders against litigants bringing cases in the public interest effectively prevents them from accessing justice and enforcing human rights breaches of the Charter.

We strongly believe that mechanisms should be implemented to secure adequate access to justice in relation to human rights. This could include:

- Introducing public interest protective costs order provisions to alleviate the risks of adverse costs orders against human rights litigants bringing proceedings in the public interest; and
- Adequately funding services such as community legal centres and support agencies involved in human rights issues, including the EDO, so that they are better able to meet the need for assistance in environmental public interest matters, which as this submission and the case study above has highlighted, frequently have a human rights dimension.
Non-judicial remedies

While judicial remedies are critical to ensuring observance of human rights, they are not always the most appropriate or desirable solution for an aggrieved person. In some instances, a non-judicial response such as engaging in a dispute resolution process, or lodging a complaint with an independent investigative body, is appropriate and sufficient.

Accordingly, the EDO submits that in addition to providing for judicial remedies, the Charter should empower the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) to receive and conciliate human rights complaints.

Accessible, appropriate and effective judicial and non-judicial remedies are integral to enhancing government compliance with human rights obligations, and a critical guarantee in the event of non-compliance. If the Charter is to be more than an ‘empty statement’\(^{63}\), such effective and appropriate remedies are essential.

Recommendations:

- The Charter should provide an independent cause of action for breaches of protected human rights.
- The Charter should provide a full range of judicial and non-judicial remedies for breaches of protected human rights.
- The Charter should empower courts and tribunals to grant such relief or remedy as is ‘just and appropriate’, including the award of damages where appropriate.
- The Charter should empower the Victorian Equal Opportunity and Human Rights Commission to receive and conciliate human rights complaints.
- The Charter should be supported by a range of mechanisms to better secure access to justice, in particular, providing enhanced funding to community legal centres including the EDO, and introducing public interest protective costs orders to alleviate the risks of adverse costs orders in litigation brought in the public interest.

4 The effects of the Charter

4.1 The provision of services, and the performance of other functions, by public authorities

EDO sees the principal benefits of the Charter as building a stronger culture of rights in Victoria, leading to a better understanding and consideration of human rights across public decision-making, including development of legislation and policies, service delivery, funding allocations and decisions regarding enforcement actions.

However, creating a culture of human rights is not simply a matter of enacting a law. Much depends on how public bodies respond to their obligations, whether the public sector are sufficiently educated, whether people are educated about their rights and whether sufficiently-funded bodies exist to promote the aims of the Charter and respect for human rights generally.

\(^{63}\) Simpson v Attorney-General [1994] 3 NZLR 667 (Baigent’s case 702 (hardies Boys J).
While four years is a reasonably short time to assess progress, particularly of a law aimed at attitudinal change and cultural shift, the initial years of the operation of the Charter has illustrated the potential of the Charter and identified opportunities for strengthening its impact.

There is evidence that, overall, the Charter has had a positive impact on the delivery of services and the performance of other functions by the government and its agencies.

The VEOHRC’s 2010 report on the Charter observes that:

“the time that public authorities have invested in building human rights principles into their work is now beginning to make a genuine difference in the business of government and in the lives of Victorians.”66

Further, the Commission 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

The Commission’s report also finds that where the Charter has been used well, it 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.66

The submissions of the FCLCs and the HRLC provide a number of individual case examples which support the findings of the VEOHRC.

While it is clear from these examples that cultural change is taking place across the process, practices and activities of Victoria’s public authorities, in EDO’s experience, the shift in thinking has not necessarily filtered down to the everyday operations and practices of all public authorities. Unfortunately EDO has witnessed a number of instances in which the existence of the Charter has not ensured that the decisions and actions of public authorities have been made by reference to human rights standards and principles. A number of these relate to access to information from local government and state government departments and agencies. We provide the case studies below as examples.

The instances below indicate the need for a stronger focus on education and training of public sector staff to ensure they are sufficiently equipped to apply the human rights framework in their day-to-day work when creating laws, developing and implementing policies, making decisions and delivering services. The entrenchedness of a human rights framework within government and its agencies is critical to the effectiveness of the Act.

Case study 2: Freedom of Information

Our client lodged a Freedom of Information (FOI) request with the Department of Planning and Community development (DPDC) on 7 July 2009 seeking access to documents. On 6 November 2009, having received no response from DPDC, our client commenced review proceedings in VCAT against...

DPCD for a deemed refusal of the request.

On 21 December 2009, the DPCD provided EDO with a Notice of Decision. This was over 110 days in excess of the statutory time limit to respond to the request.

The Notice granted partial access to 13 pages, denied any access to a further 46 pages and granted access in full to the balance of the documents.

Upon receiving the decision and the documents, our client realised that full and proper searches had not be done pursuant to their FOI application. That full and proper searches had not been done was evident from other FOI requests made by our client to other agencies (namely, the East Gippsland Shire Council and Marine Safety Victoria), the results of which produced copies of document which fell within the scope of the FOI request to DPCD and that should have been held by DPCD. For example, Marine Safety Victoria held copies of correspondence to and from DPCD on the topic specified, and they were provided by Marine Safety Victoria pursuant to an FOI request. However, these documents were not identified in the response to the FOI request to DPCD. There were a large number of documents in this category that clearly demonstrated that DPCD had either not done adequate searches for documents or that they were willfully with-holding them.

Our client made a request for internal review of the FOI decision, asking for DPCD to check that they had done full and complete searches. The decision came back to our client unchanged, and DPCD was unresponsive to the allegations of inadequate searches.

Our client informed VCAT that, under s53(5) of the FOI Act, it wished to have the current proceedings treated as a hearing for review of the decision made on 21 December 2009.

Over the months between that time and the time of the VCAT hearing in September 2010, our client maintained their position that DPCD had not done adequate searches and made several more requests that they do so before the VCAT hearing. In response, DPCD fluctuated between two positions; 1) that adequate searches had been done, and 2) VCAT did not have jurisdiction to decide on the issue of adequacy of searches and that therefore our client did not have any redress on the issue.

On 25 August 2010, at the request of DPCD, our client provided to DPCD a list of documents that we knew to exist that had not been identified by them pursuant to the FOI request. Between this date and ten days after the first day of hearing, DPCD provided our client with more than 3000 additional pages of documents captured by the FOI request, despite their initial contention that the searches done had been

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67 In *XYZ v Victoria Police* [2010] VCAT 255 (16 March 2010). Justice Bell held that the right to freedom of expression 'incorporates a positive right to obtain access to government-held documents'. In reaching this decision, Bell J held that:

- Human rights should not be interpreted in a "narrow or legalistic fashion", but rather in a "purposeful" and "generous" way by reference to the "cardinal values" which the rights embody.
- The right to freedom of expression is foundational to democracy, the rule of law, and individual, social and cultural development.
- Freedom of information is "a necessary constituent of freedom of expression, for the purposes of the right to seek, receive and impart information will be frustrated if the government, without justification, can simply refuse the information sought".
- "International jurisprudence is moving strongly in the direction of a positive obligation being part of freedom of expression" - his Honour cited the European Court of Human Rights, Canada, the UN Human Rights Committee, the Inter-American Court of Human Rights, and the Supreme Court of India in this regard.

68 Section 32(1) of the Victorian Charter similarly requires that "so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights."

adequate.

The full provision of documents to our client was not completed until 14 months after the initial request was made, and only after a dogmatic pursuit of these documents by our client.

If our client had not been able to obtain pro bono legal assistance, had not been aware of the existence of the additional documents, and had not been unwavering in their determination to exercise their rights under the FOI Act, they would never have obtained access to the documents to which they are entitled by law.

Significance of the Charter

The Charter guarantees the Right to Freedom of Expression under section 15(2).

Recent Victorian case law confirms that the Freedom of Information Act 1982 (Vic) should be interpreted consistently with section 15 of the Charter, which recognises that the right to seek, receive and impart information is an aspect of the human rights of Freedom of Expression. The case demonstrates that the Charter does not interfere with the responsibilities of public authorities, but instead brings the issue of human rights to the forefront of interpretation.

Public authorities should ensure full respect of the right to access information through:

- Processing requests for information within statutory timeframes
- Adopting the necessary measures to promote, to implement and to enforce the right to access to information including creating and maintaining public records in a serious and professional manner, training public officers, implementing public awareness-raising programmes, improving systems of information management, and reporting by public bodies on the measures they have taken to implement the right of access.

Case Study 3 – Access to Information

Our office requested the Environment Protection Authority (EPA) provide statistical data in relation to the administration and enforcement of environment protection legislation. Specifically, we sought information on the number of breaches of legislation administered by the EPA that occurred each year; the number of breaches that were self-reported (i.e voluntary reporting); the number of complaints received each year by the EPA; the number of investigations conducted by the EPA each year, the number of licences issued each year and the total number of licences current.

Details of individual complaints, licences, investigations and EPA actions were not sought, merely the data mentioned above.

The EPA advised the EDO that it would have to submit an FOI request to access that information.

Significance of the Charter

As noted in the above case study, the Charter guarantees the Right to Freedom of Expression under section 15(2), which has been held to incorporate the right to seek, receive and impart information.

In ensuring full respect of this human right, public authorities in the performance of their public functions
should disseminate information about their functions and activities on a routine basis, even in the absence of a specific request, and in a manner which ensures that the information is accessible and understandable.  

In order to continue the momentum that has been achieved so far, and to achieve more systemic improvements in government decision making and service delivery, the case studies above demonstrate that comprehensive and continuing education and training of the public sector is critical.

Furthermore, in our day to day work, EDO has observed that many of our clients are unaware of the existence of the Charter. Therefore, in addition to education for the public sector, there is a need for education of the community to inform them of the rights they have and how to access assistance if those rights are infringed.

EDO therefore recommends that the Victorian Charter be accompanied and complemented by a comprehensive program of human rights education, both for the public sector and the community, and that legal and advocacy services be adequately resourced to enable people to understand and vindicate their human rights.

Recommendations:

- The Charter should be complemented by continuing human rights education and training for the public and community sectors.
- Legal and advocacy services be adequately resourced to enable people to understand and vindicate their human rights.

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