BY EMAIL

4 July 2011

Mr Edward O'Donohue MLC
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament of Victoria
Melbourne Victoria 3002

Dear Sir

OPI SUBMISSION IN RELATION TO THE REVIEW OF THE
CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

The Office of Police Integrity (OPI) welcomes the opportunity to provide this submission in relation to the Victorian Government’s review of the Charter of Human Rights and Responsibilities Act 2006 (‘Charter Act’).

OPI supports the ongoing operation of the Charter Act in Victoria. After four years of implementation, OPI is encouraged by the positive impact which the Charter Act continues to have, both organisationally and in the context of Victoria Police’s approach to policing.

1 OPI’s human rights obligations

Under the Police Integrity Act 2008, the Director, Police Integrity, has a dual function with respect to human rights, namely to ensure that:

• members of Victoria Police have regard to the human rights set out in the Charter Act; and
• all OPI personnel act in a way that is compatible with human rights or, in making a decision, give proper consideration to relevant human rights.

Consistent with the above functions, OPI makes this submission in response to the Terms of Reference. By virtue of its functions, OPI is unable to provide informed comment on every Term of Reference and, accordingly, has not addressed certain matters.

2 The matters referred to in s 44(2), Charter Act

2.1 Inclusion of additional rights (ss 44(2)(a), (b), Charter Act)

As an integrity agency responsible for the detection and exposure of police corruption and serious misconduct, OPI recognises and respects its responsibilities regarding the
appropriate use of its investigatory and coercive powers. OPI further recognises the sensitivities concerning persons who communicate with OPI personnel in connection with its operations.

Operationally, OPI has had particular cause to consider the provisions of the Charter Act that concern privacy and due process rights. OPI observes that the content of such rights closely reflect equivalent rights prescribed in the International Covenant on Civil and Political Rights and other international instruments. The Charter Act has had the effect of reaffirming the need for OPI, as an integrity agency, to respect and protect rights and ensure that any limitations placed on rights can be justified as reasonable and proportionate to a particular operational aim. In this context the Charter Act is beginning to have a positive effect in informing OPI’s internal decision-making, particularly in those instances where human rights are engaged by OPI’s operational decisions. This is still a work in progress.

In its monitoring and auditing of Victoria Police’s professional and ethical standards, the Charter Act has been a valuable framework by which OPI has been able to oversight compliance with fundamental rights of persons who come into contact with police actions. In addition to the specific rights enunciated in the Charter Act, OPI’s oversight obligation has been aided by reference to internationally prescribed standards, including the United Nations Rights Standards and Practice for the Police. In its monitoring and auditing of Victoria Police, OPI has adopted the UN Standards as a benchmark standard of best-practice policing.

From both an operational and oversight perspective, OPI is of the view that whilst the inclusion of economic, social and cultural rights, a right of self-determination and rights under other international human rights treaties (including the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of the Child) may be generally desirable, such a course would be unlikely to materially affect OPI’s general operations. Notwithstanding, OPI credits the implementation of the Charter Act with creating a dialogue around human rights, which in turn has led to greater awareness on the part of Victoria Police and OPI personnel of actions and decisions which have the effect of engaging human rights.

2.2 Further provisions regarding public authority compliance with the Charter Act and further provision for proceedings and remedies (ss 44(2)(c), (d), Charter Act)

(a) Compulsory auditing to ensure compliance

With respect to OPI’s function of overseeing Victoria Police’s compliance with the Charter Act, OPI is of the view that an additional independent compliance or auditing process is unnecessary as it would effectively replicate the role currently performed by OPI. There have already been situations in which both OPI and VEOHRC have identified overlapping responsibilities with respect to the monitoring of Charter Act compliance by Victoria Police.
Operationally, section 38 of the Charter Act has required OPI to be particularly vigilant to ensure that it acts compatibly with human rights and, in making decisions, is conscious of giving proper consideration to human rights. This conduct and process obligation has proven to be an effective method by which OPI has commenced to self-audit its decision making processes and outcomes. The effect of section 38 on internal decision-making is further outlined in paragraph 3.1. OPI also notes the important role played by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) with respect to compliance with human rights under the Charter Act. In particular, OPI has on various occasions engaged VEOHRC to provide training sessions to OPI personnel to promote greater understanding of the content of human rights and the obligations on public authorities to act compatibly with human rights. OPI values the approach of voluntary engagement with VEOHRC over an alternate regime of compulsory auditing against prescribed standards.

In summary, OPI is of the view that a compulsory layer of external scrutiny of OPI against prescribed standards is unnecessary. With respect to Victoria Police, OPI, the oversight agency, provides an appropriate level of external scrutiny as part of its overall oversight responsibilities. By its very nature, section 38 imposes ongoing discipline on OPI to ensure that it acts compatibly with human rights. OPI’s voluntary collaboration with VEOHRC has proved a beneficial way to promote a culture of human rights amongst OPI personnel.

(b) Further provision for proceedings and remedies

OPI observes that the Charter Act does not create an independent cause of action for individuals whose human rights have been unlawfully or unreasonably limited.

As part of its operational function, OPI often recommends the imposition of disciplinary sanctions and laying of criminal charges as a means of punishing those involved in the commission of corrupt conduct, serious misconduct and misconduct generally. Such action is generally directed towards redressing injury caused to the community. Often, however, corrupt conduct and serious misconduct can result in an unlawful or unreasonable limitation of the rights of individuals. Whilst those individuals may have a separate cause of action grounded in another source of law, there exists no ability for persons to bring independent proceedings for a remedy which acknowledges the breach of their human rights. Aggrieved individuals have, from time to time, voiced their dissatisfaction with the Charter Act framework to OPI, in particular the lack of an independent cause of action to seek redress for violations of their rights.
In a similar vein, the awarding of damages for a breach of human rights is expressly proscribed by the Charter Act. As a consequence, aggrieved individuals have, from time to time, indicated that the lack of effective and cost-efficient remedies (beyond a declaration of inconsistent interpretation) has resulted in a feeling of lack of acknowledgement in respect of their rights violations.

3 The effect of the Charter Act on government, courts and the community

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

(a) OPI’s Oversight Obligation

Statutory recognition of human rights has assisted OPI in overseeing Victoria Police’s compliance with human rights in a number of circumstances.

The Charter Act has provided a useful framework for OPI to identify and assess emerging trends in police behaviour against a legislatively entrenched body of rights. In its 2008 Annual Report, OPI identified the treatment of people in police custody as a key area of risk of human rights infringements by police. The Report also documented the results of a pilot audit of the implementation of recommendations from the 2006 Report that had been undertaken in the first half of 2008. That audit found:

While there have been significant overall improvements in the number of detainees in police cells and their access to health services, it is of concern that, contrary to the Charter, the experience for detainees continues to vary sometimes dramatically, based on their place of detention.


From April to December 2009, OPI’s Professional Standards Assurance Unit inspected 22 police stations across Victoria. The focus of the audit was to examine facilities, systems and processes in place in the cell complexes. Each station was evaluated against the recommendations from the 2006 report and the OPI Standards for police cells toolkit. In June 2010, OPI tabled in Parliament a report entitled, ‘Update on conditions in Victoria Police cells’ which acknowledged that ‘a number of the recommendations of the 2006 Report accepted by Victoria Police have been implemented.’

The Charter Act’s express recognition of the rights to life and protection from cruel, inhuman and degrading treatment has informed the OPI’s recent report, ‘Review of
the investigative process following a death associated with police contact", tabled in Parliament in June 2011. In connection with the preparation of that report, the Charter Act formed an integral component of various stakeholder submissions to the OPI inquiry, particularly in relation to the extent to which core human rights can be justifiably limited in a free and democratic society.

The above case inquiries exemplify the positive impact that a rights-based approach has had on OPI’s oversight function of Victoria Police. In the context of the above examples, the Charter Act has specifically informed the development of a toolkit for determining human rights standards and provided a meaningful framework for conducting the audit of Victorian police cells. In addition, the Charter Act’s recognition of the right to life has provided a statutory basis from which OPI was able to frame its recent inquiry into a death associated with police contact. More particularly, the existence of the Charter Act has been a critical factor in providing an impetus to conduct such oversight inquiries.

(b) OPI’s Operational Obligation

OPI is conscious that as an integrity agency its practices and procedures ought to reflect model practice of government. This objective extends to best practice in the context of OPI’s respect for, and promotion of, human rights.

Section 38 of the Charter Act imposes a statutory obligation on OPI (being a ‘public authority’) not to act incompatibly with human rights and to give proper consideration to human rights when making decisions. As indicated in paragraph 2.2, this provision imposes a level of constant discipline on OPI to monitor its own human rights compliance.

For example, in 2008 following the introduction of the Charter Act, OPI conducted a comprehensive review and update of its policies, practices and procedures to ensure that relevant human rights were being appropriately considered at all levels of decision-making across the organisation. Following a recent County Court ruling concerning the application of the Charter Act to surveillance practices,¹ OPI has again had cause to consider a further review of its policies and procedures with respect to the deployment of its investigatory powers, including powers exercised under the Surveillance Devices Act 1999, Crimes (Controlled Operations) Act 2004, Police Integrity Act 2008 and Telecommunications (Interception and Access) Act 1979 (Cth). This further review is scheduled to commence in the latter half of 2011.

In addition, OPI personnel are beginning to see the benefits of the guidance afforded by section 7(2) of the Charter Act. This provision provides useful assistance in understanding the circumstances in which a human right may be permissibly limited and sets out relevant factors to guide decision-making. In

¹ DPP v KW [2011] VCC 511.
particular, reference to the factors set out in section 7(2) enables OPI personnel being better able to determine whether their proposed use of a relevant investigatory power is reasonably appropriate and adapted to the purpose of an operational strategy. Some of these factors are also reflected in other legislation, such as the Surveillance Devices Act 1999. For example, in determining the appropriateness of making an application for a surveillance device warrant, section 17(2) of that Act, has the effect of expressly requiring an applicant to consider whether the limitation placed on the relevant subject’s right to privacy is reasonable and proportionate to the object of the particular operation.

In sum, the combination of the conduct obligation (imposed by section 38) and proportionality test (set out in section 7(2)) has been of significant use to OPI personnel in their overall decision-making, and beginning to be of use in operational decision making about the use of coercive and intrusive investigative powers. OPI is of the view that informed decision-making is achieving a more responsible exercise of investigative powers by personnel and greater adherence to human rights standards.

3.2 The effect of the Charter Act on litigation and the roles and functioning of courts and tribunals

(a) Effect of Charter Act on derivative use immunity in coercive examinations

Under Part 4 of the Police Integrity Act 2008, the Director, Police Integrity, may summons witnesses to attend and give evidence and produce documents and other things at an examination. The Act expressly limits common law protections available to persons charged in criminal courts, abrogates certain privileges (including the privilege against self-incrimination) and excludes the rules of evidence.

The limitation imposed by Parliament on such due process rights serves to demonstrate the balancing of the law enforcement objective against unfettered enjoyment of rights by individuals. However, litigation in connection with the Charter Act has been useful in demonstrating that fundamental due process rights cannot in every instance be abrogated without being incompatible with human rights. In Re an application under the Major Crime (Investigative Powers) Act 2004, Warren CJ determined that where a person is compelled to give evidence in the absence of protections against self-incrimination, derivative use of evidence obtained pursuant to compelled testimony must not be admissible against that person unless the evidence was discoverable through alternative means.

\[2\] [2009] VSC 381.
(b) **Effect of Charter Act on third party surveillance**

As indicated in paragraph 3.1(b), a recent County Court ruling has, in the age of the Charter Act, expanded the scope of the prohibition on third-party surveillance under the Surveillance Devices Act 1999. In essence, it was ruled that a person (such as a police officer) who recruits a civilian to participate in recorded surveillance with another (unconsenting) person, without a warrant, may engage in unlawful third party surveillance in contravention of the Surveillance Devices Act and also act in breach of a person's rights to privacy and due process under the Charter Act. Evidence obtained from the use of a surveillance device in those circumstances may, subject to judicial discretion, be rendered inadmissible in consequent proceedings.

Whilst OPI was not a party to the proceedings referred to above, the ruling had important policy and procedural implications in relation to the use of surveillance devices by OPI personnel. The decision also prompted a broader review of the human rights implications of the use of other investigatory powers exercised by OPI under other legislation including the Surveillance Devices Act 1999, Crimes (Controlled Operations) Act 2004, Police Integrity Act 2008 and Telecommunications (Interception and Access) Act 1979 (Cth).

The above decisions serve to underscore the effectiveness and limitations of the dialogue model of human rights protection that is prescribed by the Charter Act. Whilst OPI supports a dialogue model of human rights protection, the above decisions demonstrate that the process required of decision-makers under the Charter Act is cumbersome and overly complex for the objective it seeks to attain. In particular, OPI notes that the approach to interpretation of statutory provisions in the context of the Charter Act is under review by the High Court of Australia following an appeal against the decision of the Court of Appeal in R v Moncilovic.

Given the complexity of the current approach to the interpretation of statutory provisions in the context of the Charter Act, legislative clarification would be desirable. OPI is of the view that amendments of the Charter Act aimed at simplifying the interpretive exercise would better promote human rights protection in Victoria.

4 **Recommendations and observations**

In summary, OPI observes and recommends that:

- the Charter Act has been effective in creating a dialogue around human rights, which has led to greater awareness on the part of Victoria Police and OPI personnel of actions and decisions which engage human rights.

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3 *DPP v KW* [2011] VCC 511

• the inclusion of economic, social and cultural rights, a right of self-determination and rights under other international rights treaties would be unlikely to materially affect OPI's general operations.

• OPI has attempted to ensure compliance with its human rights obligations under the Charter Act through self-auditing and voluntary engagement with VEOHRC. OPI views a compulsory layer of external scrutiny as unnecessary.

• complainants have, from time to time, voiced their dissatisfaction with the existing Charter Act framework, in particular the lack of an independent cause of action and availability of effective remedies to redress violations of their rights.

• consideration by decision makers of the factors set out in section 7(2) of the Charter Act results in more informed decision-making and more responsible exercise of investigative powers.

• litigation in connection with the Charter Act has proved to be a complex and uncertain process, underscoring the need for amendments aimed at simplifying the interpretive process.

In the context of the observations and recommendations referred to above, OPI supports the maintenance of the Charter Act and reiterates its integral role within Victoria's legal and democratic framework.

Yours faithfully

[Signature]

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