To: The Victorian Attorney-General the Hon. Robert Clark.

Four Year Review.

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The introduction of the Charter in 2006 was a courageous move on behalf of the Victorian government and demonstrates leadership to the rest of Australia in advancing human rights. The Charter has a “symbolic value” that goes further than the specific rights protected in the Charter as it indicates that the state recognises the inherent value in treating all people with equality, dignity and respect (VCOSS 2009, p.8).

In your opening speech at the Human Rights Week you articulated the importance of “upholding human rights” (Clark 2010). The majority of Victorians would agree with you that we want a community that gives all people a “fair go”. 94 per cent of submissions to the 2005 Victorian Human Rights Consultation Committee favoured a Charter of Human Rights (Lynch 2011).

The founding principles of the Charter articulate the aspirations of a just, fair and democratic Victorian community:

Human rights are a crucial foundation to a truly democratic society. To encourage a free and inclusive society that treats all people, without discrimination, with respect, dignity and equality. That the Victorian community in enriched by the diversity of its peoples (the Charter, 2006).

Over the four years of the Charters staged implementation the three core functions of the Charter have been progressively developed:
1. As an instrument to promote and protect human rights
2. As principles that can be used to measure government action (Making Progress 2009). It is a constructive tool in achieving policy objectives.
3. Furthering the dialogue model of human rights. This puts responsibility on the three sections of government (executive, legislature and judiciary) to engage in an ongoing
conversation about the promotion, protection and developing a culture of human rights in Victoria (Making Progress 2009).

The Charter is significantly contributing to the promotion and protection of human rights, particularly in the area of legislation and policy development and it is enhancing cultural change in Victoria. A number of key examples are:

• The victims of the 2009 Black Saturday bush fires were given more substantial information and had greater input into the Royal Commission because the Charter was used to question the initial level of their participation (Making Progress 2009). This is vital as greater access to information and participation is empowering and this is known to assist in the recovery from trauma.

• Reform of the processes of the Mental Health Review Board as an outcome of the Krakke v Mental Health Review Board & Ors. As a result of the ruling in this case the appropriate bodies have undertaken to review their policies. This will have a significant impact on the realization of some of the human rights of the users of these services (Making Progress 2009).

The Victorian Scrutiny of Acts and Regulations Committee (SARC) has had important input into the drafting of Bills to ensure compatibility with human rights and has had influence in generating a greater understanding of human rights within the mechanisms of government. This process has had a considerable positive impact on government practice (Byrnes et al. 2009; Carli 2011; Making Progress 2009).

For the continued development and adequate protection of human rights in Victoria it is crucial that the scrutiny of legislation for human rights compatibility be strengthened:

• As once a Bill has been introduced to Parliament SARC has had minimal effect on the content of the legislation, as Parliament has been unwilling to change Bills and commentators have stated that the Charter has had a limited impact on parliamentary debate (Byrnes et al. 2009; Carli 2011).

• Where concerns exist that a Bill engages human rights there should be an extension of time given for thorough consultation and scrutiny, particularly it is imperative that there is community consultation (Making Progress 2009).

• Statements of compatibility encourage transparency and uniformity. Initially, critics of the Charter stated that the limits on rights that the statements articulated would lead to litigation founded on breaches of the Charter, this has not occurred and does not recognise that s.7(2) of the Charter states that human rights can only be limited if the limit is reasonable and is “demonstrably justified”. This provision has at times been interpreted with considerable latitude by the government allowing restrictive and discriminatory laws to proceed. For example the law banning people under 18 from buying spray cans and forbidding anyone to carry spray cans on public transport unless they had a “lawful excuse” (Byrnes et al. 2009, p.125).

Of particular concern was the 2009 legislation for police stop and search powers. This legislation was the first to formally show incompatibility with the charter. The government failed to sufficiently demonstrate that these increased powers were necessary (Making Progress 2009).

Therefore there should be a greater role for courts to be able to interpret legislation using the Charter and to have the power to “strike down” legislation that seriously breaches Charter
rights (Evans and Evans 2006, p.265). In discussing the Human Rights Act 1998 (UK) Evans and Evans stated "it has become clear that effective legal remedies in the courts are a necessary part of holding the government to account for breaches of rights" (2006, p.265). Not providing actual remedies diminishes the effectiveness of the Charter (VCOSS p.9). George Williams (2007, p.8) noted, "This is a major weakness of the act as it is simply silent on key issues of compliance and enforcement".

Under s.39 a person whose human rights have been breached is not able to seek damages. This provision should be changed so that courts are able to order legal redress, whether it be compensation, orders that particular policies or actions be amended or an apology be granted. There is less impetus to enforce a law that does not include legal consequences (Cauchi 2006).

- Provision of a Specialist Courts (e.g. Drug Court) and these can facilitate justice that is assessable to disadvantaged groups of people and it is important to ensure that legal representation is mandatory (Cauchi 2006).

Section 28 of the Charter states that "It is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right"

Therefore there should be mandatory auditing of public authorities that ensure the following compliance:
- Ensuring that administration and policy practices are in line with human rights promotion and protection.
- Performance indicators of human rights, where the compliance or noncompliance is included in annual reports.
- Inclusion of human rights criteria as conditions of government contracts (Cauchi 2006).

Other remedies that would strengthen the protection and promotion of human rights in Victoria are:
- A Human Rights Commissioner (an independent body or part of Victorian Equal Opportunity and Human Rights Commission (VEOHRC)) that would have the power to:
  - Conduct human rights reviews.
  - Initiate human rights audits.
  - Run test cases and act on systemic discrimination.
  - Develop non legal remedies such as mediation.
  - Develop culturally sensitive and assessable complaints resolution measures.

As presently VEOHRC can only intervene in court cases where Charter issues are engaged in an advisory and education role (s.41) and cannot initiate audits (as the ACT Human Rights Commissioner can). VEOHRC also cannot act on an individual’s behalf regarding complaints of human rights violations (Cauchi 2006).

- Local Government as the arm of government that people are more frequently engaged with on a day to day level requires adequate funding to fulfill it’s Charter obligations (Making Progress 2009).

- The majority of Victorians are not aware of the Charter. This situation significantly undermines the usefulness and success of the Charter as Victorians are not able to assert their
rights if they are uninformed. This leaves the everyday Victorians out of the 'dialogue' that is an important underpinning feature of the Charter. A significant public education strategy needs to be instigated. This will enhance the 'dialogue model', contributing to a 'culture of human rights' within the Victorian community (VCOSS 2009).

The Charter is based on the International Covenant on Civil and Political Rights (ICCPR) with some cultural rights included. For the Charter to be a fully functioning human rights instrument it should encompass the International Conventions and Covenants that Australia has signed and ratified; as Australia is bound by International Law to fulfill its obligations under these covenants and conventions, particularly (VCOSS 2009):

- International Covenant on Economic, Social and Cultural Rights (ICESCR).
- Declaration on the Rights of Indigenous Peoples.
- Convention of the Rights of the Child (CRC).

It is beyond the scope of this paper to articulate the reasons why all of the above should be included, therefore I will focus on the importance of including Economic, Social and Cultural Rights (ESC) in the Charter. I am also including the Right to Self Determination in the ESC as it is Article 1 of the ICESCR.

The compelling reasons for including ESC rights in the Charter are:

- Under international human rights practice Civil and Political (CP) rights and ESC rights are indivisible and inter-reliant, therefore they are equally crucial in promoting people’s dignity (Salvaris 2007).
- ESC rights should be treated the same as CP rights under the Charter (Tobin 2010). This would assist greatly in achieving equality and dignity for the most vulnerable and disadvantaged Victorians that regularly have these rights breached (Salvaris 2007). This is crucial as marginalized people are not able to adequately realise their CP rights if their ESC rights are breached (Advancing Women’s Rights 2010).
- ESC rights would contribute to more equal treatment for those such as women and children. The Charter in its present form does not adequately promote the rights of these groups.
- There was strong support in the consultations for including ESC rights.

Victoria has a proud history of protecting its citizens. In 1964, Victoria achieved a world first by mandating seat belts, saving thousands of lives. A comprehensive Charter can be seen as the 'seat belt' protection for the rights of the vulnerable in our community. It takes courage to have the foresight to support what at the times can be seen as contentious and controversial initiatives; but maybe, as with seat belt legislation now, people will look back in 50 years time and applaud the political will that ensured a more fair and just Victoria for all.

Yours Sincerely

Stephanie Blake
References


VCOSS, 2009 Submission to the National Human Rights Consultation Committee.


Government Printer, Victoria.