
1. Whether the Charter should include additional human rights under the Charter, including but not limited to, rights under the –
   (a) International Covenant on Economic, Social and Cultural Rights;
   (b) Convention on the Rights of the Child; and
   (c) Convention on the Elimination of All Forms of Discrimination against Women?

As recommended by the Human Rights Consultation Committee certain rights, those included in conventions that Australia is a signatory to and fall under the National Human Rights Framework, have been excluded from the Charter at the initial stage. However, all rights are interlinked and excluding certain rights may limit the protection of human rights overall. With this in mind a cautious approach needs to be taken if additional rights are to be included.

41 per cent of submissions to the Consultation Committee¹ argued for the inclusion of some or all rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and 35 per cent for the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women². These are significant numbers considering it reflects aspirations to include those from the initial stage. A cautious and gradual inclusion of these rights would reflect these significant aspirations.

The National Human Rights Consultation found that economic and social rights – such as the rights to the highest attainable standard of health, adequate housing and education – “matter most to Australians, and they matter most because they are the rights at greatest risk, especially for vulnerable groups in the community”³

Therefore, the additional human rights should be included in the Charter. However, in the name of caution, it may be beneficial to restrict the application of the above rights as only applicable to s28 (statement of compatibility) for new laws and consider the full application of the new rights beyond s28 at the 8-year review period.

2. Whether the right to self-determination should be included in the Charter?

The preamble to the Charter should include self-determination as a key principal against which rights are interpreted. This could either specifically define the concept or allow it to be used as a guiding principal⁴.

¹ Human Rights Consultation Committee 2005, Report of the Human Rights Consultation Committee, Department of Justice, Victoria, p. 27.
² Ibid.
3. Whether there should be mandatory regular auditing of public authorities to assess compliance with human rights?

As it stands the VEOHRC annually reports on the progress of the Charter, however, public authorities including state government departments are not required to contribute. An incentive to report is that they could be named publically for not reporting and would appear unprofessional. Mandatory reporting would ensure human rights are a part of every stage of the public authorities activities and would aid the policy development process. Encouraging this assists with the creation of a culture of human rights and avoids the annual report being branded ‘lip service’. The creation of this culture may also help avoid embarrassing media attention, as human rights would be considered from the beginning and abuses would be less likely to occur.

The importance of embedding this culture relies on understanding that ‘the concept of a culture of human rights does contain a vision of a particular organizational culture, one where human rights are respected, rather than simply describing the actual attitudes towards human rights that might develop organically within a given workplace.’ This has already been celebrated in the UK as their Act ‘Has moved public decision-making in this country up a gear, by harnessing it to a set of fundamental standards’ which ensured ‘a culture of respect for human rights becomes embedded across the whole of our society’.

Therefore, a provision should be included under s38 (Conduct of public authorities) that requires all public authorities to include human rights in their own reporting.

4. Whether the Charter should include further provisions 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 Victorian Charter must provide accessible, affordable and effective remedies for breaches of human rights. The mere availability of administrative mechanisms rather than binding remedies “cannot be considered an effective remedy”.

Therefore, there is a need for a free-standing cause of action for breaches of protected human rights which is justiciable and enforceable in the appropriate court or tribunal and such legal remedies should remain available in relation to acts or decisions of public authorities that are made unlawful by virtue of section 38 of the Victorian Charter.

---

7 While administrative mechanisms, such as an Ombudman, are important components of an effective framework of human rights protection, “hortatory” remedies “cannot be considered an effective remedy”: see, eg, Brough v Australia, UN Doc CCPR/C/86/D/1184/2003, [8.7]; C v Australia, UN Doc CCPR/C/76/D/900/1999, [7.3]. Further, many non-government “public authorities” bound by the Victorian Charter are not subject to the jurisdiction of the Ombudman or other Victorian complaint and dispute resolution bodies in any event. Cited in Review of the Victorian Charter: HRLC Position Paper, 12 May 2011.
Courts can only interpret statutory provisions compatibility with human rights under s32. For Victorians to actually be protected from human rights abuses an avenue of redress needs to exist, otherwise it appears symbolic especially as the Declaration of Inconsistent Interpretation only requires that a response be tabled in parliament under s37. Therefore a provision should be included under s37 (Action on declaration of inconsistent interpretation) that defines what is to be included in the written response and ensure this contains an action plan on how to redress the inconstancy, if appropriate.

5. What have been the effects of the Charter Act on –
   (a) the development and drafting of statutory provisions;
   (b) the consideration of statutory provisions by Parliament;
   (c) the provision of services, and the performance of other functions, by public authorities;
   (d) litigation and the roles and functioning of courts and tribunals; and
   (e) the availability to Victorians of accessible, just and timely remedies for infringements of rights?

Please note that as I am not a professional working with the Charter I have only commented generally on some of the following areas in section 6 below.

6. What if any, have been the overall benefits and costs of the Charter?

The progressive realisation model that the Charter works on means that change and strengthening happens incrementally. There is evidence of positive examples already been heard in courts such as the protection on the right to family, right to privacy and right to home in Director of Housing v Sudi or the right to a fair hearing in Kracke v Mental Health Review Board & Ors. Importantly the Charter has also increased and enhanced parliamentary dialogue about human rights\(^8\), in turn helping to contribute to a culture of rights.

Whilst the protection of rights mentioned above are significant, cultural change is key to the Charter’s objectives of promotion of human rights. The Making Progress reports from the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) indicate that this is coming along although acknowledging that such change is ‘gradual and nuanced’ (2009)\(^9\). The review process needs to be mindful of the time it takes to create a culture especially when parliament and community alike do not have a clear and consistent understanding of human rights\(^10\).

---


Since the Victorian Charter is relatively young it is important to look internationally at how similar instruments have achieved cultural change. A 2008 study of the first 10 years of operation of the UK Act the British Institute of Human Rights reported it was ‘an invaluable tool for public service staff, service users and their advocates, enabling people to challenge poor treatment without having to go to court, because it requires public services to consider people’s basic human rights in their everyday work, and to respond to individual needs’.

7. What options are there for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria?

The primary opportunity for reform is the creation of strong remedies and avenues for redress as discussed under section 4.

In addition to legal remedies the Victorian Equal Opportunity and Human Rights Commission (the Commission) should be able to receive human rights complaints using a similar process to that available for discrimination complaints under the Equal Opportunity Act 2010 (Vic). This should be extended to include consideration and investigation of what the Commission considers to be ‘systemic discrimination’ as this is relevant to both the Charter and the Equal Opportunity Acts.

Dear Mr O'Donohue,


Kind regards,

Lidija Bujanovic
Student, BA(International Studies)(Honours)
RMIT University, Melbourne