Submission to the Scrutiny of Acts and Regulations Committee
from Arnold Bloch Leibler
10 June 2011
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1 **Introduction**

1.1 This submission has been prepared by Romy Grace, Emma Rattray and Peter Seidel on behalf of Arnold Bloch Leibler’s (ABL) Reconciliation Action Plan (RAP) working group and on behalf of ABL’s Public Interest Law Practice (PIL practice) in response to the Review of the Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter) by the Scrutiny of Acts and Regulations Committee of Parliament (SARC).

1.2 ABL’s RAP was borne out of a desire to recognise, respect and celebrate Indigenous culture and the unique relationship of traditional owners with their lands and waters, and to work towards a society where all Australians enjoy the same standard of living while each community retains its own cultural identity. Our firm’s approach to reconciliation and a large part of the firm’s PIL practice have been shaped by our close relationships over many years with Indigenous peoples and those supporting Indigenous empowerment. This submission, by which we call for greater recognition of the rights of Australia’s Indigenous people in the Charter, draws on the experiences of many of our Indigenous clients.

1.3 This submission comprises ABL’s recommendations for improvement of the Charter by the inclusion of additional rights in accordance with the Terms of Reference outlined by the SARC. Lest there be any doubt, we strongly favour an approach in which the substantive features of the Charter are maintained, and in which the Charter in its present form serves as a foundation for the incorporation of the further rights that we identify in this Submission.

2 **Protection of Human Rights under the Charter**

2.1 Human rights are the essential, inherent and indivisible rights of all people. These rights have, to some extent, become legally enforceable, recognised and protected from derogation through the introduction of the Charter in 2006. The Charter codifies the relationship between rights and duties, a relationship that is crucial to the protection and promotion of rights in Victoria. In particular, the Charter aims to improve the work of state and local government by compelling decision-makers to consider the human rights dimension of all matters before them.

2.2 We submit that, for the Charter to continue to be valued as an essential tool in the preservation of human rights in Victoria, particularly for the benefit of those most vulnerable to human rights abuses and neglect, there are additional human rights that should be expressly valued and enshrined within it. In our view, existing Victorian and Commonwealth legislation does not extend far enough in its reach to protect these additional rights.

2.3 In particular, we consider that, in its current form, the Charter falls short of the requirements of Australia’s international human rights obligations. As mentioned below, Australia has endorsed the powerful and seminal Declaration on the Rights of Indigenous People, and in doing so has confirmed its commitment to defending and promoting the human rights of Aboriginal peoples.

2.4 Those obligations are not, however, adequately reflected in the Charter. In our respectful submission, they should be inserted into the Charter.

2.5 Inclusion of the additional rights set out below will go some way to ensuring that Victoria contributes to the fulfillment of Australia’s international human rights obligations.
3 Which additional rights should the Charter protect?

3.1 As explained below, ABL strongly recommends the strengthening of the Charter through the inclusion of the following additional rights:

(a) the right to self-determination;

(b) the right of indigenous people to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or occupied lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations;

(c) the right to non-discrimination on the basis of race;

(d) the right to access adequate standards of education;

(e) the right of a person to choose his or her trade, occupation or profession freely, the practice of which trade, occupation or profession may be regulated by law;

(f) the right to access adequate housing; and

(g) the right to an adequate standard of living, including access to adequate food and sufficient, safe, accessible and affordable water.

3.2 In our submission, the utility and relevance of the Charter would be enhanced by expanding its operation to include each of these rights.

3.3 In the remainder of this Submission, for illustrative purposes we primarily focus on the need to improve protections in the Charter for rights that specifically apply to Indigenous peoples.

4 Indigenous Peoples: the need for recognition under the Charter

4.1 The rights of Australia’s Indigenous peoples have, to a deplorable extent, been ignored or expressly denied at various times in Australia since white settlement. In 1901, when the Federal Constitution was enacted, section 51(xxvi) (the race power) provided that the Commonwealth had the power to make laws in respect of the "people of any race, other than the Aboriginal race". Aboriginal people were expressly excluded, as Indigenous issues were considered to be matters appropriate for state regulation. That constitutional provision was not amended until 1967.

4.2 Notwithstanding the Commonwealth’s power to legislate with respect to Aboriginal issues, many issues affecting the rights of Aboriginal people are, of course, legitimately the subject of State based legislation and administration. For example, native title, whilst recognised and protected under federal legislation, is generally administered over State Crown lands and waters.

4.3 Provisions in the Charter that generally refer to and protect the rights of Indigenous peoples to their lands and waters would serve to reiterate the importance of the State working with Indigenous communities to achieve negotiated outcomes.

4.4 The recent joint management agreement between the Yorta Yorta peoples, who have been proudly represented by Arnold Bloch Leibler for nearly 20 years now, and the State of Victoria, which was signed in November 2010, highlights the progress that can be made in this regard. Additional protections in the Charter would only serve to ensure that even more successful outcomes can be guaranteed in the future, built on the strong foundation of current goodwill as reflected in this Agreement.

4.5 Accordingly, in our view, it is essential that all legislation is drafted and upheld within a framework of policies and rules that protect human rights. For the reasons we refer to below, it is imperative that such a framework recognises, in particular, the rights of
Indigenous peoples. In our view, the appalling treatment of Aboriginal people in Victoria throughout history, and the lack of legal protections afforded to them, reinforces the need to ensure that the existing human rights model protects Indigenous peoples’ distinct rights as Victoria’s first peoples.

4.6 Indigenous people are entitled to the same fundamental freedoms as all Australians, but their distinct rights as Indigenous peoples should be formally recognised by the Parliament of Victoria. There is a great need and opportunity for the Victorian Government to take the next step to recognise and fully protect the inherent rights of the Indigenous peoples of this State by improving the Charter in the ways we recommend.

5 Declaration on the Rights of Indigenous Peoples

5.1 The Declaration on the Rights of Indigenous Peoples (Declaration) was adopted by the United Nations General Assembly on 13 September 2007, a move that was overwhelmingly welcomed by the international community.

5.2 The Declaration recognises the basic human rights and fundamental freedoms of Indigenous peoples. Among other things, the Declaration enshrines the rights to unrestricted self-determination, ownership, use and control of lands, territories and other natural resources, rights regarding maintaining and developing political, religious, cultural and educational institutions and to protect cultural and intellectual property. The Declaration also emphasises the importance of free, prior and informed consultation, participation and consent in all activities that may impact on Indigenous peoples, property or territories.

5.3 As stated by Mick Dodson in his ‘Foreword’ in Amnesty International Australia, United Nations Declaration on the Rights of Indigenous Peoples in 2010:

“The existence of human rights standards is not the source of Indigenous disadvantage. Human rights do not dispossess Indigenous peoples, they do not marginalise them, they do not cause their poverty, and they do not cause gaps in life expectancy and life outcomes. It is the denial of rights that is a large contributor to these things. The value of human rights is not in their existence; it is in their implementation. That is the challenge for the world and for Australia with this Declaration.”

5.4 The Declaration contains the following particular provisions to which we refer further below:

(a) Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development (Article 3);

(b) Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard (Article 25).

5.5 The strength of the Declaration is that it provides a set of internationally endorsed objective standards to guide relationships with Indigenous peoples, and to promote actions that respect and protect Indigenous cultures.

5.6 After initially voting against the Declaration (casting one of only four negative votes in the face of 143 votes in favour), the Australian Government formally endorsed the Declaration on 3 April 2009. In making its formal statement of support, the Federal Government committed Australia to a framework which fully respects Indigenous peoples’ rights and creates the opportunity for all Australians to be truly equal.
6 The Charter

Relationship between the Declaration and the Charter

6.1 The Charter aims to improve the work of state and local government by compelling decision-makers to consider the human rights dimension of all matters before them.

6.2 Sub-section 32(1) of the Charter states that:

"[s]o far as is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights."

6.3 Sub-section 32(2) of the Charter further permits:

"international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right...[n]o...be considered when interpreting a statutory provision".

6.4 Accordingly, the standards set out in the Declaration should be honoured in all relevant Commonwealth and Victorian legislation, including in the Charter.

The Charter falls short of compliance with obligations pursuant to the Declaration

6.5 In our submission, the provisions of the Charter do not currently go far enough to enshrine Australia’s obligations under the Declaration.

6.6 The Charter explicitly refers to Aboriginal culture in two parts - as part of the preamble (section 1), which recognizes that human rights have special importance for Aboriginal people of Victoria, and again in the context of the right to culture (section 19(2)), which emphasizes that Aboriginal people hold distinct cultural rights. However, in our view, inexplicably the Charter otherwise fails far short of recognising and fully protecting the inherent rights of the Indigenous peoples of this State in accordance with what is contained in the Declaration.

6.7 In particular, the Charter does not, as it stands, give express recognition to the principle of relative equality, which is directed towards the protection of the most disenfranchised within the State.

6.8 By way of example, the Charter does not generally prescribe as an important human right the protection and promotion of the inherent rights of Indigenous Victorians to maintain their religious and spiritual relationship with, and economic and cultural rights in, their lands and waters. Section 14 of the Charter, which protects freedom of thought, conscience, religion and belief, does not reflect the fact that Indigenous religions and belief systems are inextricably linked with country.

6.9 Further, the Charter, particularly section 18, fails to adequately recognise the right to self-determination. Self-determination, which is a right that is recognised to inhere in all peoples, does not necessarily mean political independence. Rather, it requires effective political participation. In our view, political participation, particularly by Indigenous people, is far from guaranteed, and ought to be protected in the Charter in accordance with Australia’s obligations under Article 3 of the Declaration.

6.10 Accordingly, the Charter does not extend as far as Article 3 of the Declaration, which provides for the right to self-determination/effective political participation and Article 25 of the Declaration, which also provides for the right to maintain and strengthen spiritual relationships with traditional lands.

6.11 In the result, sub-section 32(2) of the Charter establishes an inconsistency in the sense that beyond the Charter, other Victorian statutes are to be read in accordance with the Declaration, but the Charter itself arguably falls short of properly articulating the minimum
standards housed in the Declaration. This anomaly must be rectified as the current misalignment serves only to confuse and weaken the legitimacy of the Charter.

6.12 Accordingly, in our respectful submission, the Charter needs to reflect Victoria’s compliance with Australia’s obligations under the Declaration by explicitly recognising the following inherent rights and interests of Indigenous Victorians:
   (a) the right to self-determination/effective political participation (Article 3 of the Declaration); and
   (b) the right to maintain and strengthen spiritual relationships with traditional lands (Article 25 of the Declaration).

6.13 We sincerely believe and submit that the provisions of the Declaration should be better reflected in the Charter. This would, in our strong view, significantly strengthen Victoria’s growing reputation for respecting the rights of Indigenous peoples.

6.14 In summary, we submit that the Declaration should be used as a benchmark for the protection of Indigenous rights in the Charter.

Additional rights to be included in the Charter

6.15 In addition to the above rights, we submit that, further to the general protection against discrimination afforded by section 8 of the Charter, the Charter should expressly protect the right to non-discrimination on the basis of race. Whilst the Racial Discrimination Act 1975 (Cth) at the federal level and the equal opportunity laws at the Victorian State level, prohibit discrimination on the basis of race, there is nothing prohibiting either a Federal or State Government from legislating to override these provisions, as occurred with the Native Title Amendment Act 1998 (Cth). It is therefore imperative that the Charter includes such a provision.

6.16 Further, we submit that the SARC should consider enshrining in the Charter fundamental economic and social rights, including the rights of a person to:
   (a) choose their trade, occupation or profession freely (the practice of which trade, occupation or profession may be regulated by law);
   (b) access adequate housing;
   (c) an adequate standard of living, including safe, accessible and affordable food and water; and
   (d) receive an adequate education.

6.17 These are areas in which not only Indigenous peoples continue to suffer. Nevertheless, the poverty suffered by many Indigenous Australians in particular impacts on their ability to exercise their inherent rights to maintain their cultural identity.

6.18 Although provision for the above rights should not be specifically directed towards Indigenous peoples, given the enormous disparity in the living conditions of many Indigenous Australians compared to non Indigenous Australians, the enforcement of such rights would be more likely to benefit a relatively larger proportion of Indigenous peoples.

7 How the additional rights should be protected

7.1 Having regard to the economic parameters within which the Victorian Government operates, the Government ought to be able to sensitively and empathetically set reasoned and reasonable parameters on the obligation to take protective measures to achieve realisation of the above rights, to best ensure they are consistent with the available resources of the State (as is the model in the South African Bill of Rights 1996).
7.2 Further, we strongly recommend the development of educational strategies capable of being understood at different levels (namely, government institutions, stakeholders, community and sectoral interest groups), which inform about the Charter in respect of:

(a) the subject matters which are covered by human rights;
(b) the nature or status of those who are entitled to claim legal enforcement of human rights; and
(c) the conditions imposed on their protection.

7.3 The differences between negative rights and positive duties should also be made the subject of education strategies, such that they become readily apparent to all.

We sincerely wish the SARC all the very best in its important work ahead.

Arnold Bloch Leibler

10 June 2011