

Charter of Rights and Responsibilities in Victoria

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In 2005, the Victorian Government established the Human Rights Consultation Committee to conduct a community consultation project into the merits of legislating to protect human rights in Victoria. The committee received over 2500 submissions; the gross majority of which (84%) were in favour of changing the law in Victoria to protect human rights.¹

The committee's final report, *Rights, Responsibilities and Respect*, made 35 recommendations for a Charter of Human Rights and Responsibilities Act.

Charter should recognise the significance of human rights to indigenous peoples as the traditional owners of the land, in addition to emphasising rights, responsibilities and respect more broadly.²

What rights are not included in the Charter?

Despite persuasive submissions from community and legal organisations,³ the recommendations did not adopt rights contained in the *International Covenant on Economic,*



Cartoon by John Ditchburn

That's sedition!

What rights are included in the Charter?

The fundamental rights to be protected are contained in the *International Covenant on Civil and Political Rights* 1966, to which Australia has been a party for over 20 years. Such key rights include the right to life, protection against unlawful deprivation of property and freedom of religion.

Although self-determination is not included as a right, the committee recommended that the preamble of the

Social and Cultural Rights 1966, which protects basic living standards such as access to food, housing, social security, education and health.

It is submitted that social and cultural rights are equally as important as civil and political rights. For example, it would be of little comfort to a homeless person that he or she has the right to life in the absence of a right to food and shelter.

Despite the exclusions, the committee recommended that the Charter include a review mechanism to address

change after a period of four years and again after eight years.⁴

The practical effect of the Charter

Reassurance that human rights are important in Victoria

The average citizen can be reassured that human rights are important in Victoria and deserve recognition and protection. We will also benefit from a consolidated statement of our rights.

The Charter will be enacted as a Victorian statute. This serves the dual purpose of requiring both the courts and the government to formally take human rights into account in decision-making processes.

One of the key practical outcomes is that government policy will be required to take the Charter's objectives into account; which could extend to audits of existing policies.⁵ In relation to new legislation, it is envisaged that the Scrutiny of Acts and Regulations Committee (renamed the Human Rights Scrutiny Committee) would advise Parliament on the impact of a Bill on human rights.⁶ Likewise, for each new Bill, the Attorney-General would be required to present a Statement of Compatibility to Parliament that would address the impact of the proposed Bill on the rights in the Charter.⁷

From an enforcement perspective, all Victorian courts and tribunals would be required to address and apply the Charter. If the Supreme Court is satisfied that a legislative instrument cannot be interpreted in a manner that is consistent with the Charter, it would have to issue a Declaration of Incompatibility which the Attorney-General would then be required to present in Parliament.⁸ The offending legislative instrument would continue to apply,⁹ however, to quote a comment arising during the process of community consultation, the Declaration would serve as a "virus checker"¹⁰ on the system, alerting Parliament to the breach.

Unfortunately, the rights in the Charter are not absolute.¹¹ However, Parliament would have to assess the breach, and make a public decision, as our elected representatives, as to whether it is justified. Combined, these mechanisms are intended to provide a "democratic insurance policy"¹² for Victorians.

Promoting the recognition of rights in Australia

In 2004 the ACT successfully enacted the *Human Rights Act 2004* and became the first Australian jurisdiction to commit to a consolidated statement of human rights by legislation. Australia remains the only democratic nation without a national or state-based human rights Charter. It is hoped that the Victorian example will raise human rights on the states' agenda, and provoke a positive response from the Commonwealth.

Enforcement

One of the key motivators for legislating rights was to remedy a "patchwork" system where rights were scattered throughout a variety of legislation.¹³ This has led to confusion regarding what rights were protected, and how to enforce them. For example, a person seeking to enforce a right against discrimination would have to deal

with multiple authorities and multiple statutes, to determine what their rights are, and whether they had an action.

Theoretically, the most likely action arising under the Charter would lie in tort and the damages would result from a public authority's breach of human rights.¹⁴ However, due to the government's aversion to the concept, the Charter will not entertain a cause of action, and there will be no right to damages for breach of its provisions. In any case, the committee expressed a view that it did not think damages would add "significant extra value to the Charter model at this stage".¹⁵

The question then becomes – in the absence of a cause of action, how do we make the Charter more than rhetoric? The committee recommends that a person should be able to apply for judicial review to injunct a public authority, and/or to apply to a court for a declaration that the act complained of is unlawful.¹⁶ While this will not sound in damages in itself, it may bolster a complainant's case in an action under another statute where damages are available (such as the *Equal Opportunity Act 1995*).

Where to from here?

The Victorian Attorney-General has committed the government to enacting a Charter in 2006 in line with the recommendation of the committee.¹⁷ Although the specifics of the Bill are yet to be finalised (the Report appended a draft Bill for consideration), it is recommended that the Bill, for the most part, should come into force on 1 January 2007.¹⁸

It is hoped that the legislation, and the education campaigns that are recommended to support it, will foster a culture of prioritising human rights in Victoria. Ideally, at the time of review in four years' time, there will be grassroots support to expand and develop the protected rights and strengthen the accompanying enforcement mechanisms.

1. *Rights, Responsibilities and Respect – The Report of the Human Rights Consultation Committee* (HRCC Report) p11
2. Recommendation 7.
3. See especially submissions from PILCH, Public Advocate and the State-wide Steering Committee to Reduce Family Violence, available online at www.justice.gov.au.
4. Recommendation 34 and Recommendation 35.
5. HRCC Report p10.
6. Recommendation 16.
7. Recommendation 14.
8. Recommendation 19 and Recommendation 21.
9. Recommendation 19.
10. Comment from a participant in the consultation project at Geelong, referred to at p28 of the HRCC Report.
11. Recommendation 8. See also override clause outlined in Recommendation 15.
12. HRCC Report p28.
13. See particularly the submissions of the Australian Lawyers Alliance and Julian Burnside QC and Georgia King-Siem available online at www.justice.gov.au.
14. HRCC Report p145.
15. HRCC Report p128.
16. Recommendation 30.
17. Media Release from the Office of the Attorney-General, "Victoria leads the way on human rights", 20 December 2005.
18. Recommendation 33.