Are the rights of Victorians under

The Baillieu government has commissioned the first review of the *Victorian Charter of Human Rights and Responsibilities Act* 2006 (the Charter Act). While the impact of the Charter review remains uncertain, it has the potential to transform the human rights framework in Victoria. In this context, it is critical to reflect upon human rights protections in Victoria, and consider what human rights landscape young lawyers envisage for our state.

Two steps forward . . .

Human rights and equal opportunity protection has largely enjoyed broad public and political support. But how successful are the means by which we seek to protect these valued rights and has Victoria managed to "level the playing field" through changes to human rights and equal opportunity laws?

From the Hamer government's enactment of Victoria's first *Equal Opportunity Act* in 1977, through to the advances made by the Cain government, Victoria has progressed human rights protection.

Over the past decade, the Victorian Parliament has enacted Bills to strengthen the state's human rights framework, including:

- the *Equal Opportunity (Gender Identity and Sexual Orientation) Act* 2000, prohibiting discrimination on the basis of gender identity or sexual orientation;
- the *Racial and Religious Tolerance Act* 2001, criminalising the vilification of others for their race or religious belief;
- the *Equal Opportunity Amendment (Family Responsibilities) Act* 2008, expanding the range of what constitutes discrimination against parents or carers in employment; and
- the *Relationships Act* 2008, which repealed part IX of the *Property Law Act* 1958, introducing registrable relationships for same sex couples for property purposes.

A further reform came in 2006, with the passing of the Charter Act, introduced by the former Attorney-General, Rob Hulls, creating the Charter of Human Rights and Responsibilities.

Similar to the ACT's *Human Rights Act* 2004, the Charter is structured on a parliamentary model of human rights protection and aims to uphold parliamentary supremacy while fostering dialogue about human rights between Parliament, the executive and the judiciary. Several legislative mechanisms support this dialogue:

- a requirement that all members of Parliament prepare and table a statement of compatibility (SOC) for each Bill introduced to Parliament, to explain how the Bill is, or is not, compatible with the human rights set out in the Charter;
- the Scrutiny of Acts and Regulations Committee's (SARC) consideration of Bills introduced to Parliament, and its reporting back to Parliament about a Bill's compatibility with human rights; and
- the Supreme Court's power to declare that a statutory provision is incompatible with a human right(s) and the requirement that the relevant minister respond to that declaration.

Together, these mechanisms aim to incorporate consideration of human rights into the lawmaking process of governments, provide an additional basis upon which legislation can be interpreted in accordance with human rights and ensure Victorians are more informed about how legislative changes affect their human rights.

Despite substantial national debate in recent years on how best to protect human rights, Victoria remains the only state in Australia with a specific human rights charter. However, in the last four years, inquiries into human rights Acts have been held in Western Australia, Tasmania and nationally, evidencing strong community support for legislative protection of human rights.

. . . and one step back?

On 19 April 2011 Victoria's Attorney-General Robert Clark announced an inquiry and review into the Charter under s44 of the Charter Act. This requires the state government to review the first four years of the Charter's operation and consider whether additional rights should be included under the Charter, including the rights enshrined in the International Covenant on Economic, Social and Cultural Rights.

SARC, tasked with reporting to Parliament on the Charter's operation, provided its final report on 14 September 2011. The SARC majority recommended the Charter be significantly wound back, opining that substantive sections – obliging public authorities to act compatibly with human rights and for statutory provisions to be interpreted, so far as possible, consistently with the Charter – be repealed. Section 44 of the Charter Act indicates that the purpose of the review is to consider how the Charter may be strengthened. Any amendments to the Charter stemming from the review should be informed by this.

The Human Rights Commission noted that while many submissions to SARC saw the Charter as a "means of enhancing government transparency and accountability", the majority recommended reducing the "obligation on government to

threat?

take human rights into account in its work"; a move that would weaken human rights protections. To wind back the Charter in the way proposed in the SARC report would result in a lost opportunity for Victoria, and an end to its role as a national and regional leader in human rights protection. At the time of writing, the government had not indicated which, if any, of SARC's recommendations would be implemented and, although the government has indicated in a press release from the Premier that "[the] views expressed in the SARC report are those of the cross-party committee members and not necessarily those of the Coalition Government", considerable uncertainty remains regarding the final outcome of the review.

As attention is focused on the review, young lawyers should also consider Bills passed in 2011 that collectively affect certain freedoms and rights previously protected by legislation. One example is the *Equal Opportunity Amendment Act* 2011, which winds back Brumby government reforms to the *Equal Opportunity Act* 2010 that were due to commence in August this year. The reforms included additional powers for the Victorian Equal Opportunity and Human Rights Commission to require investigations into systemic discrimination on its own motion. The EO Amendment Act also exempts certain forms of discrimination from being unlawful, allowing religious organisations to discriminate in employment, and allowing schools broader scope to prescribe standards of dress, appearance and behaviour.

An SOC was prepared for the EO Amendment Bill, as is required under the Charter. The role of the SOC, explained in the Charter's second reading speech, is to "indicate whether in the member's opinion, the Bill is consistent with the Charter, and if so, how it is consistent, or, if the member considers that the Bill is inconsistent with human rights, the nature and extent of the inconsistency".

Incompatibility with human rights identified in a SOC will not negate the validity or operation of statutory provisions upon assent. In introducing the SOC, the Attorney-General stated that the EO Amendment Bill was compatible with the human rights in the Charter, despite its potentially negative impacts on these rights. It was acknowledged, for example, that allowing schools to prescribe standards of dress, appearance and behaviour "has the potential to unreasonably limit rights such as freedom of expression" but ultimately the conclusion reached was that any such limits on rights were "reasonably justified". While the justifications for this conclusion were canvassed in the SOC, the SOC is seen to be a soft power, highlighting the need to rely on other arms of the Charter to effect greater human rights outcomes.

WINDING BACK THE HUMAN RIGHTS CHARTER WOULD RESULT IN A LOST OPPORTUNITY FOR VICTORIA.

In 1950, there was no state or federal legislative protection against discrimination. Since then, Victoria has come a long way in acknowledging the need for a human rights charter. It is important that young lawyers continue to progress human rights protection in Victoria and articulate a vision that can be implemented to strengthen, and build on, our current legal framework. For more details on the charter from the LIV go to **www.liv.asn.au/News-and-Publications/Victoria-Human-Rights-Charter**. •

KATE BARRY, SOPHIE ELLIS AND CAL VINEY
are law graduates and members of the YLS Community Issues Committee.