

Submission:

from Civil Liberties Australia 

to the

Scrutiny of Acts and Regulations Committee

Review of the

Charter of Human Rights and Responsibilities Act 2006

Introduction

Civil Liberties Australia (CLA) thanks the Attorney-General of Victoria for the review into the *Charter of Human Rights and Responsibilities Act 2006* (the Charter), and thanks the Scrutiny of Acts and Regulations Committee (SARC) of the Parliament of Victoria for undertaking the review.

CLA recognises that this review is an important milestone for the Victorian community and the development of their Charter. We appreciate this opportunity to genuinely engage in the consultation process and contribute to the debate. We take this opportunity to express our willingness to further participate in this review in the future.

This submission is an opportunity for CLA to:

- articulate our view on the importance of human rights, and
- suggest how to strengthen and improve the present Charter in ways that will:
 - enhance the protections of human rights for people in Victoria, and
 - improve service delivery.

The Charter is not an aspirational statement by the Parliament that promotes a new culture in the Victorian community. Fundamentally, it is the legal glue that binds all our people, including our government, to be balanced and fair in how they treat each other, and it is a tool, or remedy, for protecting people's rights when their Charter freedoms and liberties have been abused.

From the outset, one point needs to be emphasised: the Charter does not give or bestow any right on anyone: it merely lists and catalogues, systematically for Victorians, the intrinsic liberties and freedoms they possess because they are human beings, and because the Australian Government has committed our nation to live and abide by the International Covenant on Civil and Political Rights and other treaties.

It is for this very reason, CLA believes, that the Charter must have economic, social and cultural rights incorporated formally. Doing so is necessary because all human rights are inalienable and indivisible. We believe that economic, social and cultural rights have equal status to civil and political rights and should be fully protected in the Charter. We prefer a model that recognises that the implementation of these new rights would take into account the availability of resources. The absence of these rights leaves gaps in the Charter that do not resonate with reality. Incorporating them will go far in achieving better protections for children, women, disabled, Indigenous and other vulnerable groups and would reposition economic, social and cultural rights within a rights based framework. This would provide individuals and advocacy groups with more tools to serve their interests, and make public authorities transparent and accountable. Furthermore, it would change the culture surrounding disadvantage in the community.

CLA supports the inclusion of additional human rights under rights the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities and the Declaration on the Rights of Indigenous Peoples. Furthermore, we have recommended a number of amendments and measures that would address shortcomings in the present Charter. CLA supports mandatory regular auditing of public authorities to assess compliance with human rights, and enacting 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. We have also taken this opportunity to comment on the effects of the Charter on the development and drafting of statutory provisions and the consideration of statutory provisions by Parliament

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;

CLA argues that the Charter should be amended to protect the human rights of all vulnerable people together in a holistic way. Taking a human rights based approach places an appropriate focus on vulnerable people and CLA recommends amending the Charter in a general way and making explicit reference to the rights of vulnerable people. The purpose of entrenching economic, social and cultural rights within the Charter and providing the requisite funding is to change the material circumstances of the most vulnerable members of the Victorian community. We recommend that the preamble be amended to include a statement that human rights have a special importance to people that are especially vulnerable in society. CLA submits that the State of Victoria should legislate to incorporate all human rights contained in international law instruments that Australia has ratified (appropriately adapted for a state government). Enacting economic, social and cultural rights would significantly progress the achievement of substantive equality and the goals of the other below mentioned treaties. The Charter should include all human rights contained

in the International Covenant on Economic, Social and Cultural Rights. Highest priority should be given to protecting:

- the right to an adequate standard of living (including adequate food, clothing and housing);
- the right to the enjoyment of the highest attainable standard of physical and mental health;
- the right to education.

The arbitrary division of civil and political rights from economic, social and cultural rights is nonsense to the rights holder and does not respond to their needs. This situation is exacerbated for vulnerable people at the intersection of discrimination. Social inclusion is essential to our system of democracy in Victoria which requires the active participation in political life by the community. The enjoyment of the civil and political rights that presently exist in the Charter are dependent on economic, social and cultural rights.

By including economic, social and cultural rights, the Parliament would be recognising the interdependence of human rights, which would improve decision making and policy design processes. A more sophisticated analysis of social issues that captures the interdependent and multidimensional aspects can be derived from seeking to identify all the civil, political economic, social and cultural factors that contribute to policy problems. Focusing on the conditions and capabilities that people require to meaningfully participate in the community will lead to a holistic and integrated policy response. Social and economic policy should be developed, interpreted and applied in a way that is compatible with economic, social and cultural rights

In response to the claim that the realisation and protection of economic, social and cultural rights would not be enforceable within the democratic system in Victoria, CLA disagrees. We believe that the experience in Victoria in regards to enforcing economic, social and cultural rights through the existing civil and political rights provisions demonstrates that the system can adapt to a rights based approach.

Under the dialogue model, the courts would not be required to make resource allocation decisions that are properly the domain of Parliament. Courts presently make decisions that have large political, social and economic consequences and the Parliament's sovereignty is preserved. Courts have considered economic, social and cultural rights through the enforcement of positive obligations under the existing civil and political rights in the Charter, and have made determinations. This proves that human rights are indivisibly justiciable and courts would be capable of considering claims involving economic, social and cultural rights.

A further claim has been that rights requiring the allocation of resources, which is perceived as costly, should not be codified. CLA submits that the monetary costs to government of some economic, social and cultural rights will be low. The following rights are capable of immediate protection with minimal costs:

- the right to enjoy economic, social and cultural rights without discrimination;
- the right to equality between men and women in the enjoyment of economic, social and cultural rights;

- the right to form and join trade unions;
- the obligation to protect children from exploitation;
- equal remuneration for work of equal value; and
- the right to enjoy the benefits of scientific progress.

CLA recognises that other economic, social and cultural rights may require the allocation of resources in order to progressively realise the rights. However, it must be recognised that Victorian Government has the core responsibility to provide and regulate health, education and housing and that presently large quantities of resources are allocated to implementing programs. By codifying economic, social and cultural rights, public authorities would have increased certainty as to their obligations and would introduce systems against which achieving specific targets could be measured and reported. On a micro level, this would improve administrative efficiency, whilst on a macro level, this would build long term social capital, yield an efficiency dividend to the Victorian Government and achieve the goal of the Victorian Government to create to create caring communities.

(b) Convention on the Rights of the Child; and

CLA submits that the Charter should include the human rights under the Convention on the Rights of the Child. Specifically, we specifically recommend that the right of children and young people to participate in decision making should be enacted.

(c) Convention on the Elimination of All Forms of Discrimination against Women?

CLA submits that the Charter should include the human rights contained in the Convention on the Elimination of All Forms of Discrimination against Women. Great progress can be made in achieving gender equality by incorporating economic, social and cultural rights into the Charter. Further measures that CLA specifically recommends are:

- the enactment of a right for women to be free from all forms of violence;
- the enactment of a right to culturally appropriate, gender-sensitive health care;
- the Government of Victoria take appropriate measures to change patterns of conduct, laws, policies and practices that are based on gender stereotyping.

Further rights that should be included

As stated above, CLA supports the amendment of the Charter to protect the human rights of all vulnerable people together in a holistic way, by incorporating all human rights contained in international law instruments that Australia has ratified (appropriately adapted for a state government). As such, we submit that the Charter should include the human rights contained in the Convention on the Rights of Persons with Disabilities. We recommend specifically that the following rights should be enacted:

- the right to live independently and to be involved in the community;
- the right for all persons to enjoy legal capacity on an equal basis with others in all aspects of life.

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

CLA submits that the right to self determination should be included in the Charter. Including the right to self determination would be most effective when coupled with the inclusion of economic, social and cultural rights. The combined effect of these rights would be to provide protection to a vulnerable group in the Victorian community and ameliorate the disadvantage of intersectional discrimination by providing a tool which can be used to advocate and protect human rights. CLA submits that the preamble be amended to include a statement that human rights have a special importance to people that are especially vulnerable in society and acknowledges the unique and inherent rights of Indigenous people. Furthermore, we recommend that the Charter be amended to include a right to self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. The right to self determination should include the right to autonomy or self government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. The Charter should recognise that Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

3. Whether there should be mandatory regular auditing of public authorities to assess compliance with human rights?

CLA submits that there should be mandatory regular auditing of public authorities to assess compliance with human rights. The results of audits should be made public in a timely manner. The performance of public authorities should be measured against a set of Charter related indicators. Public authorities' performance should be ranked and an overall performance rating should be established. A 5 Star system may be an effective method of communicating a given public authority's human rights compliance. Aggregated results of Victorian Government Departments should be tabled in Parliament annually. The auditing and timely publishing of compliance data would be an effective mechanism for monitoring compliance with human rights. Furthermore, it would promote open and accountable government, which would set the standard for voluntary adoption of a human rights culture and practice in the community.

Following this review, the Government should require an audit of all existing legislation against the Charter, utilising the current scrutiny mechanisms.

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?

CLA submits that 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 should be included. CLA believes that the present enforcement provisions in the Charter are ineffective. There is a disparity between the practical

implementation of the Charter and its aspirations. Protecting human rights is a fundamental matter that requires more robust remedies than the present scheme of complaining to the Ombudsman. We offer a number of possible solutions:

- the creation of a Social Justice Commissioner within the Victorian Equal Opportunity and Human Rights Commission (VEOHRC)
- Expanded powers for the VEOHRC to conduct inquiries by its own initiative and report them to parliament
- Stand alone cause of action an enforcement mechanism ‘with teeth’ must be enshrined.

5. What have been the effects of the Charter Act on –

(a) the development and drafting of statutory provisions;

CLA’s assessment is that there has been improved development and drafting of statutory provisions. In our view, this is attributable to greater education and awareness of the Charter by government Departments and the dialogue model working effectively within government.

(b) the consideration of statutory provisions by Parliament;

CLA’s analysis indicates that Parliament, in general, is genuinely considering the human rights impact of statutory provisions. Procedurally, it is clear that section 7(2) analysis occurs, that Statements of Compatibility are being laid before the house, that the SARC is producing reports, that Ministerial Responses to SARC are occurring and that legislation is being debated and passed. It is evident that since the Charter came into operation, greater consideration of the human rights impact of statutory provisions has occurred.

CLA submits that the evidence indicates that scrutiny of the human rights impacts of statutory provisions by Parliament has not occurred to the necessary extent. Leadership from the Victorian Parliament (especially in relation to controversial matters that invoke human rights issues), is vital to inform the community about human rights and politically engage with the community. Debate within the community and between the Parliament and the community it represents is necessary. It is not acceptable that Ministers or members of Parliament who introduce a Bill do not prepare accurate Statements of Compatibility. It is not acceptable that insufficient public consultation occurs. Furthermore; it is not acceptable that SARC reports and Ministerial Responses are not laid before the house prior to Bills being passed by the Parliament. The failure of the Parliament and the Executive to give the public an opportunity to be accurately informed, engage in dialogue with the Parliament and be genuinely consulted impoverished the public’s consideration of statutory provisions.

CLA calls on the Parliament and the Executive to engage in active and genuine dialogue, especially where human rights may be curtailed. Parliament must undertake its function of scrutinising proposed legislation and engage in robust debate and exchange of ideas. Ministers or members of Parliament proposing to introduce a Bill must comply with the Charter and section 7(2) analysis that is laid before the house must be comprehensive, accurate and timely. Statements of Compatibility must be substantial, informative and

accurate. When SARC raises human rights considerations or requests further information, the Minister or member of Parliament introducing the Bill, should constructively engage with the committee and the issues involved. Ministerial Responses must comprehensively address the issues raised in the SARC report. Furthermore, the practice of Bills being prioritised and being passed through the parliament prior to the SARC report being laid before the house, or SARC considering an Act within 10 sitting days after the Act receives Royal Assent is unsatisfactory and does not give the public an opportunity to be informed of the issues raised and constructively contribute to robust debate.

Genuine consultation with the community is an integral first step. This consultation should include those vulnerable groups who are most likely to be affected. Consultation must include the dissemination of exposure drafts and sufficient time needs to be allocated for meaningful reflection and response. The requirement for community consultation is commensurate with the degree of incompatibility with human rights of provisions of the Bill. CLA submits that consultation and engagement with the community post enactment should be part of the human rights dialogue.

CLA believes that special attention and scrutiny must be applied to legislation that is identified as likely to impose serious restrictions on human rights, such as the expansion of police powers. Where legislation is enacted that potentially impacts on human rights, it is critical that public authorities who are responsible for the implementation of the legislation are made aware of the section 7(2) analysis. The delivery and implementation of powers that affect human rights should be continually monitored transparently, and the legislation should require regular review with the capacity to be repealed.

CLA expresses our concern to the greatest extent that *Sentencing Amendment Act 2010* was passed by the Parliament prior to the SARC report being provided. We submit that it is incumbent on the Parliament to engage in informed and robust debate, enriched by the knowledge drawn from SARC's analysis, a Ministerial response to SARC comments or requests for further information, and the input derived from considered and reflected public consultation. The result of the failure to give SARC sufficient opportunity to consider and report and engage in dialogue on this piece of legislation, is that no independent identification and scrutiny of human rights issues was available to Parliament or the community prior to the legislation being passed. It is highly concerning that the expedited procedure is not being used in urgent or emergency situations as intended. The dialogue has been deliberately stymied. Parliament exercises power on trust of the people of Victoria. The Parliament has a fiduciary duty to act in good faith and for the benefit of the people of Victoria. The parliamentary processes that have been established are the means by which the Parliament provides accountability and transparency to the community and guarantees the good standards of the exercise of that power. We submit that on this occasion, the spirit of parliamentary process has not been followed and the expedited passage of this Bill raises questions as to whether the Parliament breached the good faith entrusted in it by the people of Victoria. Furthermore, the Parliament was unable to fulfil its function of acting as a check and balance on the exercise of Executive power.

Similarly, the *Equal Opportunity Act 1995* was amended prior to the response to the SARC report in a manner incongruent with the Parliament's function of acting as a check and

balance to the power of the Executive. Although the number of Bills that are being prioritised is small, CLA submits that in the future, Parliament must fully and adequately undertake its role of scrutinising and debating Bills in an accurate, comprehensive and timely manner. SARC must be given the requisite opportunity to contribute its analysis to the parliamentary debate; Ministers must provide responses that comprehensively address issues raised in a timely manner. The community must be given sufficient time to engage in the consultative process

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

Since the introduction of the Charter, CLA has identified a number of benefits and costs. The Charter has begun to inculcate a culture of human rights across society and has been an effective advocacy tool. The primary benefit that has resulted from the introduction of the Charter has been an aggregate increase in freedom. Vulnerable people, especially people who encounter intersectional disadvantage have been empowered by the Charter and their human dignity has been respected. The aggregate benefit to the Victorian community has been an increase in social capital. The aggregate long term economic benefits of reduced social and economic disadvantage accrue to the Victorian Government, and in turn to the taxpayer.

The Charter and a rights based approach has yielded better quality service delivery by public authorities. Treating people with dignity and respect has not harmed any person in Victoria. The Charter has helped the Victorian Government and public authorities put people at the centre of policy development and service delivery.

Within the sphere of government, the introduction of the Charter has led to a qualitative improvement in the development and drafting of legislation, improved consideration and debate of legislation by the Parliament and an aggregate increase in the transparency, accountability and quality of good governance in Victoria. CLA commends the Government of Victoria for its good work.

The introduction of the Charter has incurred monetary costs, particularly in the increased compliance requirements of scrutiny, training and monitoring. We acknowledge that some public authorities have been required to fund Charter compliance from their programs and that an opportunity cost is associated.

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

CLA has identified a number of shortcomings in the present Charter. We recommend the following amendments be made:

- the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities and the Declaration on the Rights of Indigenous Peoples should be scheduled to the Charter;
- Insert a new section titled 'Respect for Human Dignity'

Every person has the right to respect for his or her inherent dignity on an equal basis to others;

- Rights that are non-abrogateable under international law should never be suspended. The Override Declaration provisions in Division 2 should be amended to make it clear that *section 31(1) does not apply to sections 8-11*(Recognition and equality before the law, Right to life, Freedom from torture, cruel, inhuman or degrading treatment and Freedom from forced work);
- Section 31(7) should be amended to the *2nd anniversary* in order to provide closer monitoring of Acts containing override declarations and ensure rights are reinstated as soon as possible;
- Clarify the application of human rights by amending section 6(1):
Only persons have human rights. All persons have the human rights set out in Part 2. *While all persons have these rights, it is recognised that some persons in society are particularly vulnerable and extra measures may be needed to ensure they can enjoy their rights on an equal basis to others;*
- Clarify the obligation on public authorities by amending section 38(1):
Subject to this section, 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. *When acting or making decisions, public authorities must give special consideration to the human rights of vulnerable persons;*
- Remove the exemption provision in section 4(1)(k); and
- A specialist SARC human rights sub-committee should be established and resourced in order to comprehensively fulfil SARC's mandate in a timely manner.

CLA recommends that measures should be taken to further promote a culture of human rights across Victoria, with the view to extending the operation of the Charter beyond its current scope. Consideration should be given to broadening the definition of 'public authority' in the Charter. Service providers should be contractually obliged to consider, and preferably incorporate human rights into their policies and processes. Where service providers require accreditation from the Victorian Government, they should be required to demonstrate that they conform to the Charter and report their compliance through regular auditing. Human rights education should be mandatory across public authorities and preferred in regards to service providers. A mechanism should be established to provide a means for organisations and private companies to 'opt in' to the Charter and be held publically accountable through regular auditing.

Conclusion

To gain the maximum benefit from the Charter, public authorities need to progress beyond technical compliance and take a holistic rights based view. The foundation is human dignity, and public authorities need to adopt the principles of non-discrimination, accountability and participation and pay attention to vulnerable groups. By drawing the nexus between policies and practices with human rights standards, the Charter becomes a powerful tool that changes the way the Victorian Government and public authorities function. CLA has advocated for the inclusion of economic, social and cultural rights in the Charter. Incorporating these rights will go far in achieving protections for children, women, disabled,

indigenous and other vulnerable groups and would reposition economic, social and cultural rights within a rights based framework. This would also provide individuals and advocacy groups with more tools to serve their interests, and make public authorities transparent and accountable.

CLA again thanks the Attorney General for announcing this review into the Charter and we thank SARC for undertaking the review. We again reiterate our willingness to engage in the consultation process and can be contacted on: secretary@cla.asn.au or 0408 697 971 from 17 June 2011.

ENDS

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