

Review of the Charter of Human Rights and Responsibilities Act 2006

Submission to the
Scrutiny of Acts and Regulations
Committee

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Peninsula Community
Legal Centre INC

1.0 INTRODUCTION

Peninsula Community Legal Centre (PCLC) welcomes the opportunity to make a submission to the Scrutiny of Acts and Regulations Committee with regard to the Review of the *Charter of Human Rights and Responsibilities Act 2006* (hereinafter referred to as 'the Charter'). PCLC believes that the implementation of the Charter was an important step forward to promote human rights considerations in government decisions and actions. The Charter preserves the sovereignty of Parliament but requires legislation to be interpreted, and government departments to act, in accordance with legislated human rights.

The Charter cannot, however, be a static document. It is imperative that it be reviewed and refined to ensure the best possible human rights outcomes for Victorians. Ultimately the first years of operation of the Charter have highlighted both the potential and the limitations of a dialogue model of human rights protection and the Review provides a great opportunity to discuss possibilities for enhancement of the Charter.

Whilst PCLC supports the Charter, PCLC also believes that the legal protections entailed therein could be strengthened and therefore advocates for further amendments and initiatives to enhance the Charter and the effectiveness of the legislation for the practical realisation of human rights in Victoria. Consistent with this position, PCLC identifies in the following sections some areas where the Charter has performed well, whilst nominating those areas which PCLC believes should be considered in revising the Charter.

2.0 PENINSULA COMMUNITY LEGAL CENTRE

PCLC is a not-for-profit organisation that has been providing free legal services to Melbourne's outer south east communities for over 30 years. Its mission is "To empower and support disadvantaged community members of the South East and Westernport Region to use the law and legal system to protect and advance their rights and broaden their awareness of their rights and responsibilities."

PCLC's staff and volunteers provide clients with free and accessible legal services, particularly the most disadvantaged and marginalised in our community who may otherwise 'fall through the gaps'. Our clients' life circumstances can be severely affected by their legal problems and they are often not able to access other legal services. Being able to obtain free legal assistance can often help our clients move on with their lives and become active participants in their local communities.

Underpinning all service delivery is a philosophy of client empowerment and recognition of the inherent dignity of all people. In casework services, this translates to a focus on informed decision-making by clients and supported self-help wherever appropriate, so that clients achieve the confidence and skills to navigate the legal system. Most of the Centre's clients could not afford a private lawyer and would not qualify for legal aid. Their right to equality before the law might be meaningless if not for the work of the Centre in resourcing and directly assisting them to uphold their rights.

The Centre also has a strong commitment to empowering the broader community through community development and community legal education activities, viewed as core functions of the Centre. The Centre is regarded by the local community as its key legal resource, organising and

participating in forums about legal issues, providing customised workshops and reporting on policy issues that affect the community through local media. Across the community, the Centre endeavours to improve understanding of legal issues through its education activities, as well as supporting community groups and participating in relevant law reform activities.

Over the years, PCLC has campaigned for the protection and promotion of human rights both in Victoria and federally. As PCLC provides legal assistance to some of the most marginalised and vulnerable members of our community, PCLC is well placed to provide comment and input to the Review of the Charter.

3.0 SUBMISSIONS TO TERMS OF REFERENCE QUESTIONS

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?

PCLC believes that the Charter should be expanded to include additional human rights within its ambit. The inclusion of all rights contained in the International Covenant on Economic, Social and Cultural Rights; the Convention on the rights of the Child; and the Convention on the Elimination of All forms of Discrimination against Women, would contribute to the creation of the necessary conditions for all members of our community to participate fully and equally.

The Charter seeks cultural change to ensure that all people live with dignity and recognises that public authorities and the Parliament have a crucial role in the effectiveness of the protection of human rights. The Human Rights Committee of the United Nations has commented that enunciation of human rights through legal protection is an important factor in their realisation in practice.¹

A further factor impressing the importance of the inclusion of economic and social rights in particular, is that 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”.²

Beyond the inclusion of these rights within the Charter, it is imperative that these are legally enforceable. Whilst those opposed to the inclusion of economic, cultural and social rights may argue that many of these rights cannot be legally enforced, the State could be obliged to ensure that reasonable steps have been taken to ensure that the right can be progressively realised within the resources available. The legal test could then be regarding whether the administrative action was reasonable or not.

¹ Human Rights Committee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), [13].

² National Human Rights Consultation Committee, *Report of the National Human Rights Consultation* (2009), 344.

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

PCLC considers the right to self-determination is both relevant and important for inclusion in the Charter as its inclusion provides further acknowledgement of the unique rights and status of Indigenous members of our community, in so far as the right doesn't derogate from other rights.

The Victorian Equal Opportunity and Human Rights Commission consulted with Victoria's Indigenous community in relation to the inclusion of this right, and concluded that "Self-determination was considered important from the aspect that it could:

- allow for the further protection of human rights
- recognise and allow for the acknowledgment of the unique and inherent rights of Indigenous people
- provide a foundation in which existing rights and potential further social, political, economic and cultural rights can be advocated and protected."³

PCLC agrees with this assessment that the right to self determination is a complementary right which may serve to strengthen other rights for Indigenous people and that the inclusion of a right to self determination within the Charter is an essential step to recognising that Indigenous rights are human rights.

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

In order to identify systemic issues within public authorities which may be counter to the promotion of human dignity, PCLC believes that there should be mandatory regular reporting and auditing frameworks developed. Without reporting or auditing there is no capacity to assess the efficacy of public authorities in administering the Charter and therefore the success of the Charter in ushering in systemic cultural change within public authorities.

Public authorities should be required to report in relation to how they have monitored and evaluated their internal processes which are devised to ensure that their actions and decisions are compliant with the Charter and therefore compatible with human rights. PCLC also supports the Human Rights Law Centre's proposal that the Charter vest the Victorian Equal Opportunity and Human Rights Commission with an own motion power to inquire into and audit the compliance of a public authority's policies, programs and practices with human rights⁴. Such a proposal enables the actions of public authorities to be held truly accountable and public confidence in the maintenance and promotion of fundamental human rights.

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?

PCLC believes that one of the current failings of the Charter is that there is no free standing cause of action for an affected person to bring a complaint. It is PCLC's belief that s39 of the Charter is

³ Victorian Equal Opportunity and Human Rights Commission, *Talking rights: Consulting with Victoria's Indigenous community about self-determination and the Charter*, March 2011, p.21

<http://www.humanrightscsmission.vic.gov.au/index.php?option=com_k2&view=item&id=1347:talking-rights-consulting-with-victorias-indigenous-community-about-self-determination-and-the-charter-mar-2011&Itemid=690>at 7 June 2011

⁴ Human Rights Law Centre, *Four Year Review of the Charter*, Workshop Paper, May 2011.

unnecessarily complex and unworkable in practice. The *International Covenant on Civil and Political Rights* codifies the right to an effective remedy, pursuant to articles 2(3)(b) and (c), which require the availability of accessible, enforceable, judicial remedies where a breach has occurred. The Charter therefore should be revised to provide accessible, effective and affordable remedies where there have been breaches of human rights.

While administrative mechanisms, such as an Ombudsman, are important components of an effective framework of human rights protection, they are not a panacea. There are also many non-government “public authorities” who are bound by the Charter but fall outside of the jurisdiction of the Ombudsman and other Victorian complaint and dispute resolution bodies.

Instead of providing a judicial remedy from the outset, the Charter could provide for the Human Rights Commissioner to receive complaints from individuals who allege a breach of their rights. Such a mechanism would be similar to that available for complaints of discrimination pursuant to the *Equal Opportunity Act 2010* (Vic) and would enable conciliation to occur, providing an accessible and affordable means for enforcing the Charter.

PCLC strongly believes that s.39 should be replaced with a provision that enables a free-standing cause of action to be taken in respect of breaches of human rights. Such a cause of action must be enforceable in the appropriate court or tribunal and empower the court or tribunal to make an order, or grant relief or remedy, as the court or tribunal considers to be just and appropriate. This should include an award of damages if this is considered appropriate by the court or tribunal.

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

(a) the development and drafting of statutory provisions;

One of the most obvious effects of the Charter, in PCLC’s opinion, has been the improvement of the quality of law-making in Victoria. The Charter ensures that human rights concerns are given due consideration in the drafting of new legislation and policy. Sections 28 and 30 of the Charter have played a crucial role in ensuring that all new laws are assessed against human rights standards.

The requirement to issue a statement of compatibility for each new bill has meant that the approach of government in developing new laws has been influenced by a healthy dialogue with the legislature, Scrutiny of Acts and Regulations Committee and the Victorian Equal Opportunity and Human Rights Commission. Improved laws have benefits for the community over the long term, particularly in providing additional safeguards for vulnerable individuals. The Scrutiny of Acts and Regulations Committee has recognized this benefit reporting that “[t]he requirement that all Bills be accompanied by a statement explaining whether and how they are compatible with human rights has the purpose of both informing parliamentary debate and ensuring that human rights are properly considered when Bills are developed”.⁵

(b) the consideration of statutory provisions by Parliament;

PCLC believes that the Parliament plays a critical role in the protection and promotion of human rights. Parliament can lead by example and the requirements of members introducing legislation

⁵ Scrutiny of Acts and Regulations Committee, *Alert Digest* 11 (14 September 2009) 3.

into Parliament to table a statement of compatibility of the proposed legislation with respect to human rights, leads to a greater level of scrutiny of legislation. In their 2010 review the Victorian Equal Opportunity and Human Rights Commission has found that the Charter provides greater transparency in both the operation and scope of government activities.⁶ The Parliamentary processes prescribed in the Charter establish a dialogue about human rights within the Parliament, which as previously stated improves the quality of legislation produced.

Section 30 of the Charter is in PCLC's opinion operating well with respect to the review and reporting function vested in the Scrutiny of Acts and Regulations Committee. PCLC does not, however, support the inclusion of section 31, which allows the Parliament to pass a law that does not uphold rights in "exceptional circumstances". PCLC has concerns with respect to what may be defined as exceptional circumstances.

In particular PCLC made a submission to this Committee regarding the introduction of the *Summary Offences and Control of Weapons Acts Amendment Bill 2009* in November 2009. PCLC was extremely concerned that the Statement of Compatibility for the Bill expressly stated that parts of the Bill were not compatible with human rights. This meant that the Parliament admitted that the limitations on rights were not necessary, reasonable or demonstrably justified, as required by section 7 of the Charter. PCLC believes that the subsequent enactment of the legislation was contrary to the spirit in which the Charter was enacted, and set a dangerous precedent for a government to turn its back on providing fundamental protections for its citizens when politically expedient to do so. PCLC believes that the Charter should be amended to prevent this from occurring again in the future.

(c) the provision of services, and the performance of other functions, by public authorities;

Where public authorities are concerned, the Victorian Equal Opportunity and Human Rights Commission's report has found that where the Charter has been used, it has been used well, but there are still different levels in which the Charter has been integrated into the work of each public authority.⁷ To determine whether there has been appropriate integration, maintenance of effective auditing and reporting requirements of authorities is crucial.

Section 38 of the Charter is pivotal to safeguarding human rights with respect to the actions and decisions of public authorities. This section makes it unlawful for a public authority not to comply with the Charter. An effective remedy where public authorities breach their obligation is an important mechanism for ensuring public authority compliance.

(d) litigation and the roles and functioning of courts and tribunals; and

There appears to have been only a limited number of reported cases that have considered the Charter since its inception, demonstrating that there has not been a flood of litigation arising from legislating human rights protections, despite what many opponents of the Charter had suggested. Those matters that have considered the Charter have considered that the legislation in question has been considered consistently with human rights and that acts and decisions of public authorities have also duly and appropriately considered human rights.

⁶ Op cit. n3. at 43.

⁷ Op cit, n 3. at 9.

Court decisions concerning the Charter will provide guidance, in particular to public authorities, in respect of the practical application of the Charter, therefore it is crucial that cases continue to raise the Charter where applicable.

PCLC is aware that the Charter has been carefully drafted to ensure the sovereignty of Parliament and for this reason section 36 only provides for the Supreme Court and Court of Appeal to make a declaration where a law cannot be interpreted compatibly with human rights. PCLC believes that stronger powers, such as a provision enabling a law to be struck down where it is incompatible with human rights, could be given to the Courts without there being an imbalance between the roles of parliament and courts and there being any derogation of Parliament. Appropriate drafting of such a section would achieve this.

(e) the availability to Victorians of accessible, just and timely remedies for infringements of rights?

As discussed previously, the current provisions of section 39 of the Charter are unnecessarily complex and PCLC believes a suite of measures could be developed to enable both judicial and non-judicial review of alleged breaches of human rights.

PCLC reiterates the need for human rights remedies to be both justiciable and accessible and reasserts the comments made in relation to question 4. PCLC believes that a free-standing cause of action is required for inclusion in the legislation as a matter of priority to fully realise and protect the human rights of all Victorians and correctly value human dignity.

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

The reviews conducted by the Victorian Equal Opportunity and Human Rights Commission indicate that the Charter has had a positive impact in relation to the development of legislation and policy, as well as in the delivery of public service outcomes.⁸ The Charter has ushered in a cultural change and PCLC acknowledges that cultural changes require time to fully take effect and be fully implemented within existing frameworks.

Of critical importance to the success of the Charter are the scrutiny of bills component and the legal duties imposed on public authorities. It is necessary for there to be effective auditing and reporting mechanisms to ensure accountability. The existence of the Charter has obviously not remedied or prevented every breach of a human right since its inception, however, it has enabled gaps in the protection of rights, through the creation of complementary accountability mechanisms, to be pursued in a cost effective and efficient manner.⁹

The 2010 Victorian Equal Opportunity and Human Rights Commission's community consultation found that there was widespread community support for the Charter, where community members

⁸ See generally State Government of Victoria, *Charter of Human Rights and Responsibilities: Working for Victorians* (2010) and Victorian Equal Opportunity and Human Rights Commission, *2009 Report on the Operation of the Charter of Human Rights and Responsibilities* (2010).

⁹ *Report of the National Human Rights Consultation* (2009) 377: the National Human Rights Consultation Committee found that a human rights act can 'provide a resilient thread in the...quilt of human rights protection' and be 'useful and cost-effective'

and advocates had embraced the language of human rights and are using this language to hold the government accountable and improve services and policies.¹⁰

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

PCLC believes that the Charter would be further strengthened through the recognition of absolute rights, such as the right to protection from torture and cruel, inhuman or degrading treatment. These rights are recognized as absolute under the International Covenant on Civil and Political Rights and should similarly be recognized within section 7 of the Charter. PCLC submits that rights which are considered absolute should be clearly defined in section 7 and these rights must not be subject to limitation under any circumstance.

4.0 CONCLUSION

PCLC strongly supports the Charter as essential legislation to provide better human rights protections in Victoria. Victoria, through the adoption of the Charter has become a leader in respecting the rights of all Victorians and can improve on the Charter through the process of consultation and experience.

PCLC believes that the most imperative change that could be made to the Charter to improve access to justice, would be to include a free standing cause of action for human rights breaches and provide remedies through both non-judicial and judicial pathways. The predication of human rights protection is that the individual can enforce their right, and this cannot necessarily be achieved at present in the absence of a free standing cause of action within the Charter.

PCLC would welcome the opportunity to provide further comment and input into the further development of the Charter and to other initiatives to improve legal responses to fully realize human rights protections in Victoria.

¹⁰ See generally, op cit, n.3