

Reviewing the Evidence and Addressing Myths and Misunderstandings Response to Submissions to the Review of the Victorian Charter

The Human Rights Law Centre made a comprehensive submission to the Scrutiny of Acts and Regulations Committee's review of the *Charter of Human Rights and Responsibilities Act 2006* on 1 July 2011.¹ This further submission is provided in response to issues raised in other submissions to the Committee made public after that date. The further submission addresses some of the views expressed in relation to the operation of the Victorian Charter that are unfounded in evidence or based on myths or misunderstandings.

The common law and our political system of representative democracy already adequately protect human rights. The Victorian Charter is unnecessary.²

While for most Victorians most human rights are protected most of the time, this does not obviate the need for rights to be protected in legislation. Many vulnerable groups face significant human rights issues and cannot rely only on the Victorian Parliament to respect their rights.

Prior to the introduction of the Victorian Charter, some human rights were protected in law however many rights were not adequately protected. Basic rights that many Victorians take for granted – such as the right to freedom of expression and freedom of association – were not protected by legislation before the Victorian Charter came into operation. Many others, such as the right to privacy, are not recognised or protected under the common law.

The operation of the Victorian Charter has demonstrated that:

- there is strong evidence that the Victorian Charter has increased and enhanced parliamentary dialogue about human rights in the consideration of new legislation;³
- the decision-making framework provided by the Victorian Charter has offered useful guidance to public authorities and employees when making decisions and implementing policies;⁴ and
- where appropriate, courts and tribunals have ensured that the Victorian Charter has served its purpose to ensure a “dialogue” about human rights and that laws, policies and practices are developed with appropriate consideration to human rights.⁵

The Victorian Charter contributes to strengthening the effectiveness and fairness of our system. It is an important tool for protecting the human rights of all Victorians and for ensuring that the Victorian government is more responsive and accountable.

¹ The HRLC submission is available at <http://www.hrlc.org.au/content/topics/victorian-charter-of-human-rights/hrlc-submission-review-victorian-charter/>.

² See, eg, submissions numbered 3, 5, 104, 119, 136, 212, 265, 269, 294, 301 and others.

³ See HRLC submission, in particular Section 3: The Effect of the Charter on the Role of Parliament.

⁴ See HRLC submission, in particular Section 4: The Effect of the Charter on the Role of Public Authorities.

⁵ See HRLC submission, in particular Section 5: The Effect of the Charter on the Role of Courts and Tribunals.

While the Victorian Charter has by no means been a panacea to all forms of unfairness and injustice in Victoria, it has played an important role in ensuring that human rights are appropriately considered across all areas of governmental activity. This includes in the development of laws and policies, in decision-making that affects every day Victorians, and in the role of courts and tribunals.

The Victorian Charter undermines parliamentary sovereignty and transfers power from parliamentarians to unelected judges.⁶

The Victorian Charter has operated in a way that preserves parliamentary sovereignty at all times. It does so in five key ways:

- First, section 28 of the Charter provides that any Bill introduced into Parliament should be accompanied by a Statement of Compatibility. As is the case with an Explanatory Memorandum and Second Reading Speech, such a Statement can elucidate Parliament's purpose and intent in enacting legislation and thereby enhance sovereignty.
- Second, Parliament may pass whatever laws it deems necessary, even if they are incompatible with human rights. This was the case with the *Summary Offences and Control of Weapons Acts Amendment Act 2009* (Vic),⁷ in respect of which a Statement of Incompatibility was tabled. Further, as section 29 makes clear, a failure to comply with the requirement under section 28 to accompany a Bill with a Statement "does not affect the validity, operation or enforcement of that Act or any other statutory provision".
- Third, if it deems appropriate, Parliament may issue an override declaration under section 31 of the Victorian Charter. This enables the Parliament, in "exceptional circumstances", to declare expressly that an Act or a provision of an Act has effect despite being incompatible with the Charter and acts, in effect, to oust the "Charter-jurisdiction" of the courts in relation to that law.
- Fourth, under the Charter, courts and tribunals do not have the power to invalidate or "strike down" laws. If a legislative provision is determined to be incompatible with a protected human right, the Supreme Court may issue a Declaration of Inconsistent Interpretation. However, as section 36(5) of the Charter expressly states, this does not affect the validity or the effect of the Act, nor does it affect the outcome in that particular case. Rather, the provision is referred back to Parliament to consider the human rights implications of the law in question.
- Finally, where courts have interpreted legislation in a way that was not intended by Parliament, the Parliament has been free to amend the law if it chooses to do so. This was the case with the amendments that were made to the *Serious Sex Offenders Monitoring Act 2005* (Vic) following the Court of Appeal's decision in *RJE v Secretary to the Department of Justice*; Parliament considered that the Court had not interpreted the legislation in a manner that Parliament intended and amended the law accordingly.⁸

⁶ See, eg, submissions numbered 104, 119, 133.

⁷ See HRLC submission at [13], [28].

⁸ See HRLC submission at [104]. It is important to note that the "human rights compatible" interpretation rendered by the Court of Appeal in this case proceeded under common law principles of interpretation and not in reference to or reliance upon the Charter.

The Victorian Parliament therefore retains the power to set the policy agenda and pass legislation as it sees fit. The Victorian Charter merely requires that human rights are appropriately considered by Parliament in the drafting of new laws and by the Government in developing policies. The Charter therefore preserves parliamentary sovereignty, while at the same promoting more transparent and accountable government decision-making.

The Victorian Charter is a lawyers' picnic and leads to more litigation.⁹

This argument is simply not borne out by the evidence. Since its introduction, the Victorian Charter has only been considered in 1.48% of all Victorian reported judgments and substantively considered in 0.58% of all cases.¹⁰ The impact of the Victorian Charter on litigation has therefore been significantly less than many predictions or descriptions.

Rather than at the litigious end of the process, the Victorian Charter has had its greatest practical impact at the interface between service delivery providers and decision makers and the Victorian community, particularly with respect to marginalised or disadvantaged individuals and groups.

The Victorian Charter protects the rights of minorities at the expense of the majority. The Charter is therefore undemocratic.¹¹

The legal protection of human rights provided by the Victorian Charter applies universally and is available to all Victorians, not just minorities or particular groups. The wide range of areas in which the Victorian Charter has played a role to date suggests that the protection of human rights is relevant to Victorians in many different contexts.

There is no doubt, however, that the Victorian Charter has had a particular relevance for some groups, such as children and young people, people with disability and mental illness, and those at risk of homelessness. Indeed, many of Victoria's most socially and economically marginalised and disadvantaged people are the most likely to come into contact with government services. Given their high level of interaction with public services, such vulnerable people are also more likely to suffer violations of their human rights than people in majority groups or people with the means to protect their own interests.

Moreover, far from being individualistic, the consideration of human rights requires reaching a balancing between the rights of the individual and the rights of the broader community. Indeed, this is explicitly reflected in section 7(2) of the Victorian Charter, which provides that human rights may be limited in situations where it is appropriate and reasonable to do so in a free and democratic society.

⁹ See, eg, submissions numbered 136, 304, 306 and others.

¹⁰ See HRLC's analysis of Victorian cases in which the Charter has been *substantively considered* in the HRLC submission, in particular Section 5: The Effect of the Charter on the Role of Courts and Tribunals.

¹¹ See, eg, submissions numbered 136, 137 and others.

The Victorian Charter is bureaucratic, costly and inefficient.¹²

The formal scrutiny processes established by the Victorian Charter play an important role in ensuring that the needs of all Victorians are more appropriately considered in legislative and policy formulation. Such scrutiny mechanisms are intended to strengthen parliamentary scrutiny of new laws for consistency with human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development. The social and economic benefits of policies which promote “prevention” or “early intervention” – precisely the model of human rights protection established under the Charter – are well documented.¹³

In this respect, the Charter’s human rights “impact assessment” play a similar role to regulatory and environmental impact assessments that are undertaken by governments – both of which are recognised as playing important roles in good and effective government. The Victorian Charter provides a necessary, complementary and supplementary layer of accountability, and assists to fill gaps in human rights protections in an efficient and cost-effective way.¹⁴

The Victorian Charter undermines religious freedom, particularly by constraining freedom of religious speech and expression.¹⁵

In its first four years of operation, there is no evidence to suggest that the Victorian Charter has eroded the right to religious freedom. Indeed, section 14 of the Charter explicitly recognises and protects the right to freedom of religion and belief. Despite this, some submissions to SARC from Victorians with church affiliations express concerns about the operation of the Victorian Charter. However, these concerns are based on a misunderstanding of the operation of the Victorian Charter. As Fr Frank Brennan has acknowledged:¹⁶

[t]he Victorian Charter has not caused any of these problems, uncertainties or disputes for religious Victorians. Its application might even help to protect the right to freedom of thought, conscience, religion and belief, which is included in the Charter.

Some submissions express concern about the specific issue of the Victorian Charter’s application to the *Abortion Law Reform Act 2008* (Vic).¹⁷ The Victorian Charter explicitly does not apply to the *Abortion Law Reform Act* — section 48 of the Charter, which provides that nothing in the Charter “affects any law applicable to abortion or child destruction”, was included on account of the Catholic Church’s lobbying efforts.¹⁸

¹² See, eg, submissions numbered 119, 201, 212 and others.

¹³ In the field of children’s rights, for example, RAND Corporation research has established that “well designed early interventions can generate a return to society ranging from \$1.80 to \$17.07 for each dollar spent on the program”: see RAND Corporation, *Research Brief: Proven Benefits of Early Childhood Interventions* (2005).

¹⁴ Further information about the costs and benefits of the Charter is available in the HRLC submission, in particular Section 7: Overall Benefits and Costs of the Charter.

¹⁵ See, eg, submissions numbered 217, 320 and others.

¹⁶ Frank Brennan, ‘Rights Charter no Threat to Religious Freedom’, *Sydney Morning Herald*, 31 July 2009. See also Report of the National Human Rights Consultation (2009), 48-9.

¹⁷ See, eg, submissions numbered 13, 21, 25, 26, 31, 33, 40, 47, 104, 218, 310 and others. Interestingly, many of these submissions advocated for the Charter to be *strengthened* rather than weakened or repealed.

¹⁸ ABC News, ‘Catholic Maternity Wards ‘Face Closure’ if Abortion Law Passes’, 24 September 2008.

The Victorian Charter's failure to impact upon the referral provisions in the *Abortion Law Reform Act* does not demonstrate that the Charter is ineffective or worthless. On the contrary, it demonstrates the potential unintended consequences of excepting certain areas of law from the general operation of the Victorian Charter.

Human rights are vague and ill-defined.¹⁹

The human rights contained in the Victorian Charter are modelled on the civil and political rights enshrined in the International Covenant on Civil and Political Rights (ICCPR) and other treaties to which Australia is a party. Many of these civil and political rights have also been enshrined in regional and domestic human rights instruments, including the United Kingdom's *Human Rights Act 1998* and similar legislation in the Australian Capital Territory. Perhaps more than in any other field of law, there is a vast body of international and comparative case law that can be considered in the elucidation of the content and application of the human rights contained in the Victorian Charter. While not strictly binding, this case law provides parliamentarians, public officials and judges with a wealth of guidance and assistance in determining the meaning and content of those human rights.²⁰

By way of analogy, there are also many other terms contained in legislation which, on their face, appear to be broad, vague and ill-defined, including concepts such as "reasonableness", "unconscionable", "unfair", "misleading and deceptive" and "public interest". Similarly with the field of human rights law, however, the scope and meaning of these terms have been well developed through case law and commentary in such a way as to be both susceptible to consistent interpretation but also adaptable to particular facts and circumstances. .

The expression of the human rights contained in the Victorian Charter is inconsistent with the expression of those rights in international conventions, like the ICCPR.

The Charter has been criticised by some for failing to properly express rights in strict accordance with the expression of those rights in international instruments. It is common for the wording of some human rights to be modified when they are incorporated into domestic laws. This ensures that the laws are consistent with the expectations and aspirations of the domestic community.

However, contrary to the criticism of inconsistency, the rights protected in the Victorian Charter are broadly consistent with the rights set out in the ICCPR. There are a limited number of instances of ICCPR rights not being included in the Victorian Charter on policy grounds. For example, the right in article 26 of the ICCPR not to be discriminated against on the basis of "birth or other status" is not included in the Victorian Charter, though presumably this is to ensure consistency with Victoria's already existing equal opportunity protections.

In most other cases, however, differences between the text of the ICCPR and the Victorian Charter are not for the purposes of weakening the protection of these rights but rather to:

- modernise the language of the ICCPR consistent with provisions of the *ACT Human Rights Act 2004*;
- remove ICCPR obligations that fall within the jurisdiction of the Federal Government;

¹⁹ See, eg, submissions numbered 119, 212, 216, 219 and others.

²⁰ See further *Kracke v Mental Health Review Board & Ors* [2009] VCAT 646, [201].

- ensure consistency with existing Victorian laws;
- remove specific limitations on rights due to the operation of the general limitations provision contained in section 7 of the Victorian Charter; or
- strengthen the obligation expressed in the corresponding Charter right.

Nevertheless, to the extent possible, the HRLC notes that it is beneficial for the articulation of human rights in the Victorian Charter to be consistent with the rights as articulated in international law, as well as other similar domestic legislation such as the ACT Human Rights Act. This will allow for the development of human rights jurisprudence in Victorian to continue to be informed and guided by the experience of other jurisdictions to the extent necessary, and in turn for Victorian jurisprudence to be influential and meaningful in jurisdictions outside of Victoria.

Ben Schokman and Philip Lynch
www.hrlc.org.au

31 August 2011