

To whom it may concern,

Re: Review of the Charter of Human Rights

The Victorian Gay & Lesbian Rights Lobby (VGLRL) provides the following submission to the Review of the Charter of Human Rights. This submission can be made public and we would be pleased to make ourselves available to the Reviewer at any stage to discuss the matters therein.

1. About the VGLRL

The VGLRL is a community based advocacy group that works towards equality, social justice and advancing human rights for lesbian, gay, queer, bisexual and same sex attracted Victorians. We work with and for the community along with other non-profit organisations, health bodies and government representatives to create positive change in the area of human rights and policy development. In particular, the VGLRL works constructively, cooperatively and respectfully with transgender, bisexual, intersex and other organisations that support our mission and vision.

2. Current operation of the Charter

The VGLRL believes that, since it took effect in 2008, the Charter has demonstrated its value and fulfilled its purposes such that it should be maintained. Evidence demonstrating the benefits of the Charter to Victorians will continue to build over time with the continued development of a human rights culture within government agencies, the legislature and the courts.

However, the effectiveness of the Charter is significantly undermined by unjustifiable exemptions for religious organisations that particularly impact on LGBTI people and a number of other structural weaknesses that impact on all individuals. The combination of these weaknesses has meant that LGBTI groups and individuals have generally not relied upon the Charter as a tool to combat unfair treatment. The VGLRL urges the Reviewer to recommend amendments to strengthen the Charter and improve access to justice for individuals. In this regard, the VGLRL supports the submissions of organisations such as the Human Rights Law Centre, Liberty Victoria and the Law Institute of Victoria.

This submission outlines some key issues in the operation of the Charter that are particularly relevant to LGBTI people.

3. Providing access to an effective remedy

The Charter would be significantly strengthened with the introduction of a number of measures to increase access to justice and remedies for individuals.

(a) Stand-alone cause of action

Section 39 of the Charter provides that if, otherwise than because of the Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of the Charter.

This provision has led to confusing and uncertain legal outcomes and unnecessarily limits the ability of individuals to access the courts. Section 39 should be simplified to allow a stand-alone cause of action for breach of the Charter.

(b) Compensation

Section 39 also provides that a person is not entitled to be awarded monetary compensation because of a breach of the Charter.

The VGLRL recommends that complainants should have access to compensation for breach of their Charter rights. Such a reform would provide greater incentive for compliance by public authorities and meaningful protection for individuals.

(c) Complaints

The costs and time associated with bringing legal action pose a barrier to those seeking to enforce their Charter rights. As the VEOHRC states:

Access to courts should not be the only mechanism for people to pursue a breach of their Charter rights. Court is often the last resort for people because of cost, time and the risk associated with an unsuccessful claim. A simple and effective model that allows for the resolution of alleged breaches through conciliation by an independent statutory body would allow the community to... resolve many issues without the cost and complexity of court proceedings.¹

The VGLRL recommends that complaints should be able to be made to and conciliated by the VEOHRC. This would increase access to justice for complainants.

(d) Investigations

As the VEOHRC states, ‘independent oversight and scrutiny of human rights is an important element of government transparency and accountability.’²

The VGLRL recommends that the VEOHRC should have own-motion investigation powers and the power to conduct reviews or audits of practices. This would deal with systemic issues related to the Charter, be consistent with similar powers held by other regulators such as the Victorian Auditor-General’s Office and the Victorian Ombudsman, and build on the Commission’s existing review function under section 41(c).

¹ Victorian Equal Opportunity and Human Rights Commission, Submission No 278 to Scrutiny of Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Victorian Charter of Human Rights and Responsibilities Act 2006*, 114.

² Ibid, 101.

Given that LGBTI community groups such as the VGLRL are wholly volunteer run and unfunded, the need for regulators with greater resources to address systemic issues is particularly acute.

4. Remove the exception for religious organisations

An increasing number and breadth of services are delivered by faith-based organisations, in part due to the rapid expansion in the contracting out of services traditionally performed by government agencies. Under the Charter, this leaves LGBTI people without the same human rights safeguards as other Victorians and vulnerable to discrimination.

Section 38(4) of the Charter contains an exception allowing religious organisations to discriminate if ‘acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates’. This wording was also adopted in section 82(2) of the *Equal Opportunity Act 2010*, which provides for a permanent statutory exception from the operation of the Act.

(a) The religious exception is contrary to international human rights principles

The VGLRL is highly concerned by the existence of the exception for religious organisations. Such a carve out is unjustifiable under international human rights law, particularly given the role of these organisations to deliver publicly funded services or perform other government functions. International jurisprudence supports protection of the manifestation of religious belief when it does not impair the rights of others.³

(b) The religious exception is inconsistent with government policy

The religious exception has the potential to justify discrimination and exclusion of people on the basis of their sexual orientation or gender identity. Such a notion runs counter to the Victorian Government’s equality agenda and the substantial investment in the health and wellbeing of LGBTI people.

Discrimination, stigma and social exclusion are significant problems for LGBTI people, who experience higher rates of depression, self-harm and suicide.⁴ The Victorian Government has allocated significant funds to programs aimed at reducing these poor mental health outcomes and is working towards mainstreaming LGBTI inclusive practices across the whole of government activities.

The maintenance of this anachronistic provision undermines this work and perpetuates discrimination and stigma against LGBTI people.

(c) Case studies of discrimination

³ See, e.g. *R (Williamson) v Secretary of State for Education and Employment & Ors* [2005] 2 AC 246 [16]-[17]; *Cantwell v Conn*, 310 US 296, 303-304 (1940); *R v Big M Drug Mart Ltd* (1985) 1 SCR 295, 336-337; *Christian Education South Africa v Minister for Education*, Case CCT 4/00 [35].

⁴ William Leonard et al, *Private Lives 2: The second national survey of the health and wellbeing of GLBT Australians* (Australian Research Centre in Sex, Health & Society, 2012) 35.

The VGLRL is aware of instances of vulnerable people being discriminated against in the provision of services. For example:

- transgender women turned away from homeless shelters;
- queer young people fearing discrimination by faith based service providers and simply opting out of accessing services altogether and risking homelessness;
- teenage girls exiting state care turned away from faith based welfare agencies when they are discovered to be pregnant; and
- a 12 year old girl suspended from a religious school because she came out as same-sex attracted.⁵

Discrimination in settings involving vulnerable people is highly concerning and should not be permitted under Victorian law.

(d) Many faith based service providers do not wish to discriminate

Despite instances of discrimination reported in a range of settings, the VGLRL understands that the vast majority of faith-based service providers do not discriminate and do not necessarily support the need for an exception. For example, in the debate around introduction of federal discrimination protections for LGBTI people in 2013, faith based service providers in the aged care sector supported a complete prohibition on discrimination in Commonwealth funded aged care.⁶ These service providers are committed to providing quality care and recognise that religious exemptions in discrimination laws act as a barrier to consumers accessing and experiencing the best of their services.

Recommendations

The VGLRL recommend that the broad exemption for religious bodies in section 38(4) be removed in order to protect LGBTI people from unfair treatment. This section is at odds with the human rights framework of the Charter in that it voids religious bodies of any responsibility for the protection of human rights. Furthermore, its vague language allows for these institutions (also vaguely defined) to maintain or promote discriminatory practices that cause harm and suffering to LGBTI people.

In addition, the VGLRL recommends:

- procedures and guidelines be introduced for government tendering of contracts that require non-discrimination (regardless of religious beliefs) as a condition of the contract; and

⁵ We recognise that independent schools are not generally considered public authorities under the Charter but include this example to illustrate the broad impact of religious exceptions in the Charter and the *Equal Opportunity Act 2010*.

⁶ Harley Dennett, *Crikey*, 'Coalition split on gay exemption aged care providers don't want', 18 June 2013 (available at <http://www.crikey.com.au/2013/06/18/church-owned-aged-care-providers-dont-want-exemption-from-laws/>).

- amendments to the Charter to allow for claims to be able to be made against the Department that contracted out the service to the faith based service provider, even if the service provider seeks to rely on the defence available for religious bodies.

In the alternative, if the exception is to remain, the VGLRL strongly recommends the following amendments to the wording of the exception:

- a stricter, clearer definition of 'religious body' at section 38(5); and
- the removal 'beliefs' and 'principles' from 'doctrines, beliefs and principles' at section 38(4), as it is unduly broad and there is no evidence these additional terms are required.

We thank the Reviewer and his team for taking the time to review this brief submission. We would be pleased to make ourselves available at any stage to address further questions in relation to these submissions.

Yours sincerely,



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