Dear Mr Young,


Thank you for the opportunity to contribute to the review of the Charter of Human Rights and Responsibilities 2006 (the Charter). The Commissioner for Privacy and Data Protection (CPDP) supports and recognises the Charter as an essential tool in the promotion and protection of human rights in Victoria. CPDP acknowledges the Charter review is a significant opportunity to strengthen the legal protection and practical realisation of human rights in Victoria. The CPDP supports the terms of reference of the review, which make clear that it will focus on ways to enhance the effectiveness of the Victorian Charter.

While the Charter has been utilised to assist a number of vulnerable Victorians since its enactment, we have identified opportunities for improvement that should be considered.

The CPDP was established under the Privacy and Data Protection Act 2014 (PDPA) in order to ensure an integrated, whole of Victorian government approach to public sector information privacy and data security. The CPDP is responsible for overseeing the collection and handling of personal information in the Victorian public sector, and establishing, overseeing and monitoring a protective data security regime for the Victorian public sector.

The right to privacy in Victoria

Personal information is defined under the PDPA as ‘information or an opinion that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion’. The federal Privacy Act 1988 administered by the Office of the Australian Information Commissioner is also relevant to Victorians, which applies to the collection and handling of personal information by Commonwealth government agencies and large private sector organisations. There are also privacy protections at common law.¹

Article 13 of the Charter provides a multi-dimensional right to privacy and reputation in Victoria, including a right for an individual ‘(a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and (b) not to have his or her reputation unlawfully attacked’. The Charter right to privacy includes the protection of personal information but also encompasses bodily, territorial, communications and locational privacy.

The rights contained in the Charter can lawfully be limited but only insofar as the limitation can be justified by consideration of all relevant factors, including the nature of the right, the importance of the purpose for limiting the right and the importance our society places on protecting human rights. A person’s right to privacy can be interfered with, provided the interference is both lawful and not arbitrary. The United Nations Human Rights Committee has interpreted the term ‘arbitrary’ to mean unreasonable in the particular circumstances. The right to privacy is therefore not an absolute right and

will often need to be balanced with other rights, such as freedom of expression. The right to privacy under the PDPA is also limited. Section 5 of the PDPA provides that the right to privacy must be balanced with the public interest in the free flow of information and section 6(1) specifically allows the PDPA to be overridden where authorised by another law.

Individuals may complain to the CPDP in relation to breaches of their information privacy. In 2013-14 this office received 2,468 enquiries regarding alleged breaches, with 289 of these investigated as potential complaints, 58 dealt with as actual complaints, with 46 of these closed in that year. Of the closed complaints 26 were dismissed, 11 were referred to VCAT, 7 were successfully conciliated and 2 were withdrawn. These figures are broadly comparable with figures over the 5 year period ending 2013-14.

The Charter right to privacy and reputation has been raised judicially 219 times between the Charter’s inception in 2006 and 2014. Since the last Charter review four years ago, this right has only been raised in a small number of cases and has been upheld a handful of times. Often when assessing the right, the relevant court or tribunal has found that its infringement was justified, necessary and proportionate or within the scope of the relevant legislation.

Ways to enhance the effectiveness of the Charter

The development of a human rights culture in Victoria

Since its inception, the Charter has served to promote a human rights culture in Victoria. The Charter articulates a commitment to human rights by government and the community. It lays out the core values that promote a healthy, inclusive and respectful Victorian community.

The Charter has played a key role in increasing awareness of human rights in Victoria. The Charter has contributed to human rights becoming part of the language of government and there appears to be a reasonably strong awareness of Charter obligations among public officials. In many instances, departments, agencies and local governments have embedded rights into their practice and procedures. In addition, advocates have used the Charter to advocate for their client’s rights.

Nevertheless, we have a long way to go in entrenching human rights norms into Victorian society. For example, in the privacy sphere a sophisticated human rights culture should dismantle ideas such as ‘if you have nothing to hide, you have nothing to fear’, which misplaces the inherent value of privacy to our autonomy, and the importance of people having control over their personal information and of their personhood more generally.

Strengthening the Charter could contribute to the development of an enhanced human rights culture in Victoria.

Stand-alone cause of action

It is proposed that consideration be given for the Charter to include a separate, stand-alone cause of action for violation of human rights. The current Charter rights can only be raised if it is linked with action under another Act that purportedly breaches the Charter. Such a change is likely to further

---


3 See, eg. JX v WIV and Middle South Area Mental Health Service [2014] VSC 564 (17 December 2014); Re Beth [2013] VSC 189 (23 April 2013); Raytheon Australia Pty Ltd v Victorian Equal Opportunity and Human Rights Commission (Anti-Discrimination) [2011] VCAT 796 (19 April 2011).
encourage public authorities to be accountable for their decisions and actions, and will avoid victims of human rights breaches not being unduly restricted in seeking relief or remedy. It will also serve to enhance the reputation of the Charter as equal to other legislation in Victoria.

International human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, either explicitly or implicitly require that a person have access to effective remedies, including judicial remedies, if their rights are breached. Likewise, the Charter could be amended to provide a direct right of action in the Victorian Civil and Administrative Tribunal (VCAT) as an accessible, low cost jurisdiction. Where VCAT finds a contravention of section 38 of the Charter by a Victorian public sector body, it would then be able to make a range of orders, including compensation for loss, damage or injury suffered.

A useful model is that provided under the ACT Human Rights Act 2004. Despite fears at the time, the ACT has not been overwhelmed by litigation since 2009, when a stand-alone cause of action was introduced in the ACT Charter.

Alternative dispute resolution

Alternative dispute resolution should be considered for inclusion in the Charter as the first level of redress in any remedies provision, as is the case with the PDPA. This could provide a speedy and accessible way for people to informally resolve individual disputes about their human rights.

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) has expertise in this area and is best placed to carry out this function. Dispute resolution provided under the Charter may follow the model set out in the Equal Opportunity Act 2010, which currently exists for complaints of discrimination, sexual harassment, victimisation and vilification. The dispute resolution process under the privacy provisions of the PDPA also provides a workable model. As the data referred above demonstrates, this process has not to date created an unworkable burden for this office.

Improved information sharing

While the VEOHRC, the Victorian Ombudsman and the Independent Commission Against Corruption (IBAC) each have responsibilities under the Charter, their ability to share information in relation to these functions is limited.

The Ombudsman’s responsibilities under the Charter include an express function to enquire into or investigate whether an administrative action is incompatible with a human right set out in the Charter. IBAC also has investigative responsibilities in relation to allegations of human rights breaches by Victoria Police.

While the VEOHRC is likely to receive numerous complaints relating to human rights breaches, its functions under the Charter do not include an ability to deal with these. Further, the secrecy provisions contained in section 176 of the Equal Opportunity Act 2010 limit the VEOHRC’s ability to refer any allegations to the appropriate complaints handling body. Currently, the VEOHRC may only deal with such matters by providing contact details of these bodies to the complainants.

While the Ombudsman has a power to refer a complaint to the VEOHRC where appropriate, the VEOHRC is excluded from the list of agencies with which the Ombudsman can share information otherwise obtained in the course of his duties.5

The PDPA – the primary legislation governing privacy and information sharing in Victoria – provides a useful model in relation to information sharing. The PDPA attempts to balance the public interest in the

---

5 Under section 16(2) of the Ombudsman Act 1976.
free flow of information with the public interest in protecting the privacy of personal information. The right to privacy is not absolute — in some contexts the right to privacy will give way to countervailing public interests. One such interest is the proper administration and enforcement of laws.

Accordingly, the confidentiality provisions in the Ombudsman Act 1976 and the Equal Opportunity Act 2010 should be amended to facilitate information sharing in relation to statutory functions under the Charter, where appropriate. For example, the VEOHRC should be able to directly refer a complaint to the Ombudsman for investigation where it raises systemic issues in matters of public administration. Further the Ombudsman should be able to share information with the VEOHRC in appropriate circumstances. With the right controls, this would ensure the privacy and security of personal information is properly balanced with the proper administration and enforcement of the Charter.

The application of the Charter to non-State entities when they provide State-funded services

I note the current ambiguity in the Charter regarding the application of the Charter to non-State entities when they provide State-funded services. CPDP is of the view that Victorian public sector agencies should be responsible for ensuring that human rights are upheld in the provision of their services, whether these services are provided by the agency itself or non-State actor on the agency's behalf.

The data security provisions of the PDPA provide a useful model. Under the data security provisions (Part 4) of the PDPA, a Victorian public sector agency is responsible for ensuring that contracted service providers do not act or engage in a practice that contravenes a protective data standard issued under the PDPA. In other words, while a Victorian agency may contract out its functions, it may not contract out its responsibilities with respect to data security.

This straightforward model is largely preferable to the model under the privacy provisions (Part 3) of the PDPA, which provide that privacy responsibilities may rest either with the agency or the contracted service provider, depending on a number of factors, including the terms of the contract. This ambiguity can lead to confusion — including among complainants of potential privacy breaches — about which agency is responsible for ensuring information privacy requirements are met.

Further reviews

The Charter should be subject to periodic reviews to ensure that the Charter does not become fixed and unchangeable, but an instrument that may be amended over time to reflect community values and improve human rights protections.

Yours sincerely,

Tony Nippard
Assistant Commissioner Operational Privacy and Assurance

17/5/15

---

6 Privacy and Data Protection Act 2014, s 5.