

Submission to the Eight Year Review of the Victorian Charter of Human Rights and Responsibilities

Darebin Council
June 2015

Darebin Council welcomes the opportunity to participate in the eight-year review of the Victorian Charter of Human Rights and Responsibilities ('the Charter').

We make this contribution to the review of the Charter based on;

1. The understanding that human rights are important and worth protecting, and that Victorians have already benefited from the Charter in several ways – in particular from greater understanding of rights within the community and also enhanced protection for individuals and groups from rights breaches;
2. The eight years of wisdom and insight gained through the experience of applying and integrating the Charter, and human rights principles generally, into Council's core decision making.

Darebin Council was one of the first councils to respond to the introduction of the Charter, notably with a Human Rights Officer position with directly responsibility for coordinating the Charter implementation. Darebin's work to implement the Charter has featured in all annual reports on the progress of the Charter since 2008, prepared for the Victorian Government by the Victorian Equal Opportunity and Human Rights Commission.

A challenging beginning

Since the beginning of 2008 Council has worked hard to ensure our systems, policies, decision-making and legislative processes comply with the rights contained in the Charter. With little investment by the State Government over the last eight years, Darebin Council has worked hard to maintain its compliance with the Charter but has struggled to establish a systemic human rights culture within the organisation. Council recognises that culture change requires a long-term process. While implementing the Charter has been worthwhile and informative to date with many gains for the organisation and the community, in order to consolidate and build on the work a redoubling of effort and investment by both levels of Government is required.

In 2011, Council – partly in response to the opportunities provided by the Victorian Charter of Human Rights and Responsibilities ('the Charter') but also building on Council's previous equity and diversity work – developed the *Darebin Human Rights Action Plan 2012-15*. This new initiative articulates Council's strategic commitment and sets out actions which further embed human rights with Council's

culture and practice at all levels, and ensures Council's legal responsibilities with the Charter. The Plan also includes actions which commit Council to working with citizens and communities to strengthen relationships with, between and in communities based on the key human rights values – Freedom, Respect, Equality and Dignity.

In making this submission, Council is drawing openly and deliberately on the experiences of implementing the *Darebin Human Rights Action Plan 2012-2015* at organisational, service delivery and community levels.

This submission will address the key Terms of Reference relevant to local government in general, and to the City of Darebin in particular. Council has made ten recommendations in relation to these Terms of Reference.

About Darebin

The City of Darebin is located in the northern suburbs of Melbourne, between 5 and 15 kilometres north of the Melbourne CBD and is home to 148,728 residents. Darebin is a richly diverse community, 29% of Darebin's residents born in non-English speaking countries and have come to Australia from over 140 countries. Darebin also has one of the largest proportions of Aboriginal and Torres Strait Islander residents in metropolitan Melbourne, making up 0.8 per cent of the total population

Darebin rates as the sixth most disadvantaged metropolitan municipality in Victoria and the 39th most disadvantaged municipality in Victoria, however a large disparity remains between suburbs, with several suburbs in the municipality ranked amongst the most disadvantaged in Victoria.

Recommendations

Recommendation 1:

Council recommends that the review should be used as an opportunity to strengthen the Victorian Charter. The general orientation of the review should be to strengthen rather than limit the legal protection of human rights in Victoria.

It is Council's view that the strength of the Charter in its current orientation is to trigger mediation between public institutions and individuals. This is a position supported when advice is sought from the Victorian Equal Opportunity and Human Rights Commission ('the Commission'). It has little or no legal weight and as such has little power for compulsion.

The principle of compulsion (based on robust, case-based precedents) is an excellent tool for cultural change. Stronger legal codification within the Charter and its administration would send a clear signal by the State Government of the primacy of human rights considerations in the business of governments. Currently the bar is set too high for legal action under the current Charter provisions.

Council's *Human Rights Action Plan 2012-2015* expresses and demonstrates Council's commitment to the actions taken to protect, fulfil and promote the human rights of all citizens in the City of Darebin. Council's commitment reflects a belief that human rights are at the heart of community harmony, safety, health and wellbeing. The strengthening of legal protections for human rights will have clear benefits to the community, but will also help to further embed a human rights culture within public authorities including local government.

Furthermore, protection of human rights is a foundation principle of Council's *Diversity and Inclusion Policy*, its *Community Engagement Framework* and its *Equity and Inclusion Planning and Audit Tool*. Council believes that human rights matter in the lives of Darebin citizens and communities, and that community harmony is best supported by a focus on our shared human rights values.

Recommendation 2:

Council recommends that the State Government should remain fully committed to the protection and promotion of human rights and ensure that public authorities give appropriate consideration to human rights when developing laws and policies and making decisions. In particular, the legal obligation placed on public authorities by section 38 is important and must be retained to ensure the Charter's effective operation.

Council recommends that greater opportunities be made available to the local government sector to share and learn from the diversity of approaches to meeting the obligations placed by section 38. There is a role for the State Government in providing and facilitating these opportunities.

The Victorian State Government has a clear leadership role in promoting and demonstrating the application of s.38 developing its own laws and policies. Many of the State Government's decisions (especially with regards to policy changes in the areas of health, education and social policy) can seem contradictory to the Charter's human rights provisions. Local Councils and community organisations would greatly benefit from access to the documentation prepared by State Government regarding its human rights considerations when announcing changes to laws and policies.

Council has several mechanisms in place to ensure that human rights considerations are part of everyday decision making, and that these considerations are brought in early in the process, to influence initial thinking and planning. Council's planning tool for equity and inclusion requires the user to consider Charter rights within their proposal, including a Charter Check which supports the intention of s. 7 when rights may be restricted by the proposal. In best case scenarios, this has led to extremely valuable, thoughtful and collaborative work in integrating Charter rights. Council's *Reporting Template for Briefings and Reports* require the author to notate where and how human rights considerations have been made within the recommendations being made to Council. In worst case scenarios, this is simply a tick-the-box exercise with consideration only applied at the tail end of a decision-making process. These are Council's two primary mechanisms for supporting human rights considerations in decision-making.

Consideration of Charter rights within decision-making process is best served not as a stand-alone exercise, but embedded in the tools which require officers to consider the equity, diversity and/or social inclusion impacts of their proposal for particular groups within this community. In Council's experience, this establishes the grounds for a more purposeful, educative and ultimately useful discussion between officers. It provides context for understanding that human rights exist, that there is a legal imperative expressed through the Charter that they must be protected and that to limit rights can have negative outcomes – particularly for already disadvantaged citizens and communities.

Recommendation 3:

Council recommends that tailored (for example culturally sensitive, multilingual) and also more readily available education and training be made available to the community about their rights and responsibilities under the Charter. Particular attention must be paid to citizens and communities who could benefit most from greater awareness of and engagement with the Charter.

The State Government can play a vital role in funding peak bodies to plan, design and implement tailored education programs for those communities likely to be most affected by provisions within the Charter.

There is also a strong argument for ensuring that the work done with schools through the Commission includes information and discussions about human rights. Conversely, there is evidence that some Darebin schools are producing quality work in human rights but lack opportunities to showcase and

share their work with the broader community. There is an undeniable role for local governments in any work which promotes active citizenship, as per the Local Government Act (s. 3).

Council has committed substantial work through its Human Rights Action Plan to strengthen community capacity to implement human rights values and laws, including using these values and laws for human rights advocacy. Through this work it continues to be apparent that many Victorians do not know about the Charter, while others are unsure of how to use it as a tool for advocacy and to bring about change. There is a continued need for up to date, accessible and widely available community information on the Charter in addition to a renewed focus on developing and delivering resources which are culturally appropriate and meet the particular needs of those community groups who are most likely to benefit from the Charter.

In 2013 Council developed an easy to use, step-by-step guide to inform and enable community members to raise human rights issues with different public authorities, based on a similar resource produced by the British Institute of Human Rights. This resource has been very well received by community members. It features plain English, graphics which emphasise key points in the text, and folds out from a brochure to poster for display. This resource would however be far more optimally and successfully produced by State Government (such as through the Commission) ensuring its availability to all Victorians.

Recommendation 4:

The Victorian Charter should protect the fundamental civil, political, economic, social and cultural rights that are necessary for all people to live with dignity and participate equally and fully in our community.

If the protected rights contained in the Charter are to be expanded to include the additional rights enshrined in the International Covenant on Economic, Social and Cultural Rights, this should be done in full acknowledgment of the work remaining to be done to consolidate the Charter in Victorian civic life.

In its 2011 submission to the four year review, Council recommended the introduction of economic, social and cultural rights, which include the right to education, health, an adequate standard of living, family life and culture. Council notes that the extension of the Charter in this way may entail resource implications for government and public authorities, but would conversely assist with better understanding and practice of human rights-based practice within our organisations given that the concept of indivisibility is so central to understanding the nature and impact of human rights.

Council made this recommendation on the basis of evidence that Darebin citizens are seeking protection of economic, social and cultural rights. In the 2005 community consultations undertaken by the Human Rights Consultation Committee, members of community of Darebin expressed a clear view that protection of their economic, social and cultural rights was at least as important to them as protection of their civil and political rights. More recently, consistent feedback from diverse

communities in the broad, inclusive engagement for the development of the Human Rights Action Plan referred to the critical significance of some specific economic, social and cultural rights including the right to accessible and safe housing and healthcare.

However it is also Council's view that the Charter in its current configuration continues to be a fragile instrument for the provision of human rights in Victoria. It is important that the current protected rights should be strengthened and consolidated before any expansion is considered. An unintended consequence of expanding the charter too early is a further dilution and confusion of the provisions. Further it gives a false and unjustified view that the State Government and public authorities have the necessary sophistication and practical capacity to expand the Charter at this point.

Recommendation 5:

Council acknowledges that reporting and auditing frameworks are important to identifying systemic and structural issues and also monitor the effectiveness of actions to address such issues.

As such, Council recommends that the Victorian Charter should be amended to:

- (a) Require the State Government and all its departments to develop an action plan for the protection and promotion of human rights and compliance with the Charter, undertake an annual audit of their human rights compliance and publish the outcomes on an annual basis.***
- (b) Require the State Government to undertake and publish annually, an independent audit and critical analysis of its own work to implement the Charter,***
- (c) Require all public authorities to develop an action plan for the protection and promotion of human rights and compliance with the Charter,***
- (d) Require all Councils to undertake an annual audit of their human rights compliance, and***
- (e) Strengthen opportunities for sharing information, case law examples and the challenges faced by local governments in implementing the Charter- including, importantly, the structural and cultural barriers to implementation.***

The State Government has a leadership role in setting the standard for all public institutions in measuring the effectiveness of its human rights actions and establishing a critical framework to identify systemic and structural issue. The current audit and reporting arrangements tend to be descriptive and provide little practice guidance.

Council acknowledges that annual Charter audit survey lead by the Commission has provided an important trigger for Council to record and reflect on its annual progress in implementing the Charter. It has also provided Councillors and the Senior Executive Team an opportunity to consider this progress. The audit survey has not driven progress, however. Instead, Council's *Human Rights Action Plan* has provided the imperative for action. Council believes this approach could work equally well within other Council environments, with a human rights action plan working in tandem with other mandated plans such as the municipal health and wellbeing plan.

A stronger dialogue between the Commission and Councils is needed to support work, particularly with those who are consistently failing to respond to the annual survey. Importantly this should provide a basis for discussion and recording of what is challenging and why. This information could then form the basis of further discussion and collaboration in a regular moderated forum for local government officers with responsibility for implementing the Charter.

The current format and tone of the annual reporting document written by the Commission for the Government inflates the 'good news' stories at the expense of the opportunity to share the far more challenging situations, including where the Charter is failing to impact decision making.

There is an important role for the Commission in working constructively with the local government sector to identify and address the structural and cultural barriers to implementation, leveraging the results of the audit survey but initiating a sector wide dialogue on how these barriers can be addressed.

The current resources provided by the local government peak bodies to support Charter implementation are now well out-dated and were not ever useful as a guide to working in intractable environments. New, substantial and sector specific resources are urgently needed.

Recommendation 6:

Council recommends that Section 7 (the general limitations clause) be reframed in plain language and with a potential reduction in the list of factors to be considered.

Council recommends that opportunities for Councils to openly and safely share their experience of implementing Section 7 (and therefore, justifying the restriction of Charter rights) in their decision, policy and law-making be facilitated including with legal officers from the Commission.

Section 7 provides a framework for determining when and how a Charter right may be limited. In other words, it requires public authorities to consider the basis for reasonable limitations of human rights. Council notes that a review of s.7 for clarity and conciseness was one of the recommendations of the Security of Acts and Regulations Committee (SARC) in the 2011 review of the Charter. Council is committed to the intention of s.7 and acknowledges that a thorough understanding of the rationale for s.7 and of the relevant factors set out in s.7.2 (the 'reasonable limitations' clause), is critical to the influence of the Charter on decisions, policies, laws and strategies within Councils.

However in its current form, s.7 is challenging for non-legal personnel to understand and apply, and also reads as both cumbersome and repetitive - particularly within a primarily policy-making context. A key example is the test which requires consideration of whether a limitation is "...demonstrably justified in a free and democratic society based on human dignity, equality and freedom". This is a very complex consideration to expect an everyday policy maker in local government to understand and then confidently apply.

It would be invaluable for Councils to safely share how they have approached s.7 of the Charter. It would also be valuable to have access to mechanisms which allowed for regular sharing of the specific discussions happening in Councils in relation to the relevant factors listed in s.7.2. Discussions would also be strengthened by the participation and input from legal personnel from the Commission.

All applications for an exemption under s.7 (including State Government) and their outcomes should be published on an annual basis. These applications should form the basis of an annual inter-governmental conversation as a vehicle to create a deeper and more reflective practice around the application of the Charter. It is these critical conversations that contribute to a shift from compliance to culture.

Recommendation 7:

Council recommends that the legal obligations placed by the Charter be extended to include the private sector.

Council recommends that the Charter be extended to recognise class actions so that communities and groups can claim remedies for shared human rights limitations

The private sector has equal rights and responsibilities for adhering to human rights principles, as is the case with Equal Opportunity legislation for example. It is not clear what the principles for exempting the private sector should be.

Council relies on sound partnerships with private authorities in its human rights, diversity and inclusion work, for example property developers, local retailers and owners of local venues. Work with these entities would be significantly strengthened if there was a shared obligation to protect and promote human rights of community members.

By including the private sector the Charter would also need to recognise the need for class actions not just actions by individual citizens.

For instance under the current State Government's gambling provisions, operators are able to place most of their Electronic Gaming Machines (EGMs) in areas of high disadvantage. Based on legal advice and advice from the Commission, Council is not able to use the Charter in any appeal against poker machine planning applications on behalf of disadvantaged neighbourhoods and using human rights as legal grounds. This inability seems like a major gap in the spirit and intent of the Charter.

Recommendation 8:

Council recommends that information on the application and rationale for any override declaration by Parliament (as provided for in Section 31) be reported publicly.

Section 31 provides for an override declaration, where in ‘exceptional circumstances’ Parliament may override the Charter through the use of an express declaration in the relevant act to that effect. Council is interested to understand on what grounds such exemptions are being sought, and by whom – to extend its own thinking on the impact of the Charter on law making in particular. Opportunities to work through the thinking and reasoning behind these decisions would be of particular benefit to the local government sector, in the spirit of learning together and building public service capacity.

Recommendation 9:

That a funded program to support local-level community initiatives to promote human rights be established, including through existing community grant schemes administered at state and local government levels.

There is little evidence of the community actively using the Charter when dealing with Council including as a tool for advocacy and change. This is likely due to the minimal understanding of the Charter by many people as noted in earlier sections of this submission.

There is tremendous scope to boost this understanding by supporting small scale, local level community initiatives which are led by established groups. Actions such as the development of guidelines for Councils to embed human rights criteria/ considerations into all their existing community-level grant schemes has potential as a low-cost, high-impact strategy for bringing human rights to life in communities.

Recommendation 10:

Council recommends that further reviews of the Charter be established and that these be timed every four years.

The work from compliance to culture is a long one, and can be characterised as a ‘learning journey’ for both state and local government sectors in Victoria. This review complements but is qualitatively different to the annual audit report prepared by Councils. A regular, mandated review is important to supporting this learning over time. Additionally, opportunities must always be made available for citizens and community groups to comment on the implementation and progress of the Charter. To date, the timing of a review every four years has worked well – it has provided sufficient time to Council to complete a body of work balanced with timely reflection on what’s been achieved and what remains to be done.

