2015 Review of the Charter of Human Rights

June 2015
About VCOSS

The Victorian Council of Social Service (VCOSS) is the peak body of the social and community sector in Victoria. VCOSS members reflect the diversity of the sector and include large charities, peak organisations, small community services, advocacy groups, and individuals interested in social policy. In addition to supporting the sector, VCOSS represents the interests of vulnerable and disadvantaged Victorians in policy debates and advocates for the development of a sustainable, fair and equitable society.

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Recommendations

1. That the Review considers a range of mechanisms for fostering cultural change across government and the community, including by:
   - expanding opportunities for staff in all public authorities and conducting public functions to participate in training and education about implementing the Charter in their planning and operation
   - encouraging the incorporation of human rights into public authorities' strategic and business planning
   - developing leadership within government and the community
   - increasing people’s knowledge about their rights and mechanisms available to enforce them.

2. That the Charter be expanded to include additional rights, in accordance with international instruments, and in particular to include economic, social and cultural rights and the right to self-determination.

3. That the Review considers options for clarifying the specific entities and functions intended to be covered by the definition of public authorities, including by:
   - inserting a mechanism allowing organisations to opt-in to coverage by the Charter
   - expanding the existing regulation-making power to include specifying functions of a public nature
   - including a duty to inform non-government agencies of obligations under the Charter

4. That the Charter be amended to include a direct cause of action against public authorities who may have acted inconsistently with human rights, or failed to consider human rights in making a decision.

5. That the Charter be amended to include access to a range of judicial and non-judicial remedies where human rights are found to have been infringed.

6. That the Victorian Equal Opportunity and Human Rights Commission be empowered to receive and conciliate complaints under the Charter.

7. That the Victorian Civil and Administrative Tribunal’s jurisdiction to hear Charter related matters be clarified to ensure people have a range of accessible and inexpensive means of enforcing their rights.
8. That the Review considers mechanisms for improving the consistency in consideration and discussion of statements of compatibility.

9. That the Scrutiny of Acts and Regulation Committee process be strengthened by improving the public participation process that supports members of the community to provide input and reflection on the potential impacts of bills and promoting active engagement with community groups and organisations likely to be interested or affected by the bill.
Introduction

The Victorian Council of Social Service (VCOSS) welcomes the opportunity to contribute to this review of the Victorian Charter of Human Rights and Responsibilities (the Charter). VCOSS has been engaged in the development and implementation of the Charter over many years, and will continue to advocate for the human rights of Victorians experiencing poverty and disadvantage.

VCOSS supports the Charter as an overarching framework for the Victorian Government and community to respect, protect, promote and fulfill human rights. VCOSS advocates that the Charter should continue to evolve, and be further strengthened to enhance human rights protections and provide a stronger and more enduring human rights culture in Victoria.

Victorian community organisations widely support human rights principles. Many have explicitly incorporated human rights into their organisations' values, vision and practice. Other organisations continue to use language such as social justice, social inclusion, fairness and equality. VCOSS believes these concepts are inter-related and mutually reinforce one another, and that the creation of a culture that respects human rights is an important pathway to a Victoria without poverty.

The most vulnerable and disadvantaged people in our society are those most likely to have their human rights violated. Human rights set an agreed minimum standard for the fair and humane treatment of people, below which no-one should fall. By legislating for human rights, the Victorian Parliament has made a strong statement about the moral dignity of human beings in our State, and helped create tolerance, respect and cultural change to value each person equally.

This submission argues that the Charter can be strengthened by creating a deeper and more sustained cultural change across the community. Ultimately, human rights can only be protected if everyone has a basic understanding and respect for the decent treatment of people, regardless of their circumstances.

The Charter can also be strengthened by incorporating additional rights, especially social, economic and cultural rights. These rights are often the most meaningful rights to vulnerable members of our society, as they protect access to the basic necessities required in a modern society.

The Charter can also be improved by reducing some uncertainty about its application, by enhancing the ability to seek redress for human rights infringements, and by strengthening the human rights dialogue between the Victorian Government, Parliament, Courts and the community as a whole.
A stronger human rights culture

Recommendation

That the Review considers a range of mechanisms for fostering cultural change across government and the community, including by:

• expanding opportunities for staff in public authorities or conducting public functions to participate in training and education about implementing the Charter in their planning and operation

• encouraging incorporation of human rights into public authorities’ strategic and business planning

• developing leadership within government and the community

• increasing people’s knowledge about their rights and mechanisms available to enforce them.

One of the most important roles of the Charter is to foster cultural change within government community sector and the general community.

The Victorian Charter’s dialogue model of human rights protection intends human rights are given proper consideration at the front end of legislative and policy development and decision making. A strong human rights culture includes the widespread adoption of human rights frameworks and can prevent breaches of human rights by ensuring they are taken into account by public authorities in planning, operation and decision making.

However, meaningful implementation of the Charter means that its influence should extend beyond the actions of lawyers, public servants and politicians, to the decisions, actions and understanding of the general community. Ultimately, human rights can only be protected if everyone has a basic recognition and respect for the decent treatment of people.

The human rights culture in the Victorian Government

Embedding human rights culture across government and community requires continuing commitment. Since the introduction of the Charter, we have observed an increased understanding and awareness of human rights within government and public authorities. This has included
incorporating the Charter into government policies and departmental plans and increased discussion of the human rights impacts of decisions on Victorians.

Ongoing leadership and commitment to human rights is required to embed a human rights culture in Victoria. In recent years there has been less focus at a political level on the Charter. One of the consequences of this has been reduced attention and dialogue about human rights within government and the broader community. It is important that this Review consider mechanisms for insulating Victoria’s human rights culture from changes in leadership.

Despite the greater awareness of human rights across government following the introduction of the Charter, knowledge and application of the Charter remains inconsistent. VCOSS members provided examples where they had attempted to use the Charter to raise an issue or advocate on behalf of clients but these were not treated as serious considerations by government departments. Community organisations also reported that some staff in public authorities appear to have little knowledge of the Charter, do not recognise its relevance to their work or do not incorporate it in their policies or decision making.

It is also our understanding that there is some inconsistency in government staff participation in human rights training across departments and program areas. We also understand there are fewer resources available than in previous years for staff training and professional development around the Charter.

**The human rights culture in the Victorian community sector**

While the Charter is valued by the community sector, its use and application among community organisations is uneven. Some community organisations strongly embrace a rights based framework, describing the Charter as ‘integral’ to their everyday work and incorporating the Charter in all of their policies and guiding documents, while others appear to have a limited understanding of the Charter. Some acknowledge the role of the Charter but have not incorporated it into organisational policies and daily work.

The reasons for this include a lack of awareness about the Charter, insufficient education for organisations about the use of the Charter and their obligations, as well as confusion around its relevance and coverage.

Some community organisations reported that the Charter was rarely a useful tool in advocating for their clients, or protecting their rights. For example, one organisation reported that the lengthy process for seeking remedies for their vulnerable clients needing immediate crisis assistance was impractical. Another highlighted the complexity of the Charter as a barrier to its use in advocating for their clients and felt that it was better at addressing systemic issues than advocacy for individuals.
Upon the passage of the Charter, VCOSS received short-term public funding to help raise awareness and provide strategies for community organisations to incorporate the Charter into their practice. However, we are aware that in an environment of often inadequate and uncertain funding, community organisations experience high rates of staff turnover compared to other industries. It is apparent that much of the initial awareness of the Charter has eroded over subsequent years, highlighting the need for more permanent arrangements to provide access to information on the Charter and incorporating it into practice.

Options for embedding a human rights culture

Embedding a human rights culture across government and the community requires a multi-pronged approach.

1. Resources for awareness, education and practice alignment

All staff in public authorities should be aware of the implications of the Charter, and encouraged to reflect on the relevance of human rights in their own role. The effect of the Charter could be strengthened by greater access to:

- promote and raise awareness of the Charter
- provide targeted education sessions on the obligations of public authorities
- information on the rights and responsibilities of clients
- advice on how to use the Charter meaningfully to advocate for clients and to bring about systemic change
- strategies to incorporate Charter rights into organisational practice.

The community sector requires additional resources to deliver targeted training on how to incorporate the Charter in their planning and operations. For many individuals whose rights have been breached the community sector may be their primary or only source of advice and assistance. Community organisations highlighted the lack of training and resources about human rights available to them over the last few years.

Experience from the ACT after the introduction of a direct right of action against public authorities suggests that to be effective, the training needs to be tailored and meaningful for organisations. Over time, the ACT Council of Social Service (ACTCOSS) found attendance at training declined, and it was difficult to maintain community sector engagement. Feedback showed that organisations preferred specifically tailored advice about how the Charter would impact across their organisation.

Human rights information and education should also be incorporated into training for new public service staff members and graduates. Additional resources need to be provided to government departments to ensure all staff are aware of the Charter and its relevance to their work.
Improved education for the general community helps people better understand their rights, meaning they are more likely to not only enforce them, but to respect the rights of others. Targeted education and resources can also be developed for vulnerable groups, including young people, older people, Aboriginal people and people from culturally and linguistically diverse backgrounds about their rights. Schools and community groups are important partners in developing and delivering human rights education to vulnerable groups.

2. **Embed human rights in key plans and management**

Government agencies and public authorities should be encouraged to include human rights frameworks and considerations in their key documents and structures, including departmental and strategic plans.

An example of where strong leadership is supporting the development of a human rights culture in government is within Victoria Police, where The Victoria Police Blueprint 2012-15 contains priorities related to human rights and the Charter. An internal human rights committee comprised of senior staff, and a human rights strategic advisory group comprised of external stakeholders and community members, have been established to lead a whole-of-organisation approach to human rights implementation.

3. **Improved reporting and auditing**

Another mechanism to develop Victoria’s human rights culture is to improve reporting by public authorities. There are already a range of existing accountability and reporting requirements for public authorities. Human rights reporting could be embedded into these processes, to more systematically report on human rights activities and alignment.

This process should not seek to add another layer of ‘red tape’ over reporting requirements, but rather to reinforce the importance of embedding human rights across organisational structures and documents, rather than as a discrete and isolated consideration.
Examples of organisations embedding human rights across planning and operations

There were a number of positive examples of organisations that were relatively unfamiliar with the Charter, but as a result of reviewing their policies following a complaint, have fully embraced the Charter and incorporated it into their policies and practices. Two case studies below illustrate the positive transition organisations can make from having practices which do not align with the Charter to developing a strong human rights culture across the organisation.

A Community Health Centre changed policies around treatment of clients

A community health service had a policy which enabled staff to refuse treatment for clients considered to be ‘aggressive’. A complaint was lodged and it was found that this policy was non-compliant with the Charter. Following this finding, the service reviewed all of its policies and processes. Significant changes were made to ensure that their new policies were inclusive and reflected a human rights culture, including developing a new client engagement policy. The organisation has also taken a proactive approach to help support other health services to be more inclusive. With assistance from the local community legal centre they have co-delivered a number of workshops/sessions for other health services to educate them around ways to deal with conflict and aggressive behaviour among vulnerable clients.

Melbourne hospital changed policies to meet requests for female-only care

A Melbourne Hospital overhauled its policies following a discrimination complaint.1 A young woman attended Monash Health for an antenatal consultation and ‘a conflict’ arose when she requested a female doctor because of her religious beliefs. As a result, the woman lodged a discrimination complaint with the Victorian Civil and Administrative Tribunal. The complaint prompted a review of the hospital’s policies by the Victorian Equal Opportunity and Human Rights Commission. The case highlighted a hospital policy which advised pregnant patients requesting a female midwife or doctor ‘for cultural or personal reasons’ that this was not possible and that they should consider ‘other options of care’. The Commission’s review found that this policy was not compliant with the Equal Opportunity Act 2010 or the Charter of Human Rights and Responsibilities Act 2006. Monash Health has confirmed that it will implement the commission’s recommendations, ‘including prioritising requests for same gender care where possible for people with specific religious or cultural needs or who have experienced trauma, except in a medical emergency’.

Include additional human rights in the Charter

Recommendation
That the Charter be expanded to include additional rights, in accordance with international instruments, and in particular to include economic, social and cultural rights and the right to self-determination.

The Charter’s adoption in 2006 has had a positive impact on the lives of many Victorians, particularly those who are most vulnerable.² It has also driven better service delivery and greater accountability by government when developing policies and laws. However, eight years on, it is time to strengthen the Charter to include a broader range of rights, to help create an environment that supports all Victorians to live with dignity and participate fully in the community.

While Australia has ratified seven of the core human rights treaties³, the Charter exclusively draws from the International Covenant on Civil and Political Rights (ICCPR). The right to self-determination, an ICCPR right, is not included in the Charter.

VCOSS supports the expansion of the Victorian Human Rights Charter to better reflect the full range of rights Australia has agreed to protect under international instruments. In particular, we support the inclusion of rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR), including:

- the right to self-determination
- education
- health
- an adequate standard of living (including adequate food, clothing and housing)
- work (including favourable conditions at work)
- social security


³ International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention against Torture (CAT).
family life (including paid parental leave and the protection of children).

VCOSS also recommends a review of the other key treaties which Australia has ratified with the aim of including additional provisions to help strengthen the safety and protection for vulnerable groups such as women, children and people with disability and to help eliminate discrimination in all forms, including racial discrimination, discrimination against people with disability and discrimination against women.

There has been a tendency both in Australia and internationally to separate, and place greater emphasis on, civic and political rights over economic, social and cultural rights (ESC rights); however, this distinction is artificial and detrimental. As an advocate for people who experience poverty and disadvantage, VCOSS is aware that many of the most important human rights to a person’s wellbeing are access to the basic necessities of life: food, clothing, housing, healthcare, education, income, employment, and human relationships.

VCOSS believes all human rights are indivisible and interdependent and the enjoyments of many rights are contingent on, or contribute to, the enjoyment of other human rights. For example ‘it is often harder for individuals who cannot read and write to find work, to take part in political activity or to exercise their freedom of expression’. Similarly, adequate housing could be considered a precondition for the enjoyment of several other human rights already in the Charter, such as the right to vote, the right to protection of families and children, and the right to privacy. A fragmented approach, which places a greater value on civil and political rights over other rights leaves holes in Victoria’s human rights protections. This review is an opportunity to correct that omission.

Support for inclusion of additional rights

Our consultations with VCOSS members indicate widespread support for the inclusion of economic, social and cultural rights, particularly given their importance in protecting marginalised and vulnerable groups in the community. This view is supported by the 2009 Human Rights Consultation which found that the ISECSR rights were the rights of primary concern to Australians, particularly for disadvantaged groups for whom “these rights are most at risk”. The review found that marginalised and disadvantaged groups reported “frequently suffering discrimination” and often “fall through the cracks” when it comes to obtaining accessing basic rights such as health, housing and education.

There is also support for the inclusion of economic, social and cultural rights among the broader community. Consultations by the Human Rights Consultation Committee found that economic, social and cultural rights were of primary concern to Australians, particularly for disadvantaged groups for whom “these rights are most at risk”.

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social and cultural rights are the rights most highly valued by the Victorian and Australian community, with support for their inclusion in state jurisdictions.9

VEOHRC’s consultations in 2011 revealed that a number of people were not aware that economic, social and cultural rights were excluded in the Charter and were ‘shocked’ when they discovered their absence.10 The 2011 Scrutiny of Acts and Regulations Committee Review of the Victorian Charter also found that many submissions were in favour of the inclusion of economic, social and cultural rights within the Charter, in particular the right to health, education and adequate living standards including food, clothing and housing.11

The Victorian Charter would better represent the values and concerns of Victorians and protect vulnerable members of the community by expanding its coverage to include economic, social and cultural rights. This would help protect these rights through greater consideration in decision making and transparency by government and public authorities and help create a stronger platform for individuals and organisations to advocate for their rights.12

The right to self-determination is important to Australians and Victorians, particularly among Aboriginal and Torres Strait Islander people.13 Self-determination is significant to Aboriginal people due to historical and present experience of dispossession and marginalisation. The Charter should include an explicit right to self-determination for Aboriginal people in Victoria in regard to their lands and waters, the protection of their culture and early engagement with government policies and procedures which impact on their future. There are a broad range of perspectives on this right, and further engagement with the Aboriginal community is necessary to ensure these diverse perspectives are heard and that concerns around language, definitions and implementation are addressed.

There is also support within the Aboriginal community to adopt an empowerment framework which is based on the idea ‘that Indigenous Australians have a right to development, which includes economic, social and cultural development as families, individuals and communities and as Indigenous peoples’.14 From this perspective, self-determination is a key concept, but is seen as part of a broader framework which incorporates mutual responsibility between government and Indigenous Australians, and subsidiarity, that is providing decision-making authority as close as possible to the people the decision is affecting.15

14 Wunan Foundation, Empowered Communities Steering Committee, Empowered communities: empowered peoples: design report, Department of the Prime Minister and Cabinet, Canberra, 2015, p. 97.
15 Wunan Foundation, Empowered Communities Steering Committee, Empowered communities: empowered peoples: design report, Department of the Prime Minister and Cabinet, Canberra, 2015, p. 97.
Under this framework, Aboriginal people have the right to take responsibility for their own lives and futures. Government is responsible for providing Aboriginal people with the rights and support required for their empowerment.\(^{16}\) VCOSS strongly supports the right for people to freely determine their political status and their own economic, social and cultural development. It is recommended that the right to self-determination is incorporated into the Charter, with an emphasis on the empowerment of individuals and communities.

**ESC rights provide meaningful principles for service delivery**

Expansion of the Charter to include economic, social and cultural rights makes particular sense for state governments, whose primary role is in service delivery. Over half the Victorian Government Budget is spent on health and education alone, and it seems contradictory to excise rights from the Charter that are most directly relevant to the Government’s responsibilities. Including economic, social and cultural rights in the Charter will provide a more meaningful framework to interpret the responsibilities of public authorities, and help maximise the opportunities to protect human rights in the context of service delivery.

Despite the exclusion of economic, social and cultural rights, the Charter is most often applied in areas such as housing and health. This is supported by the Human Rights Law Centre review, which found that “two of the most significant areas where courts and tribunals have considered the Victorian Charter are housing and mental health”.\(^{17}\) Community organisations report using the Charter to help make decisions when providing assistance to and advocacy for people, including people with disability, women and children who are victims of family violence, and people accessing social housing and health services. One peak advocacy body described the Victorian Charter as the ‘backbone of their work’. The Charter also has an important role in protecting the rights of members of the community who are not sufficiently covered under international instruments, including refugees and transgender people.

Similarly, VEOHRC’s consultations found that including the right to housing would be simpler and provide greater clarity both for individuals who are affected and for public authorities who work in the housing sector, rather than relying on other rights within the Charter.\(^{18}\) Given the Charter is being used to protect economic, social and cultural rights, it would be simpler and more meaningful for these rights to be explicitly included.\(^{19}\) This is unlikely to lead to an increase in complaints, as individuals and organisations are already raising Charter rights in these cases. Instead, it would provide a simpler and clearer framework for considering the human rights implications of these decisions.

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\(^{16}\) Wunan Foundation, Empowered Communities Steering Committee, *Empowered communities: empowered peoples: design report*, Department of the Prime Minister and Cabinet, Canberra, 2015, p. 97.


ESC rights are justiciable and can be protected by legislation

It is sometimes argued that ESC rights are not ‘justiciable’: that is, they are not of a nature that can be determined by the courts, and can only be determined by executive government as they involve decisions about the allocation of public money. It is salient to consider that civil and political rights also involve public expenditure for their protection, including allocating resources to courts and law enforcement agencies for them to be considered and implemented. Even under common law, courts make decisions with fiscal consequences. More importantly, nowhere in the world has the inclusion of ESC rights meant that courts have engaged in drastic allocation of public expenditure, and rather sought to incorporate human rights into legislative interpretation. An increasing body of international case law attests to this interpretation.

Related to this point is the common misconception that the inclusion of ESC rights requires government to provide free goods and services, such as healthcare, education and housing. Instead, ISCERs requires governments to ensure that good and services required for the enjoyment of economic, cultural and social rights are available at affordable prices and that costs are not a barrier to individuals accessing basic services. In this regard, the right to housing does not require the government to build housing for all citizens. Instead, it requires government to take measures ‘to prevent homelessness, prohibit forced evictions, address discrimination, focus on the most vulnerable and marginalised groups, ensure security of tenure to all, and guarantee that everyone’s housing is adequate’. Similarly, the right to highest attainable standard of physical and mental health requires governments to ensure that individuals can access a range of goods and services necessary for the realisation of this right. It is not an unconditional right to be healthy.

There are case studies both within Australia and abroad, which provide good examples of how governments can legislatively protect social, cultural and economic rights. In August 2012, the ACT parliament passed legislation to amend the Human Rights Act 2004 to include a partial right to education (s 27A). This right commenced operation on 1 January 2013 and was seen as "an important step in advancing potentially a range of other economic, cultural and social rights in time into a statutory form"

The right to education was introduced incrementally by the ACT Government. The right is currently limited to two immediately achievable aspects: non-discrimination; and the right of the parent or guardian to choose schooling for the child that aligns with their religious and moral convictions. In addition when first introduced, the obligations of public authorities under part 5A did not apply.

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While there are limitations, the inclusion of the right to education means that this right must be considered when scrutinising bills and other legislative instruments. Further, as part of the 2014 review the Government lifted the initial limitations on public authorities, with the decision that they now should act, and make decisions in accordance with the right to education. This shows that incremental steps towards the inclusion of ESCs is achievable in Australian jurisdictions. The ACT example also demonstrates the limited impact that the changes have on government resources. The 2014 review of the ACT Human Rights Act 2004 found that the addition of the right to education had not lead to an increase in complaints to the human rights commission.

Another positive example is the decision in 2003 by the Scottish Parliament to pass the Homelessness etc (Scotland) Act 2003, which significantly changed Scotland’s homelessness legislation by progressively introducing a fully justiciable right to housing. Again, an incremental approach was taken, with the first step being to apply only to people that have a ‘priority need’ with the intention that this will then be extended to include everyone without a home. Since then, Scotland have introduced a 2012 homelessness commitment, created under the Act, which entitles ‘all unintentionally homeless people’ to accommodation as a legal right. The government aims to achieve this through focusing efforts on prevention, so that fewer people reach the point of homelessness, and through greater collaboration between local authorities and government. For example, Section 11 of the Act gives local authorities early notice of households at risk of homelessness due to eviction. It places a duty on landlords (except local authority landlords) and creditors to notify the relevant local authority when they serve certain notices to tenants, including taking possession of a property. Since the introduction of these measures homelessness has been substantially reduced, for example the number of housing applications in 2013-14 is 40 per cent lower than the number in 2005-06.

**Progressive realisation of ESC rights**

A key concept in relation to economic, social and cultural rights is that they can be progressively realised over time, providing that governments can demonstrate meaningful steps towards the fulfillment of these rights. Article 2.(1) of the ICESCR requires a State to undertake ‘to take steps...to the maximum of its available resources, with a view to achieving progressively the full

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realization of rights recognized in the present Covenant by all appropriate means’. 33 Progression realization provides some flexibility in the implementation and fulfillment of these rights acknowledging that full realisation may only be achieved over a period of time due to resource constraints. 34 Thus, if the ESC rights were to be incorporated into the Victorian Charter, there is scope to include some progressive obligations in addition to immediate obligations.


More certainty for public authorities

Recommendation

That the Review considers options for clarifying the specific entities and functions intended to be covered by the definition of public authorities, including by:

- inserting a mechanism allowing organisations to opt-in to coverage by the Charter
- expanding the existing regulation-making power to include specifying functions of a public nature
- including a duty to inform non-government agencies of obligations under the Charter

VCOSS strongly endorses the idea that every organisation, whether public, private or not-for-profit, should not violate people’s human rights. We believe that every organisation has an ethical obligation to uphold human rights, regardless of whether they have a legal obligation to do so. Respect for human rights strongly aligns with the ethical values that underpin community sector organisations. While human rights awareness, explicit recognition, and improved records documenting their consideration can be improved in the sector, we believe that there are limited circumstances where the infringement of human rights would substantially affect current models of service delivery by community organisations.

In developing this submission, we consulted with ACTCOSS, who indicated that community organisations had not been materially affected by clearer indications of coverage under the ACT Human Rights Act 2004. The ACT legislation contains additional mechanisms to indicate coverage, as well as more deeply embedded indication of coverage and practice support from the ACT Government for community organisations.

The existing definition of public authority is vague

VCOSS continues to support a definition of ‘public authority’ that makes sure that the Victorian Government cannot ‘contract away’ its responsibilities to protect the human rights of Victorians. Victorians should be assured that public services are obliged to protect their human rights, regardless of whether the service is delivered directly by the State government, or delivered by a not-for-profit or commercial organisations.

The extensive definition of public authority in section 4 of the Charter is designed to make sure that public services remain covered by it, regardless of the entity that is delivering the service. The definition is also broad enough to incorporate evolution over time of functions of a public nature.
VCOSS supports this objective of a definition, as we are aware that many functions that are considered a contemporary public function would not have been considered so in the past.

However, VCOSS is aware that in an attempt to incorporate these objectives into the definition of public authority, the result has been that the definition is vague, and does not give clear guidance to non-government entities about the extent of their obligations under the Charter.

This lack of clarity has been compounded by an unwillingness of government agencies to give guidance to the organisations they fund or regulate about the extent of their obligations under the Charter. At the same time, where organisations have sought legal clarification about their obligations, the advice has been conflicting and contradictory.

The lack of clarity in the definition is also compounded by the fact that the services contributed by community organisations cannot be easily categorised into ‘public’ and ‘private’ functions. Community organisations develop in organic ways. They are embedded in the communities they work with, and can evolve their services in response to community need, often utilising whatever resource is available at the time. This is a necessarily different operating structure to public agencies, which are often centrally organised and functionally separated. As values-driven organisations, part of the role of community organisations is often to ‘join-up’ these disparate and ‘silofied’ functions and resources – be they from State, Federal or local governments, or from private, philanthropic or self-generated sources – and produce an integrated, seamless service to meet the needs of the communities they work with. Trying to legally separate this melded structure into separate elements that are of a public or private nature can be legally and structurally difficult.

The consequences of uncertain coverage

Uncertainty about the coverage of the definition of ‘public authority’ has real consequences for community organisations and the people who use their services.

Uncertainty of coverage makes it difficult for people who consider their rights have been infringed to make an informed decision about their recourse to the Charter as a mechanism supporting any action for redress. If a person cannot clearly determine whether an organisation is obliged to protect their human rights, they are far less likely to raise this objection in any complaint or action regarding an infringement, especially where taking action may have adverse financial consequences.

Uncertainty of coverage also means that organisations have less steady ground on which to counter requests or requirements of funding agencies that potentially infringe human rights. Our members have suggested that, on occasion, public authorities place conditions, policies or requirements on funded services without considering their human rights implications. However, if it is uncertain whether this affects a ‘function of a public nature’, then there is less scope for an organisation to object to those conditions as contrary to the Charter. This impedes meaningful dialogue about the best way to protect the human rights of Victorians, and instead leads to a debate on questions of coverage.
Uncertainty of coverage also means that organisations have reduced capabilities to attract resources to adapt their service design and practices to align with Charter rights. If an organisation does not have a clear indication that they are covered by the Charter, it is difficult to make the case to funding agencies for the resources to make sure that human rights are protected.

Uncertainty of coverage also has implications for organisational priorities and practice. While community organisations overwhelmingly endorse, advocate for and seek to uphold human rights, they are also often poorly resourced and under pressure not only to meet the needs of people requiring assistance, but are subject to a wide array of regulatory requirements and funding restrictions. When their human rights obligations are unclear, they can easily become overwhelmed by the everyday demands and stresses placed on organisations, and not give human rights obligations the priority they deserve.

**Options to increase clarity of public authorities**

To reduce the adverse consequences of the lack of clarity in the definition of public authority, VCOSS recommends that the review consider options to provide greater certainty. We believe that these should take the form of mechanisms that confirm coverage, but would not support options that excise functions or entities from coverage. VCOSS submits these may take various forms, of which multiple may be pursued to clarify coverage. VCOSS would be open to discussing additional mechanisms to those suggested here.

1. **Insert a mechanism allowing organisations to opt-in to coverage by the Charter**

   The ACT *Human Rights Act 2004* was amended in 2008 to include the ability for an organisation to choose to be subject to that legislation, in the same way as a public authority. While to date, only seven organisations have done so, this remains an effective way for an entity to confirm its coverage and to make a binding commitment to integrate human rights into its practice. This mechanism is especially valuable for leading organisations to publicly demonstrate their commitment to human rights protections, and removes any uncertainty for those organisations that they are subject to the Act, regardless of their relationship to the Territory Government.

   VCOSS supports the inclusion of a similar mechanism into the Charter. This would allow leading human rights organisations to voluntarily commit to maintaining human rights for the people using their services. However, this mechanism does not completely solve the uncertainty around the coverage of human rights, as it requires voluntary action.

2. **Expand the existing regulation-making power to include specifying functions of a public nature**

   The Charter already includes a regulation-making power (section 4 (h)) that allows an entity to be declared a public authority for the purpose of the Act. However, it is limited in that it only allows for entities to be declared as public authorities, presumably in their entirety. To date, only the Adult Parole, the Youth Residential Board and the Youth Parole Board have been declared to be public authorities by this mechanism.
The regulation-making power does not currently provide a mechanism to declare public functions, or to declare a set of organisations to be performing a public function. By extending this regulation-making power, and using it to provide certainty about the coverage of the Charter, organisations can act more confidently on their obligations.

3. **Include a duty to inform non-government agencies of obligations under the Charter**

Another option to help create greater clarity of the coverage of the Charter is to include a duty of public authorities to inform non-government agencies of any public functions they believe to be exercised on their behalf by that entity. It is not proposed that failure to do so has any effect on the coverage of the Charter, but by including this duty, a further mechanism is provided for public authorities to investigate and provide information on the public functions performed on their behalf by other entities, and to engage in dialogue with those organisations about the implications for their practice.

It would also overcome the frustration experienced by some community organisations that their funding agencies will not provide a direct answer as to the extent of the community organisations' human rights obligations.
Strengthening the Charter through Courts and Tribunals

Inclusion of a direct cause of action

**Recommendation**

That the Charter be amended to include a direct cause of action against public authorities who may have acted inconsistently with human rights, or failed to consider human rights in making a decision.

Legal protection of human rights is an important part of their realisation. As a last resort, where other methods to protect or enforce human rights have failed, people should be able to access an effective remedy.

The Charter does not allow courts to award remedies solely for human rights breaches. There is no independent 'cause of action.' People cannot bring a claim against a public authority solely on the basis of a human rights breach or failure to consider human right in decision making. The Charter can only be used to strengthen or 'piggy back' on another legal claim.

The absence of effective remedies significantly weakens the effectiveness of the Charter. In the UK and the ACT, a person has a direct right of action to the legal system solely on the grounds of a breach of their human rights. Under the UK legislation a court 'may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate'. The ACT legislation empowers the Supreme Court to 'grant the relief it considers appropriate except damages'.

Opponents to the inclusion of a direct cause of action are often concerned about the potential for 'opening the floodgates' for litigation against public authorities that could tie up valuable government, court and system time and resources. This has not been the experience of the UK, and the ACT showed no discernible increase in human rights litigation after amendments were made to include a direct right of action in the ACT Human Rights Act.

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A direct cause of action would encourage the prioritisation of human rights in departmental and organisations’ planning and decision making and act as a deterrent to human rights infringements in the first place. The potential for legal action is an incentive for public authorities to protect rights. The Charter is currently seen by some in the community as a law without any consequences. There is a feeling reported by many in the community sector that some public authorities do not feel the imperative to incorporate human rights into their policies and planning because there are no repercussions for not doing so.

The absence of effective remedies has also led to some disappointment and disillusionment within the community about the Charter. Most people’s understanding of the legal system includes an expectation that where there is a law, there will be a corresponding remedy and method to enforce it. When they understand this is missing from the Charter, consultation participants reported becoming disillusioned, or feeling the government was not really taking human rights seriously.

**Access to a range of judicial and non-judicial remedies**

**Recommendations**

That the Charter be amended to include access to a range of judicial and non-judicial remedies where human rights are found to have been infringed.

That the Victorian Equal Opportunity and Human Rights Commission be empowered to receive and conciliate complaints under the Charter.

Judicial remedies available through the Charter should be consistent with those generally available from the justice system. There is no obvious case to provide fewer means of redress for breaching the Charter than to breach another law. For instance, these might include:

- an order that a law, policy or program be implemented in accordance with human rights
- an injunction, declaration or order that conduct in breach of human rights be stopped
- an award for recompense for the breach.

However, court proceedings can be costly and intimidating for people, especially marginalised or disadvantaged people. The Charter should also include access to non-judicial remedies that will provide a quicker, less expensive resolution for people whose rights have been infringed. The Charter should be amended to provide VEOHRC with jurisdiction to receive and conciliate complaints. A similar model to VEOHRC’s discrimination complaints process could be adopted quickly and easily.

The Victorian Ombudsman does already have jurisdiction to take complaints under the Charter, which should be maintained. However, community sector public authorities are outside the Ombudsman’s jurisdiction, which is a barrier to people seeking to enforce human rights in non-government agencies. The Ombudsman’s empowering legislation also restricts the office from
taking evidence from young people. A VEOHRC process would complement the Victorian Ombudsman’s existing ability to take complaints, providing a range of options for people to choose from.

Expansion of the jurisdiction of Victoria’s tribunals

**Recommendation**

That VCAT’s jurisdiction to hear Charter related matters be clarified to ensure people have a range of accessible and inexpensive means of enforcing their rights.

The absence of a direct cause of action has prevented people from seeking to enforce their rights or to challenge a decision. This has been compounded by court decisions that have limited access to tribunals on Charter related matters.

For many people in the community the Victorian Civil and Administrative Appeals Tribunal (VCAT) is a more familiar, simpler and less intimidating legal process than the more formal court system. However, the Victoria Court of Appeal has held that challenges to administrative decisions by public authorities can only be heard by the Supreme Court. Administrative tribunals, including VCAT do not have jurisdiction to hear Charter issues and challenges.

This is a significant barrier, cutting off an important avenue for people seeking to enforce their rights under the Charter. Taking action in the Supreme Court is expensive and time consuming and beyond the reach of many Victorians, especially those already facing disadvantage.

VC OSS believes human rights are universal and belong to all people, and the ability to enforce those rights should not be limited by financial or other access to justice considerations. The judgement in the *Sudi*\(^{37}\) case said that legal aid and pro bono legal assistance is likely to be available in ‘legitimate Charter issues.’ It has been the experience of the community sector; however, that access to legal aid and pro bono support is limited. Community legal centres and legal aid are struggling to meet overwhelming demand for their services, and are forced to turn many people away.\(^{38}\)

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\(^{37}\) *Director of Housing v Sudi* [2011] VSCA 266

Strengthening the Charter through Parliamentary oversight

Statements of compatibility

Recommendation

That the Review considers mechanisms for improving the consistency in consideration and discussion of statements of compatibility.

The Charter has played an important role in ensuring that new laws are assessed against their compatibility with human rights. All new bills must be accompanied by statements of compatibility. The purpose of these statements includes facilitating debate inside and outside parliament about the potential impact of new laws on human rights, increasing transparency and accountability in law making, reducing the likelihood of rights being inadvertently infringed, and requiring the parliament to clearly justify any limitation of human rights.

VCOSS recognises the important role the tabling of statements of compatibility has played in generating parliamentary debate and enhancing transparency and accountability in policy making and legislative development. Where there are identified limitations in statements of compatibility, it is the responsibility of parliament to engage in discussion arising from this. However the community sector reported concerns that statements of compatibility are not always receiving the attention and recognition they deserve.

This process is most effective when the statements of compatibility are taken seriously and treated with respect by every Member of Parliament, regardless of their political leanings. Promoting a human rights culture requires leadership, and our political leaders must set the standard for recognition and promotion of human rights.

The community sector has also raised some concerns about the inconsistency in the analysis and consideration of statements of compatibility. Some statements of compatibility are quite inaccessible and overly legalistic. This makes it difficult for community organisations and non-lawyers to follow or engage in the law making process.
Scrutiny of Acts and Regulation Committee

Recommendation

That the SARC process be strengthened by improving the public participation process that supports members of the community to provide input and reflection on the potential impacts of bills and promoting active engagement with community groups and organisations likely to be interested or affected by the bill.

The Scrutiny of Acts and Regulation Committee provides independent scrutiny of bills and publishes a Charter Report on new bills. VCOSS supports the SARC process as an important avenue for protecting human rights and parliamentary accountability.

However, the community sector reports a number of concerns about the SARC process that limit its effectiveness, including:

- SARC does not actively engage with community organisations or invite public submissions so many organisations are unaware of when Bills are under consideration, and what the timelines are for providing input
- SARC’s tight timeframes mean community organisations often do not have the time or resources to prepare a submission
- SARC does not usually comment on or respond to submissions received, so organisations can feel their input is not being actively considered, and question if it is worth their time and resources
- organisations can feel their time is better spent raising issues through the media or directly advocating to MPs

The SARC process would be strengthened by increasing opportunities for community participation and input. This should include proactive efforts by SARC to engage community organisations and groups who are likely to be affected by the legislation under consideration.

We also support the HRLC’s recommendations to the 2011 review process that the Charter require the responsible Minister to respond substantively to any concerns raised by SARC prior to the passage of a Bill, and that other than in exceptional circumstances (situations of emergency or public imperative), legislation is not to be passed by Parliament before SARC has provided its human rights report.