

4<sup>th</sup> June 2015

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*Electronic Lodgement*

**Re: Submission to the 2015 Review of the  
*Charter of Human Rights and Responsibilities Act 2006***

Dear Mr Young

Thank you for the opportunity to make the following points and recommendations with an aim to strengthening the Victorian Charter of Human Rights and the rights of all Victorians.

I have been observing the operations of the Human Rights charter for several years now; since researching and co-authoring the submission made by ACHRE, RMIT in 2011 (submission #276). I have taken an active interest in its operation and effect on the community and sincerely hope that the following analysis and recommendations are of assistance in strengthening the enjoyment of all Victorians to human rights under the Charter.

Yours sincerely

Ms Rosetta Moors

# Submission to the 2015 *Review of the Charter of Human Rights and Responsibilities Act 2006*

By Ms Rosetta Moors

## SUMMARY OF RECOMMENDATIONS

To truly engender a culture of rights the Charter needs to be widened to include the following:

1. Increase education of the Victorian Charter and Rights in general in Victorian schools and the general public.
2. That VEOHRC be given the power to instigate a review of a public authority if and when they see fit.
3. Therefore I recommend that Recommendation 21 in SARC's 2011 report is not enacted and that SARC is required to comment on all Bills before the house. A bill would not be able to progress through Parliament without receiving SARC comments.
4. SARC publishes its comments and provides a short period of time wherein any interested party may provide written remarks on SARC's comments. These comments are made publically available.
5. That Recommendation 14 made by SARC in 2011, and discussed in the Victorian Government Response (Parliament of Victoria, 2012, para 2.25 p. 9) be withdrawn in the current review and replaced with the recommendation that SARC is required to report on a Bill and a Bill will not be enacted until the SARC report is received, considered and responded to **OR -**
6. If this recommendation is not adopted and SARC is allowed to not report on a Bill, then at a minimum, a forum (such as a web site) should be opened for a specified period of time under the Charter auspices to receive, log and publish comments made on the bill by the public. These comments could then be collated and reported on by SARC to the parliament.
7. The inclusion of ESC rights into the Victorian Charter would fulfil Victoria and Australia's obligations under the ICESCR, eliminate the current arbitrary division between CP and ESC rights that currently exist and enable the Victorian Charter to accurately reflect the rights that Victorians hold most important and help to engender a culture of human rights in Victoria.
8. At a minimum the Right to Health and the rights contained in the Convention on the Rights of Persons with Disabilities (CRPD) are incorporated into the Charter.
9. That any cost/benefit analysis of the charter specifically include gauging of how far the Charter has gone towards creating a culture of human rights in Victorians.
10. Regular reviews of the Charter should continue, but held in six-yearly, instead of four-yearly intervals so they do not coincide with the Victorian government terms of election and are more manageable administratively (i.e the next occurring in 2021).
11. Continuing Charter reviews should be conducted by an independent third party as is occurring now in the 2015 review.
12. Any extension of the Charter is met with a commensurate increase in funding to Charter agencies such as SARC and VEOHRC to execute these functions adequately.

## Promoting a 'Culture of Human Rights'

Initially the Victorian Charter of Human Rights was widely welcomed as a means of redressing a significant lack of understanding and awareness of rights in the Victorian community, for example The Victorian Human Rights and Equal Opportunity Commission (VHREOC) welcomed the Charter of Rights as a means of promoting "a strong human rights culture in Victoria" (VHREOC, 2005) to help overcome widespread ignorance in the community about human rights. Prior to the introduction of the charter, George Williams cites a 1987 survey which found "only 1 in 3 people felt reasonable well informed about their rights and responsibilities as Australian Citizens" (Williams, 2006, p. 888). He went on to remark that a 2006 Amnesty International survey found that only 13% of Australians knew we do not have a national bill of rights, 61% erroneously believed we have a national bill of rights and one-quarter of Australians did not know. Similarly In interviews and focus groups conducted by Colmar Brunton in 2008 for the National Human Rights Consultation, they found "awareness and understanding of rights in any detail is very limited" (Commonwealth of Australia, 2009, p. 384). A similar result was found in 2011, when an extensive online survey of over 1000 Victorians was conducted ascertaining their understanding and awareness of human rights as well as gauging their opinion on a range of specific rights and the values that underlie rights. The RMIT survey showed that, five years after its introduction many Victorians were still unaware of the Victorian Charter, for example over three-quarters (77%) of Victorians surveyed did not know of the existence of the Charter, and when told of the Charter, over two-thirds surveyed admitted they knew 'very little' or 'nothing' about it. When asked "How would you rate the overall health or strength of human rights currently in Australia in practice today?" Victorians ranked the health of human rights as slightly above mediocre (6.5 mean score out of 10), the same score as Australians in other states. Clearly the project of creating 'culture of human rights' in Victoria had got off to a slow start.

The Colmar Brunton report says that participants highlighted a need for more education on human rights: 52% disagreed or strongly disagreed to the statement "People in Australia are sufficiently educated about their rights" (Commonwealth of Australia, 2009, p. 384). This report also argued for the creation of a human rights culture, stating that "a considerable number of the submissions the committee received referred to the need for greater human rights education and for the development of a human rights culture" (Commonwealth of Australia, 2009, p. 131). Similarly in 2011 RMIT found clear support for human rights and the values that underpin such rights (ACHRE p. 5)

Creating a culture of human rights was welcomed by Victorians in the 2011 survey, and the two main ways to achieve this were nominated as: "A program of education in human rights, in schools and the wider community" and "A more direct role and better training for judges in human rights interpretation and enforcement".

Promoting a culture of rights requires not only education of the public, but also clear evidence that that Victorian Charter of Human Rights is protecting and changing people's lives for the better. However, creating a culture of rights cannot be done half-heartedly. The Victorian public will have little regard for a Charter which not only reflects less than half their real rights, but also has no power to protect those rights.

### **Recommendation:**

1. Increase education of the Victorian Charter and Rights in general in Victorian schools and the general public.

A number of the recommendations made by SARC in the 2011 review, that are currently being examined by Parliament will, if enacted, effectively reduce the power of the Victorian Charter. This will not help to

foster a culture of human rights, but rather engender in Victorians a cynicism towards a Charter that pays lip-service to rights. Therefore I propose the following recommendations be made by the independent review committee in this current review:

### **Mandatory Auditing**

Currently the Victorian Equal Opportunities and Human Rights Commission (VEOHRC) have the function of reviewing the programs and policies of public authorities to determine their compatibility with human rights only when requested by that public authority. This practice weakens the Charter as a true human rights instrument as public authorities unwilling to institute human rights practice will also be unwilling to call for a review. To truly promote a culture of human rights VEOHRC must have the ability to call public authorities to account if and when needed.

#### **Recommendation:**

2. That VEOHRC be given the power to instigate a review of a public authority if and when they see fit.

### **Recommendation by SARC to repeal Section 31 (Override Power of Government)**

Although it is correct that as the Charter now stands, Parliament in Victoria has the ‘final say’ regarding legislation and so technically does not need an ‘override power’ to override any statements of compatibility provided by SARC. However, what the override declaration provides is a powerful statement about human rights in itself. The fact that a public statement has to be made overriding Charter rights serves to draw the public’s attention to the fact that a human right has been impinged upon. Indeed, if a true culture of human rights was to be encouraged, there would be a period of time that SARC’s review of a Bill was ‘open for comment’ wherein the public are able to comment on SARC’s review before a Bill is passed.

#### **Recommendation:**

3. That Recommendation 21 in SARC’s 2011 report is not enacted and that SARC is required to comment on all Bills before the house. A bill would not be able to progress through Parliament without receiving SARC comments.
4. SARC publishes its comments and provides a short period of time wherein any interested party may provide written remarks on SARC’s comments. These comments are made publically available.

### **Development and Drafting of Bills**

I support SARC’s recommended in the 2011 review (Recommendation #9) that consideration be given to publishing a draft statement of compatibility, as appropriate, when drafts of Bills are exposed for public comment. This would ensure that “the public is consistently informed about the potential human rights impact of proposed Bills and have an opportunity for input into the human rights impact assessment process itself.”

### **Effect of failure of SARC to report on a bill (Recommendation 14)**

The strength of this Charter is in engendering a culture of Human rights in the Victorian Community by making people aware of their rights and how they operate in daily intercourse with public organisations. One important way in which this is done is via SARC’s Bill reporting function. Recommendation #14

from the 2011 review proposed to modify the Charter to include the statement that “a failure of SARC to report on a bill does not affect the validity, operation or enforcement of any law” (Parliament of Victoria para 2.25, p. 9). If this recommendation was implemented it could result in legislative ‘cherry-picking’, where SARC is able to choose which bills to comment on, perhaps ignoring bills which do have important human rights implications that are not immediately recognised by SARC. It is true that the Charter does not specify what the consequences are if SARC fails to comment on a Bill.

This could be redressed in one of two ways. Either the consequences of not reviewing a bill should be made clear, such as that a Bill is not able to continue its passage through parliament until SARC's report is received, considered and responded to.

If this recommendation is not forwarded in the current review, an alternative method to ensure some type of review is that SARC or other body associated with the Charter (such as VEOHRC) operate a forum (perhaps online) that calls for comments from the public. These comments are received, logged and published for anyone interested to access. Implementing either of these recommendations would foster a culture of human rights in Victoria, where rights are debated and tested against legislation on an ongoing basis.

**Recommendation:**

5. That Recommendation 14 made by SARC in 2011, and discussed in the Victorian Government Response (Parliament of Victoria, 2012, para 2.25 p. 9) be withdrawn in the current review and replaced with the recommendation that SARC is required to report on a Bill and a Bill will not be enacted until the SARC report is received, considered and responded to.

OR

6. If this recommendation is not adopted and SARC is allowed to not report on a Bill, then at a minimum, a forum (such as a web site) should be opened for a specified period of time under the Charter auspices to receive, log and publish comments made on the bill by the public. These comments could then be collated and reported on by SARC to the parliament.

## **Inclusion of Economic, Social and Cultural Rights into the Charter**

### ***Background***

Australia signed the International Covenant on Civil and Political Rights (ICCPR) in 1972 and ratified it in 1980. In 1975 Australia signed and ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) with no reservations registered and therefore is bound by international law to uphold it.

The previous Charter review in 2011 specifically asked whether certain other rights should be incorporated into the Charter. Although much support for this incorporation was signalled in submissions and in community consultations, the subsequent Victorian Government response (Parliament of Victoria 2012) recommended against the inclusion of ECS rights as the submission had “not identified any problems in Victoria’s existing laws” (Section 2.8 & 2.9). This appears to be a specious argument for two reasons - firstly the incorporation of ECS rights would mean that future laws/legislation/bills would benefit from the review in the light of ECS rights and may indeed be found to have ‘problems’. Secondly it is in the application of existing laws to particular situations (in the future) that ‘problems’ are found. Therefore I recommend that this recommendation be overturned in this current review.

The indivisibility and interdependence of the CP and ESC rights have been stated by a number of international bodies, for example the 1986 UN declaration on the right to development, the 1993 Vienna

Declaration, the World Conference on Human Rights in 1993 and the 1997 Maastricht Guidelines on violations of Economic Social and Cultural Rights.<sup>1</sup> As outlined by John Tobin “The official position within the United Nations is that economic, social and cultural rights and civil and political rights are interdependent and indivisible. This means that one set of rights does not have priority over the other and one set of rights and cannot be enjoyed in a meaningful way if the other set of rights is also not enjoyed.” (Tobin, 2010 p. 7)

This position is also understood by the Australian government. Indeed the Australian National Action Plan states, “Human rights policy in Australia is based on the principle that human rights are inherent, inalienable, indivisible and universal. They are the birthright of all human beings, cannot be lost or taken away, are all of equal importance and apply to all persons irrespective of race, sex, disability, language, religion, political or other opinion, national or social origin, age, property or other status.” (Commonwealth of Australia, 2005 p. 5) This was understood at the time of the drafting of the Victorian Charter. Indeed, it was stated in the Report of the Human Rights Consultation Committee that “one of the common arguments expressed in the submissions is that human rights are indivisible and the civil and political rights are best secured by ensuring protection for economic, social and cultural rights” (Department of Justice, 2005, p. 28) George Williams, the Chairperson of the Human Rights Consultation Committee admitted that the distinction between economic, social and cultural rights and civil and political rights was “arbitrary or even non-existent” (Williams, 2006, p. 897). However, the Victorian Government chose to exclude these rights from the original scope of the Charter Review.<sup>2</sup>

Because this indivisibility was recognised, Williams saw the existing Charter as only the “first step in better protection of human rights in the state” (Williams, 2006, p. 897) and thus ESC rights, rights of children and women were designed for consideration for inclusion in the 2011 review. However by removing them from the Victorian Charter the government has created a division in the perception and status of these rights, and rendered them “second class rights, and in the strict sense not rights at all” (Salvaris, 2007, p. 32)

### ***Support for economic, social and cultural rights***

There was widespread support for inclusion of ESC rights into the original Charter consultation in 2005. Despite the fact that ECS rights were not mentioned in the terms of reference of the consultation, 41% of the submissions received asked for the inclusion of ECS rights. Similarly, in focus groups conducted by Colmar Brunton in 2008 for the *National Human Rights Consultation*, participants identified a hierarchy of rights. At the top of this hierarchy were ‘absolute rights’ which were seen as “the most important rights to protect and promote in Australia ... they are essential for survival and cannot be limited or removed at any time”. A significant number of these premier rights were ESC in nature, namely “basic amenities (water, food, clothing, and shelter), essential health care and education” (Commonwealth of Australia, 2009, p. 387). In the same vein, a 2011 consultation undertaken by VEOHRC also found clear support for ESC rights; individuals and organisations were in support of ESC rights being treated the same as CP rights, as “it reflects the general understanding that economic, social and cultural rights and civil and political rights are indivisible” (VEOHRC, 2012).

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<sup>1</sup> The UN States “the indivisibility and interdependence of civil and political rights and economic, social and cultural rights are fundamental tenets of international human rights law. This point of view has been repeatedly reaffirmed, for example at the World Conference on Human Rights in 1993.” (United Nations, 1991, p. 2)

<sup>2</sup> The *Human Rights in Victoria: Statement of Intent* released by the Victorian government in 2005 clearly “indicated its preference for a limited set of human rights taken from the International Covenant on Civil and Political Rights and not for the protection of other rights taken from other conventions, such as women’s rights, indigenous rights, or economic social and cultural rights more generally” (Williams p. 887).

Economic, social and cultural rights are recognised worldwide as key rights. For example the University of Maryland, World Public Opinion Project showed high support, across 27 nations for ECS rights<sup>3</sup>:

<b>Right</b>	<b>Average % support across 27 nations surveyed:</b>
Ensuring citizens' basic need for health-care	95%
Ensuring citizens' basic need for education	91%
Ensuring citizens' basic need for food	87%
Women should have full equality with men	86%
The right to peaceful protest	75%
The right to express opinions and dissent	66%
Torture should be banned in all circumstances	57%

<b>Right</b>	<b>Average % support across 27 nations surveyed</b>
Gov't should have responsibility to ensure citizens basic need for health-care	95%
Gov't should have responsibility to ensure citizens basic need for education	91%
Gov't should have responsibility to ensure citizens basic need for food	87%
Women should have full equality with men	86%
The will of the people should be the basis of government authority	85%
Gov't leaders should be selected by elections in which all citizens can vote	85%
Gov't should prevent discrimination against women	81%
The right to peaceful protest is important	75%
Views of the people should have influence on decisions between elections	73%
UN should actively promote human rights in all UN member states	70%
The right to express opinions and dissent is important	66%

Similarly the RMIT survey conducted in 2011 found overwhelming support for Economic social and cultural rights. As stated in this report:

<sup>3</sup> University of Maryland, World Public Opinion Project. 2008. 'World public opinion and the Universal Declaration of Human Rights'. This reports a survey of 27 nations in 2007-2008 including: Argentina, Azerbaijan, Britain, China, Egypt, France, Germany, Hong Kong, India, Indonesia, Israel, Italy, Jordan, Kenya, Macau, Mexico, Nigeria, Palestine, Philippines, Poland, Russia, South Korea, Taiwan, Thailand, Turkey, Ukraine, USA.

*“The Victorian Government’s rationale for introducing the Charter was to redress inequality and disadvantage.<sup>4</sup> To truly address existing inequality and social disadvantage the Charter needs to include ESC rights as it is areas such as housing, health, occupation and education that individuals experience the most social disadvantage in Victoria.”*  
(ACHRE, RMIT submission #276, p. 10)

When asked in this survey what respondents saw as the most important human rights, the top rights were economic, social and cultural rights, namely education and health. Also when asked what rights they believed were most under threat again the top two under threat were ESC rights, namely decent health care” and “adequate housing”.

In addition the argument by SARC in their 2011 Review to not support the inclusion of ESC rights into the Charter because the submissions in the review did not identify any problem in Victoria’s existing laws does not take into account that future legislation may well raise problems regarding ECS rights. Indeed, any work done to create a ‘culture of human rights’ would be seen as a not bona fide by Victorians if their fundamental ECS rights were curtailed by future legislation.

It is clear the Victorians, like others, see rights holistically and not divided into civil and political and economic, social and cultural rights. Therefore including all ICCPR and IESCR into the Victorian Charter will go a long way to creating a true culture of rights in this state. It is time now for the second-step of the Charter to be implemented, the inclusion of ECS rights.

### ***The Right to Health***

The Right to Health into the Charter. This is because the health and wellbeing of all Victorians is connected with this right. Right to health is widely seen as the most important right for all citizens. In our 2011 survey of over 1000 Victorians and Australians the right to decent health care was seen as the most important Right (ACHRE, RMIT submission #276 p. 23) and one of the most important reasons for having human rights was “To protect the health and well-being of citizens” (Ibid. p. 24). Similarly, in the University of Maryland survey of 27 nations, on average, ensuring citizens’ basic need for health-care garnered the highest (95%) support.

### ***Disability Rights***

Since 2008 Australia has also ratified to the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol, a convention which encompasses civil, political, economic, social and cultural rights. Therefore a federal system such as Australia’s, subordinate (State or local) governments are legally bound to implement human rights agreements made by the federal government which fall within their power or competence, and if they do not, they can be compelled to do so under s. 51 of the Constitution (see UNCHR, 2006).

Those rights contained in Convention on the Rights of Persons with Disabilities need to be incorporated into the Victorian Charter. In the research conducted by RMIT in 2011, those with disabilities were identified as among the most vulnerable of Victorian citizens and in need of further rights protection (ACHRE, RMIT submission #276, p. 11).

### **Recommendations:**

7. The inclusion of ESC rights into the Victorian Charter would fulfil Victoria and Australia’s obligations under the ICESCR, eliminate the current arbitrary division between CP and ESC rights that currently exist and enable the Victorian Charter to accurately reflect the rights that Victorians hold most important and help to engender a culture of human rights in Victoria.

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<sup>4</sup> “The Attorney-General’s Justice Statement was approved by Cabinet and released in May 2004. It established as a priority the need to ensure that human rights are valued and protected and that issues of inequality and disadvantage are demonstrably addressed by the justice system.” (Department of Justice, 2005, p. 161)

8. At a minimum the Right to Health and the rights contained in the Convention on the Rights of Persons with Disabilities (CRPD) are incorporated into the Charter.

### **Cost / Benefit Analysis of the Charter**

One element of the SARC report was that they observed there “is no established methodology for assessing the benefits and costs of the Charter” (SARC, 2011, Recommendation 12). Any analysis of the costs and benefits of the Charter needs to take into account the following:

The benefit of the charter as an educative tool in human rights also needs to be taken into account and not “lost in the numbers” of a simple financial cost benefit analysis. Qualifying and quantifying educational and promotional benefits is not as nebulous as it seems. For example an annual survey should be conducted that charts the awareness of attitudes of Victorians towards human rights in the charter and rights in general and the Victorian Charter of human rights in particular. An example of such a survey is one carried out by RMIT (see ACHRE, RMIT submission #276). Another excellent survey was carried out by Australian National University (see Charlesworth 2008) as part of a 5 year project titled “Assessing the impact of the ACT HUMAN RIGHTS ACT 2004”.

#### **Recommendation:**

9. That any cost/benefit analysis of the charter specifically include a assessing how far the Charter has gone towards creating a culture of human rights in Victorians.

### **Continuing Charter Reviews**

The four and eight year reviews of the Charter have been very helpful in clarifying the direction and use of the Charter and bringing it to the attention of the Victorian Public. The appointment of an independent reviewer in this latest (2015) review is a much better step towards transparency of process.

My final suggestion to strengthen the charter is that further review(s) needs to be built into the Charter. There has now been a fourth year (2011) and eighth year (2015) review. These reviews are very helpful in clarifying the role and scope of the Charter and reviewing its effect on the public and policy making in Victoria. It is of particular importance that the public is given the ability to review and comment on the Charter in an ongoing manner, especially any changes or additions that are made to the Charter.

Therefore I propose:

#### **Recommendations:**

10. That regular reviews of the Charter should continue, but held in six-yearly, instead of four-yearly intervals so they do not coincide with the Victorian government terms of election and are more manageable administratively (i.e the next occurring in 2021).
11. Continuing Charter reviews should be conducted by an independent third party as is occurring now in the 2015 review.

### **SARC needs to be adequately resourced**

Any extension of the Charter, for example incorporating ECS rights does of course mean that SARC and other Charter agencies such as VEOHRC are adequately resourced to undertake these extended functions.

#### **Recommendation:**

12. Any extension of the Charter is met with a commensurate increase in funding to Charter agencies such as SARC and VEOHRC to execute these functions adequately.

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