

Charter Review: Consultation Paper

21 April 2015



CHARTER REVIEW 2015

Human rights

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Message from the Reviewer

The *Charter of Human Rights and Responsibilities Act 2006* was introduced by the Victorian Parliament with the recognition that human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom.

The Act required a review to be undertaken after a period of four and eight years of operation. These reviews were built into the legislation because the Charter was a new and developing law and the community conversation about the way the Charter should operate, and what it should cover, was ongoing. The intention was to ensure that the Charter remains flexible and effective in supporting community values and aspirations in Victoria.

In 2011, the four-year review was undertaken by the Scrutiny of Acts and Regulations Committee of the Victorian Parliament.

In March this year, I was appointed by the Attorney-General, the Hon Martin Pakula MP, as the independent reviewer to undertake the 2015 review.

The Charter is designed to improve the life of individuals and the community by ensuring that government operates with respect for diversity and the basic dignity of all people in our state.

This review is an important opportunity for the community and public bodies to provide input into the next stage of human rights in Victoria.

I look forward to your contribution to this consultation.

Michael Brett Young

Introduction

On 2 March 2015, the Attorney-General, the Hon Martin Pakula MP, issued the Terms of Reference for the eight-year review of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter).

The Terms of Reference are at **Appendix A** and focus on ways to enhance the effectiveness of the Charter and improve its operation. There is a separate background brief on the Terms of Reference available on our website: www.charterreview.vic.gov.au.

A report of the review must be given to the Attorney-General by 1 September 2015 and will be laid before Parliament on or before 1 October 2015. It will then be up to the Parliament to decide whether to make any legislative changes to the Charter and for the Government to decide whether to make any changes to policy and practice as a result of the review.

Call for submissions

Mr Brett Young invites you to make a submission to the review. The **deadline for submissions is 4 June 2015**.

A submission can be your ideas or opinions about the Charter. Submissions can be anything from a personal story about how you have used the Charter, how the law has affected you or how it could, through to a researched paper.

Mr Brett Young wants to hear from anyone who has experience with the Charter. It does not matter if you only have one or two points to make. You do not have to address all of the Terms of Reference. Where you raise issues with the current operation of the Charter, your ideas about what could be done to address the issue would also be welcome.

Things to think about when making a submission

- your experience with the Charter, particularly between 2011 and 2015 (the period since the last review)
- what human rights are important to you
- key benefits and/or challenges of the Charter
- how the Victorian Government should promote and protect human rights
- how the Charter should help Parliament and government to balance different rights and interests
- examples of effective ways to improve human rights outcomes in practice (the reviewer is interested in examples applying the Charter or examples from other jurisdictions/circumstances that we could learn from)
- what should happen if a person's human rights have been breached

- other suggestions you have for improving the Charter or other strategies for better protecting human rights in Victoria.

How will my submission be used?

Submissions will help Mr Brett Young to understand different views and experiences of the Charter.

Written submissions are just one of the ways in which he will gather views and information. He will also be conducting research and having meetings to hear directly from people. This will inform his final report and recommendations to the Government. Updates about the review will appear on our website.

How do I make a submission?

The preferred method of making a submission is through the review's website.

Submissions can also be made in writing via email, mail or over the phone. There is no particular format you need to follow, however, it would assist us if you address some or all of the Terms of Reference.

Submissions can be made by:

- Online: www.charterreview.vic.gov.au
- Mail: Charter Review Secretariat, Level 24, 121 Exhibition Street, Melbourne, VIC, 3000
- Email: charter.review@justice.vic.gov.au
- Telephone: (03) 8684 7512

Assistance in making a submission

If you need assistance to participate in the review or have any questions about making a submission, please contact us via one of the options listed above.

Confidentiality

When you make a submission you can decide how you want your submission to be treated. Submissions are either public, anonymous or confidential.

- Public submissions can be referred to in the final report, uploaded to the review's website and made available to the public to read. The names of people or organisations that make submissions will be listed in the report on the review.
- Anonymous submissions can be referred to in the final report and made available to the public but the identity of the author/s will not be revealed.

- Confidential submissions cannot be referred to in the final report or made available to the public.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission treated confidentially or anonymously, we will treat it as a public document.

Mailing list

If you agree, we will add your details to our mailing list so that you will be notified of developments, including information about the final report on the review when it is published. If you would like to be added to the mailing list, but do not want to make a submission, please contact us.

About the Charter

Human rights are the basic rights that belong to everyone, regardless of age, race, sex or disability, income or education. They are about treating people fairly, with dignity and ensuring individual rights are respected.

In Victoria, 20 key human rights are set out in the *Charter of Human Rights and Responsibilities Act 2006*. The Charter is about the work of Parliament, the government and the courts. It places obligations on public authorities to respect the human rights of all people in Victoria.

The Charter was established as a parliamentary model of human rights protection. It is not a constitutionally entrenched bill of rights like that found in the United States of America, which allows courts to strike down laws that are inconsistent with those rights. The Charter gives the final say to Parliament.

The Charter is an ordinary Act of Parliament that sets out the rights, freedoms and responsibilities shared by everyone in Victoria and protected by law. It aims to promote a culture where everyone's human rights are protected and considered in government service delivery, policy and legislation.

The Charter is founded on the following principles set out in its Preamble:

- *human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;*
- *human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;*
- *human rights come with responsibilities and must be exercised in a way that respects the human rights of others;*
- *human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social and cultural and economic relationship with their traditional lands and waters.*

The Charter protects human rights in Victoria in three main ways:

1. public authorities in state and local government must act in ways that are compatible with human rights
2. human rights must be taken into account when developing new laws

3. people and public institutions, including the courts, must interpret and apply all laws in a way that is compatible with human rights, as far as possible.

These mechanisms ensure that Parliament is informed about human rights issues in its work, that human rights play an important role in policy development within government, in the preparation of legislation, in the way in which courts and tribunals interpret laws, and in the manner in which public officials treat people within Victoria in their day-to-day work in the community.

The Charter applies to state and local government, but not federal government agencies operating in Victoria. The Charter only puts obligations on private entities if they are performing public functions, such as under a contract to provide government services, but not in their non-governmental activities.

The courts must interpret laws in a way that is compatible with human rights, as far as possible. Where this is not possible, the Supreme Court can also issue a declaration of inconsistent interpretation to say that a law cannot be interpreted consistently with the human rights in the Charter. This declaration is sent to the Government, which then reports to Parliament about it. Such a declaration from the Supreme Court does not make the law invalid. It operates as a flag for the government and the Parliament so that they can choose whether or not to consider the issue in the future. The Charter does not create any new cause of action or right to go to court. The courts cannot award compensation for a breach of Charter rights.

The rights in the Charter are also not absolute. The Charter makes it clear that rights can be subject to reasonable and proportionate limitations, where this can be justified as part of living in a free and democratic society. This means that members of Parliament can continue to make decisions on behalf of the community about matters such as how best to balance rights against each other, protect Victorians from crime, and make decisions about how to use the limited funds of government amongst competing demands.

The concepts that underpin the Charter have a much longer history than the legislation in Victoria. The Charter rights have been largely adapted from Universal Declaration on Human Rights which was adopted by the United Nations General Assembly in 1948 and the International Covenant on Civil and Political Rights, which Australia became a party to in 1980.

Along with other Victorian laws that protect people's rights (such as the *Privacy and Data Protection Act 2014*, *Equal Opportunity Act 2010* and *Racial and Religious Tolerance Act 2001*), the Charter is part of a broader framework of human rights protections.

Rights are supported at a federal level by the *Australian Human Rights Commission Act 1986* (Cth), which gives people the ability to make complaints to the Australian Human Rights Commission about the actions of Commonwealth Government authorities if they breach human rights. The Charter places similar protections at the Victorian state level when people are dealing with state and local government.

What rights are protected under the Charter?

The right to recognition and equality before the law (section 8)

Everyone is entitled to equal and effective protection against discrimination, and to enjoy their human rights without discrimination.

The right to life (section 9)

Every person has the right to life and to not have their life taken. The right to life includes a duty on government to take appropriate steps to protect the right to life.

The right to protection from torture and cruel, inhuman or degrading treatment (section 10)

People must not be tortured. People must also not be treated or punished in a cruel, inhuman or degrading way. This includes protection from treatment that humiliates a person. People must not be subjected to medical treatment or experiments without their full and informed consent.

The right to freedom from forced work (section 11)

A person must not be forced to work or be made a slave. A person is a slave when someone else has complete control over them.

The right to freedom of movement (section 12)

People can stay in or leave Victoria whenever they want to as long as they are here lawfully. They can move around freely within Victoria and choose where they live.

The right to privacy and reputation (section 13)

Everyone has the right to keep their lives private. Your family, home or personal information cannot be interfered with, unless the law allows it.

The right to freedom of thought, conscience, religion and belief (section 14)

People have the freedom to think and believe what they want, for example, to hold religious beliefs. They can do this in public or private, as part of a group or alone.

The right to freedom of expression (section 15)

People are free to say what they think and want to say. They have the right to find, receive and share information and ideas. In general, this right might be limited to respect the rights and reputation of other people, or for the protection of public safety and order.

The right to peaceful assembly and freedom of association (section 16)

People have the right to join or not to join groups or unions and to meet peacefully.

The right to protection of families and children (section 17)

Families are entitled to protection. Children have the same rights as adults with added protection according to their best interests.

The right to taking part in public life (section 18)

Every person has the right to take part in public life, such as the right to vote or run for public office.

Cultural rights (section 19)

People can have different family, religious or cultural backgrounds. They can enjoy their culture, declare and practice their religion and use their languages. Aboriginal persons hold distinct cultural rights.

Property rights (section 20)

People are protected from having their property taken, unless the law says it can be taken.

The right to liberty and security of person (section 21)

Everyone has the right to freedom and safety. The right to liberty includes the right to not be arrested or detained except in accordance with the law. The right to security means that reasonable steps must be taken to ensure the physical safety of people who are in danger of physical harm.

The right to humane treatment when deprived of liberty (section 22)

People have the right to be treated with humanity if they are accused of breaking the law and are detained.

The rights of children in the criminal process (section 23)

A child charged with committing a crime or who has been detained without charge must not be held with adults. They must also be brought to trial as quickly as possible and treated in a way that is appropriate for their age. Children are entitled to opportunities for education and rehabilitation in detention.

The right to a fair hearing (section 24)

A person has a right to a fair hearing. This means the right to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Rights in criminal proceedings (section 25)

There are a number of minimum guarantees that a person has when they have been charged with a criminal offence. These include the right to be told the charges against them in a language they can understand; the right to an interpreter if they need one; the right to have time and the facilities (such as a computer) to prepare their own case or to talk to their lawyer; the right to have their trial heard without too much delay; the right to be told about Legal Aid if they don't already have a lawyer; the person is presumed innocent until proven guilty; and they don't have to testify against themselves or confess their guilt unless they choose to do so.

The right not to be tried or punished more than once (section 26)

A person will only go to court and be tried once for a crime. This means if the person is found guilty they will only be punished once. If they are found to be innocent they will not be punished.

The right to protection from retrospective criminal laws (section 27)

A person has the right not to be prosecuted or punished for things that were not criminal offences at the time they were committed.

Background: The 2011 Charter Review

In 2011, the then Attorney-General, the Hon Robert Clark MP, asked the Victorian Parliament's Scrutiny of Acts and Regulations Committee (SARC) to carry out the 2011 review of the Charter. This was the first statutory review scheduled in the legislation.

The statutory requirements for the four-year review in 2011 were broad. The review was specifically required to consider whether additional human rights should be included in the Charter, including (but not limited to) economic, social and cultural rights, women's rights and the rights of children, as they are set out in the relevant United Nations Conventions.

The review also had to consider whether to include the right to Indigenous self-determination, whether regular auditing of public authorities should be mandatory and whether a direct remedies provision should be added.

The SARC report was completed on 14 September 2011 and the then Government's response tabled on 14 March 2012. The report and the Government response available are available on SARC's website: <http://www.parliament.vic.gov.au/sarc/article/1446>. Parliament did not make any legislative amendments to the Charter as a result of the 2011 review.

Appendix A: Terms of Reference for the 2015 review of the *Charter of Human Rights and Responsibilities Act 2006*

Pursuant to section 45 of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter), to inquire into and report by 1 September 2015 on the operation of the Charter, including:

1. Ways to enhance the effectiveness of the Charter, including, but not limited to:

- a. reviewing the submissions from the 2011 Scrutiny of Acts and Regulations Committee review and the Committee's report
- b. the functions of the Victorian Equal Opportunity and Human Rights Commission under the Charter and the Victorian Ombudsman under the *Ombudsman Act 1973*, especially with respect to human rights complaints
- c. the effectiveness of the scrutiny role of the Scrutiny of Acts and Regulations Committee
- d. the development of a human rights culture in Victoria, particularly within the Victorian public sector
- e. the application of the Charter to non-State entities when they provide State-funded services.

2. Any desirable amendments to improve the operation of the Charter, including, but not limited to:

- a. clarifying the provisions regarding public authorities, including the identification of public authorities and the content of their human rights obligations
- b. clarifying the provision(s) regarding legal proceedings and remedies against public authorities
- c. clarifying the role of human rights in statutory construction
- d. clarifying the role of the proportionality test in section 7(2), in particular as it relates to statutory construction and the obligations of public authorities
- e. clarifying the obligations of courts including under sections 4(1)(j) and 6(2)(b)
- f. the need for the provision for an override declaration by Parliament under section 31
- g. the effectiveness of the declaration of inconsistent interpretation provision under section 36
- h. the usefulness of the notification provision(s) including under section 35
- i. any other desirable amendments.

3. A recommendation under section 45(2) as to whether any further review of the Charter is necessary.