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CRICOS Provider No.  
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Dear Mr Young and Review Team.

*Re Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.*

Please note I also made a submission to the Review in 2011 and I also refer to that submission and build on it here.

Unfortunately, I am unable to provide a lengthy submission as I leave for overseas in days and so this submission will use bullet points and summarise key points. I have a large number of tasks to complete before I leave the country but thought this review

was important to contribute to and as the deadline of 4 June 2015 falls whilst I will be overseas.

Please do not hesitate to contact me after 25 June 2015 - when I return - should you have follow up questions, queries or require further elaboration of the material contained in this submission.

### **Overview and Summary**

I have used the Charter in practice and in training. I currently also work as a solicitor having a current practicing certificate (on secondment from ANU on Fridays) as well as being an academic. I mainly work as a solicitor with people who have many vulnerabilities or experience disadvantage which is why the Charter is so important. Nonetheless, the great thing is that human rights belong to us all by virtue of being human, it is just that some people experience unequal treatment.

I welcome this review as an important process to see whether the Charter is achieving its aims and to suggest certain recalibrations to make it even more effective and useable.

The Charter has been a huge advance in the delivery of human rights protection both in Victoria and in the Australian Capital Territory (ACT). Sadly, human rights adherence could improve across the continent were such a legislative framework in existence nationally and in other states and territories. I have commented extensively on this in publications and submissions elsewhere.

Everyone working in a range of community based organisations that support people with disabilities, the homeless and so on have huge caseloads. For over a decade now, I have worked with such agencies to build their capacity and confidence in using the Charter both through training, legal support and secondary consultations. It would enable greater effective and efficient use of the Charter if certain operative provisions were clarified so that the rights become relevant and useable and give back power to the people whose human rights are often at risk. This has been thwarted over recent years through a watering down of the Charter and after the review in 2011. In some areas a perversion has actually occurred where some government departments have actually used the Charter decisions to thwart people's human rights. Through improved drafting and education, the Charter could be clearer, have an easier process and enable those with heavy caseloads opportunities to utilise the Charter better.

By virtue of my work I believe it is necessary for the following refinements to occur:

- Simplification and a strengthening of the Charter
- Improvements in the accessibility of the Charter so it is possible for people to avail themselves of its protection
- Improvements in the utility of the Charter
- Improvements to the Charter to give it teeth and foster accountability so that it is taken seriously which would improve decision-making down-stream to lessen human

rights non-compliant approaches/practises and improve decision-making, thus reducing human rights infringements.

- Further training of not just senior and middle management but of people who directly make decisions at the coal face and of people in the community starting with those most at risk and those who are advocates in the community sector
- Clarifications around the definitions of 'public authority' to make it less confusing, problematic in terms of interpretation. I would like to see it return it to the intent of the Charter namely to advance and foster human rights in all decision making and in service delivery especially those who function in areas of state work and in the public good using funds of government(taxpayer money)
- A more effective SARC Committee process and report back from it
- A less technical application of the Charter in view of confusion caused by the Supreme Court decisions and the reticent role of VCAT. These have led people to be put off accessing human rights protection as these decisions have been used by departments to curtail human rights rather than promote them. Distortions are often reported to me that are used to deter people from accessing and using their Charter right as relevant to day to day decision making that would be in line with human rights adherence and protection. A clearer and more accessible pathway through VCAT to ensure human rights protection is attainable by all is needed.

- A clearer role for the VEOHRC and more transparency and possibility for dialogue between it and the Ombudsman so that they can complement each other's critical roles.
- A cause of action in human rights in its own right – with experience of the Charter thus far demonstrating that there will not be the 'floodgates' in doing so. See the experience of having a stand-alone cause of action which has not led to a floodgate in the UK and ACT experiences.
- An opening up of opportunities that facilitate the dialogue model to promote and advance a human rights culture through conferencing (often not considered) and Alternative Dispute Resolution (ADR) which see different people able to sit around a table and problem solve to ensure human rights options are in place that are appropriate and allow a voice for participants whose rights are at risk
- Provide remedies that are simpler and more useful to community members and that encourage and facilitate Charter compliance. This will build confidence in the process that has waned due to impediments outlined below.

This submission will loosely follow the structure of the Terms of Reference (TOR).

## **PARLIAMENT TOR 1 (c), 2 (f)**

The SARC process could be more meaningful. Those who have made submissions about the compatibility of Bills report that they become disengaged as they see little value in the process. Some report that they have given up using the SARC process of reviewing legislation and bills as there is little point especially given the time they invest and given such agencies have limited resources. They report that there often very short time frames given for input and there is minimal follow-through with little concerns of human rights compatibility being actioned or reported back on.

The SRAC process could be strengthened by:

- Ensuring that Ministers responsible for Bills or legislative amendment respond and are required to report and comment substantively where human rights concerns exist in the legislation.
- Greater opportunity and time frames are given to enable public hearing participation and written input in ways that are not too burdensome
- Expand the role and resources of SARC enabling it to have a special human rights committee.
- A willingness of Parliament to provide realistic time frames and resources to enable real consideration Exposure Bills that truly benefits a democratic process and review.
- More concrete requirements around SARC Reporting back to community/submitters on human rights compliance or amendments undergone so that there is transparency and

accountability e.g. through a web reporting portal on changes made/considered and why/why not.

## **THE ROLE OF PUBLIC AUTHORITIES TOR 1 (d), 1 (e), 2 (a)**

Section 38 requiring public authorities to act compatibly with human rights and give proper consideration to them is a fantastic intention. Sadly, it has been undermined by the use of some public authorities of Supreme Court decisions to deflect the human rights dialogue and discourage people from using the Charter.

The original aim and intent of the Charter (and I was involved in very preliminary discussions in the lead up to its implementation and passage in the mid- late 1990s) was to improve decision-making. The aim was to enable compliance with good human rights practice and ensure the balancing of human rights where they came into conflict to reduce harm and of inflexible policy and decision-making that did not consider the real life impact of incursions on people's human rights. It was also to promote, in the public sphere human rights considerations and balancing these so that could be disproportionate and raise questions where there might not have even been consideration of the human rights impact. Public authorities and government were included as decision-makers as they have great control over people's lives and the services they can access.

What has happened through court consideration in some cases has been a narrowing of the definition of public authority, for

example, in the case of housing associations this has impacted severely on human rights adherence. The complexity around determining what is and is not a public authority has effectively acted a shield to public authorities from human rights adherence, for example housing providers that are funded by government and perform a function that would be once/or otherwise be undertaken by the State. Clearer and simpler drafting of the definition of a 'public authority' should occur so that is not so narrow as to exclude a range of organisations who deliver public purpose services with government funding. The ACT has a deeming provisions that ought to be considered by this Review that can guide this Review on the criteria that fits a public authority for the human rights Charter.

An improvement to the definition of a 'public authority' would provide consistency for everyone, for the public authority themselves, the agencies that advocate on behalf of clients/patients, and the members of the community seeking to ensure their human rights are considered.

My experience in advising agencies has been that when they understand the risks involved in not adhering to human rights and when they see there is a way forward it has led to improvements in policy, protocols, adherence and when complemented with effective training it has led to a positive culture of human rights that has meant that people have less reason to complain and are treated decently. This has certainly been the case in my work over some years in the community health space.

If there is greater clarity then the agencies and people would be clearer on where they stand, what is required of them. There would be less temptation for agencies to use the lack of clarity to subvert the charter and deflect people due to the current murky definition.

### **COURTS AND TRIBUNALS TOR 2 (b), 2 (c), 2 (e), 2 (g), 2 (h)**

It would improve the Charter, as noted above, if the process for using it to access rights was simpler. Currently pathways and the Charter is seen as overly complicated and technical and this was never its intention. The right pathway to make a human rights claim is unclear with thresholds meaning people cannot go to VCAT to enable the Charter to be used in a meaningful way. The Charter should be amended so that cases can be clearly brought before VCAT and arguments heard about the Charter's application. The window to go to VCAT has been so narrowed that it undermines the fulfilling of the rights the Charter had envisaged.

A flawed understanding of the Supreme Court decisions in the *Sudi* and *Burgess* cases have seen officials use them to deflect claims. As a result, in practice, these cases provide fuel for even further limiting the accessibility of a meaningful mechanism for ensuring the human rights compliance, Even though *Sudi* and *Burgess* in my view were unfortunate in enabling social housing providers in eviction proceedings a clear run due to the poorly drafted provision in the first place.

Such cases and the uncertainty around what is and is not a public authority that have emerged have watered down the advances of the Charter. They have also limited the ability of people without money to have a less costly and easily accessible venue in which to clarify their position vis a vis their human rights as the VCAT seems to have less of a role due to the Supreme Court rulings – not many of my clients or the agencies I seek to support in their advocacy have the capacity, means, time and money to go to the Supreme Court and retain senior legal counsel to match that of the well-resourced State – it is in fact a deterrent to them using the Charter in the way that was intended. This has made the Charter less accessible, less useable and likely to deter human rights adherence.

Since 2011 the role of VCAT has effectively been narrowed so that a member will not hear Charter arguments. One wonders what the point of the Charter is if no one can arbitrate on its use without significant technical legal support in navigating the complexity that most people do not have access to. For clients who have little power, are not confident (as is the case with many clients who routinely have their human rights ignored) and who are poor - they are unlikely to use it. For case workers who are busy and have limited resources, they are unlikely to pursue avenues that are not clear cut, simple and that are not costly. It so prohibitive and complex now that many of the uses of the Charter I saw at a grass roots level in its early days (and detailed in my 2011 submission) are unlikely to see the light of day now.

The seminal Australia wide research (Coumarelos, C., MacCourt, D., People, J. McDonald, H.M., Wei, Z., Iriana, R. & Ramsey, S. (2012) *Access to Justice and Legal Needs: Legal Australia Wide Survey Legal Need in Australia*’, Victorian Report (Sydney, Law and Justice Foundation of New South Wales).

<http://www.lawfoundation.net.au/ljf/app/&id=45728676D404E99FCA257AA000049504> accessed 19 May 2015) and the more

recent Productivity Commission ‘Inquiry Into Access to Justice Arrangements’ in this country discuss, at length, the impediments in Australia already to people accessing help.

(Australian Productivity Commission. (2014) *Access to Justice Arrangements: draft report (Overview)*, (Canberra, Australian Government Productivity Commission),

<http://www.pc.gov.au/inquiries/completed/access-justice/report> accessed 19 May 2015).

The Charter ought to heed such difficulties and ensure that it is useable, simple and that avenues are streamlined, accessible and effective.

The legislation needs to give VCAT clear power to arbitrate on issues of human rights adherence. This should be combined with the training of users of the Charter i.e. community and especially the tribunal members themselves.

Most human rights abuses happen at an administrative level and this is why VCAT is the best forum with appeal rights to the Supreme Court. This should be made clear in the Charter. The problem seems to have emerged due to a lack of clear drafting in the first instance.

Another problem has been the requirement that a matter before court needs to piggy back on another cause of action. This presents problems for human rights to be holistically available. It is suggested that the ACT provisions in its legislation be considered and that a cause of action be permitted in its own right. This would enable people to have a clearer picture on their human rights and make it easier for the public to avail themselves of the Charter rights but more importantly with such a possibility, it is likely agencies will do more to ensure they are human rights compliant thus obviating a need for court action as they will have a greater incentive to do so as a consequence for non-compliance will exist.

There is unlikely to be an opening of the flood gates as the UK and ACT experience has demonstrated. If the Charter had more teeth and other remedies (see below), it would give VCAT more opportunities to be consistent. It is likely that there would be more impetus for agencies to comply with it in the first instance and this would enhance decision-making at a grass roots level actually obviating further claims.

#### Remedies:

- It is suggested that the court/VCAT may grant relief as is just and appropriate
- Internal mechanisms can be strengthened
- Enable Alternative Dispute Resolution and strengthen the role of VEHR (see below).
- The place of conferencing ought also be considered, given the Charter is supposed to be a 'dialogue model'

opportunities to have a roundtable bringing together parties to resolve matters in a non-adversarial problem solving way can often see lateral solutions and be inclusive and enables voices to be heard. I have been able to bring parties together and achieve sustainable and longer term gains that due to ownership and an understanding of the different perspectives. Often human rights adherence involves more than one party and so conferencing can be more fitting than mediation/negotiation.

### **VEOHRC TOR 1(b), 2 (h)**

- Give the VEOHRC it 'own motion power of inquiry' so that it can intervene. This is important as they have expertise and often this can assist in ensuring a thoughtful outcomes both in how service are delivered and in court interventions.
- Training for advocates legal and non-legal, VCAT members and Court so that they might be able to make notifications earlier to VEOHRC of human rights action so that VEOHRC can respond quickly and so that decisions do not need to be delayed and can be timely
- Reinstate the audit functions of VEOHR and strengthen these so that they can incrementally check that public authorities and government departments are acting through action plans and not merely ticking boxes. If this occurs then the Charter will be seen to have teeth and agencies will work harder to adhere to human rights in their approach, policies, protocols and practice.

- Research capacity in the human rights area similar to that which exists in the VEOHRC in the equal opportunity area so that it can see pictures and identify trends and build on knowledge and an evidence base for human right adherence.
- More education capacity for public authorities and community and community sector agencies who have limited awareness and capacity so that human rights can be embedded into everyday practice and dialogue be fostered so that it is a matter of course for decision-makers to think through human rights implications of their work.
- More use of ‘train-the trainer’ models and ‘peer to peer’ learning ( I am happy to give more information on this when I return) to extend the reach and impact of the Charter
- Proper resourcing mindful that certain agencies and members of the community need greater awareness of human rights and how they can be protected or adhered to but may not have funds to avail themselves of costly training.

## OTHER DESIRABLE AMENDMENTS

- Simplify the language in the Charter so that it is clearer to everyone
- Training and education - not just at senior and middle management of the public service - but for community, especially those most vulnerable about the Charter as ‘knowledge is power’ and those who actually make

decisions on the ground who often feel uncertain or unclear about the expectation of their workplace. In addition training and education for people in service delivery such as allied health and social services and lawyers and ways they can improve advocacy for human rights adherence in a proactive and problem solving way. Scenario based adult learning approaches to training should be the type of training and include practice at having the human rights discussions with decision-makers in a constructive way. Such an approach in my experience and in the educational research has often led to good outcomes.

- More use of ‘train-the trainer’ models and ‘peer to peer’ learning as a model for education of and by community organisations including community legal centres to extend the reach and impact of the Charter
- Inclusion of Economic, Social and Cultural rights. These should be recognised as important rights. Experience informs me that people’s international, political and civil rights are often contingent upon their economic social and cultural rights. Currently the Charter leads to gymnastics using civil and political rights to secure basic protections e.g. shelter. The ACT’s experience of this might be useful to consider.
- Where rights are in conflict the very discussions around how different rights are effected and what might bring about a balancing of those rights/proportionate response-

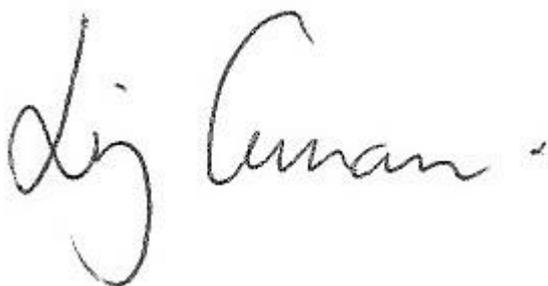
can lead to more lateral thinking and better outcomes. This has been my experience of roundtables where parties are all brought together to think through impacts. It leads me to think that most people want to make the right decisions they often feel hamstrung or are unaware of the impact of their decisions on others.

### **Conclusion**

The dialogue model between community, the Parliament, the Courts and Tribunals and agencies is a strength of the current Charter that can be enhanced and enabled as befits a participatory democracy. Voices need to be heard.

Currently, the Charter, has become so convoluted that it is being watered down and its intention is being undermined. The Charter can be drafted to enable it to be clearer, more accessible, streamlined and less complex and more useable.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Liz Curran', with a small flourish at the end.

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