



Charter Review: Consultation Paper
Submission from the Victorian Aboriginal Legal Service

June 2015

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Overview: 'a sword, not a shield'

The Victorian Aboriginal Legal Service welcomes the opportunity to provide a submission to the 2015 Charter Review. The VALS supports the Charter, in particular, with reference to Aboriginal cultural rights as per Section 19(2). However, we recognise there are a number of improvements to be made in the content and application of the Charter as it relates to, and impacts upon, Aboriginal Victorians.

Aboriginal Victorians have significant legal need, not just in the criminal space but in other areas of law such as child protection, housing and tenancy, treatment in custody, victims of crime compensation, discrimination and employment. In all of these areas the use of the Charter could contribute to the legal health of our clients.

Overall, we have found that invoking the Charter in our legal practice has been helpful and has seen some improvement in administrative decision-making. It has also opened up the space for a rights-based discussion at the point that laws are being made.

Yet the Charter has significant limitations, which can be summarised as follows:

- Aboriginal cultural rights have not been meaningfully incorporated into lawmaking, despite VALS' submissions on these points, making them reasonably meaningless for the community.
- Complicated jurisdictional questions in applying the Charter make it difficult to make these rights applicable, workable and meaningful.
- Judges do not have a positive obligation to apply Charter rights, relying instead on the inclination and skill of lawyers to raise these arguments.
- Charter rights have no role in sentencing determinations.
- Unclear application of Charter rights to non-government organisations who are publicly funded to perform public functions means that these organisations act with a lack of Charter accountability, while government organisations with the same funding and same functions are required to comply with the Charter.
- The lack of a strong cause of action means that there is limited motivation for decision makers to meaningfully apply Charter rights.

- Weak clauses regarding incompatibility of legislation and interpretation of legislation means that Parliament can be seen to pay ‘lip service’ to Charter rights without being held accountable for the incompatibility of their lawmaking processes and outcomes.

Currently, the Charter acts as ‘a shield, not a sword’, whereby it offers the potential for protection of rights (including cultural rights), where other rights are infringed but is relatively weak in its ability to actively promote such rights. We consider that although the rights in the Charter could be very useful in advocating for appropriate treatment of members of the Aboriginal community, who have distinct and significant legal needs, the complex and limited application of the Charter limits the usefulness of those rights.

Specifically, examples of this are seen in the serious lack of cases where the Charter has been able to be used to defend or promote Aboriginal cultural rights, and in the lack of accountability the Parliament has to the Aboriginal community in reference to ‘cultural rights’ in drafting legislation. The VALS makes a number of recommendations, maintaining that without education, awareness, and clear avenues to ensure the application of Section 19(2), that the Charter will be of little use in either promoting or protecting cultural rights of Aboriginal Victorians. The Charter, therefore, would be far more effective if it could be used as a sword, not a shield, and actively advocate for Aboriginal cultural rights, as well as provide avenues for accountability of public (and private) entities and authorities in relation to such rights.

In summary, the content of the Charter rights have the potential to effect significant improvements in the lives of the Aboriginal community, and we have used the Charter at times successfully in challenging administrative decisions. However, the significant weaknesses in a) the meaningful application of those rights at the lawmaking stage, and b) the ability to enforce and apply those rights in courts and tribunals, means that the Charter does not have the meaningful role that would give true effect to the values that it embodies.

[Background to the Victorian Aboriginal Legal Service \(VALS\)](#)

The Victorian Aboriginal Legal Service is an Aboriginal community controlled organisation. It was established in 1972 by committee, and incorporated in 1975. The VALS is committed to caring for the safety and psychological well-being of clients, their families and communities and to respecting the cultural diversity, values and beliefs of clients. The VALS vision is to ensure Aboriginal and Torres

Strait Islander Victorians are treated with true justice before the law, our human rights are respected and we have the choice to live a life of the quality we wish.

We operate in a number of strategic forums which help inform and drive initiatives to support Aboriginal and Torres Strait Islander people in their engagement with the justice, and broader legal system, in Victoria. We have strong working relationships with the other five peak Aboriginal Community Controlled Organisations in Victoria and we regularly support our clients to engage in services delivered by our sister organisations. Our legal practice spans across Victoria and operates in the areas of criminal, civil and family law (including child protection and family violence).

Our 24 hour support service is backed up by the strong community based role our Client Service Officers play in being the first point of contact when an Aboriginal or Torres Strait Islander person is taken into custody, through to the finalisation of legal proceedings. Our community legal education program supports the building of knowledge and capacity within the community so our people can identify and seek help on personal issues before they become legal challenges.

We seek to represent women, men and children who come to us for assistance in their legal matters, and are only hindered in doing this where there is an ethical problem such as a legal conflict of interest or where we do not have the capacity to assist. If this is the case, we provide warm referrals to other suitable legal representatives, which include Victoria Legal Aid, the Aboriginal Family Violence Prevention Legal Service, community legal centres and private practitioners as appropriate.

1 Our use of the Charter of Human Rights

The VALS has used the Charter of Human Rights in a range of contexts. The VALS has made submissions, for example, to Scrutiny of Acts and Regulations Committee (SARC) inquiries as to the compatibility of new laws with Charter rights. The VALS is now applying the Charter regularly in the civil space to administrative decision-makers in the areas of tenancy, care in custody, and other administrative decisions. On the usefulness of rights other than cultural rights, we refer to the submissions of the Human Rights Law Centre and the Federation of Community Legal Centres. The Charter has, in general, been of some assistance in advocating for the needs of vulnerable Aboriginal clients. However, lawyers at the VALS have experienced difficulties in navigating the Charter and its application in the provisions of Part 3.

1.1 Judicial and administrative oversight – civil and administrative law

Cases applying the Charter have resulted in a complex array of jurisdictional considerations that must be taken into account in applying the Charter to hold decision-makers accountable for their actions. Early cases determined that VCAT was not able to make determinations about administrative decisions and their compliance with Charter Rights and such matters must be heard in the Supreme Court, which creates significant barriers in terms of access to justice and the applicability of the Charter.* Yet VCAT itself must consider Charter rights in coming to decisions.†

There are also no non-legal avenues for individuals to seek conciliation or investigations of human rights breaches. We support the submission of the Human Rights Law Centre that the Victorian Equal Opportunity and Human Rights Commission should be empowered to receive and conciliate complaints of breaches of Charter rights using a similar process to those under the *Equal Opportunity Act 2010*.

In our experience the complexity of the existing pathways makes the application of Charter rights difficult for both lawyers and VCAT members and means the Charter does not have the depth of application and consideration that was intended.

In the areas of administrative review and tenancy law, we would hope that improving access to justice in applying Charter rights will improve the awareness and meaningful use of the Charter by public authorities.

Recommendation 1

That the Parliament simplify the application of the Charter in the civil and administrative space by allowing VCAT to make binding determinations on the application of the Charter to administrative and other decisions.

Recommendation 2

That the Victorian Equal Opportunity and Human Rights Commission be empowered to receive and conciliate complaints of breaches of Charter rights using a similar process to those under the Equal Opportunity Act 2010.

* Sudi

† Patrick (PJB)

1.2 Judicial and administrative oversight – criminal law

In the area of criminal law, the VALS would like to see far stronger judicial mechanisms for applying the Charter in the criminal space. To date, our experience has been that there has been little if any consideration of Charter rights in decision-making matters such as bail applications, parole, prisoner transport and the issuing of infringements and exclusion notices, and little reason to make these arguments as they would substantively have to occur in the Supreme Court.

We would like to see the Magistrates' Court allowed to make determinations as to the Charter compatibility of decisions regarding persons in contact with the criminal justice system.

A further step may be to provide for a positive obligation on judges in such matters to inquire as to whether Charter rights have been applied in the decision-making process.

We would also like to see a program of education for lawyers regarding the application of the Charter to decision-making in the criminal justice system.

Within the realm of criminal law, the VALS believes that there has been judicial reluctance to read in protections directed at offenders. This is evidenced by an analysis of the Charter's impact into two areas within the criminal law, namely public behaviour offences and bail restrictions.

Areas that the VALS hopes Charter arguments will become successful and more common place, and will be working to bring this to light, involve issues concerning delay (especially in children's court proceedings), bail applications, prisoner transport, and banning/exclusion notices as they engage with the Charter. The VALS submits that these responses indicate an urgent need to educate the legal services industry, including the judiciary, about the rights, responsibilities, and opportunities available within the Charter.

Recommendation 3

That the Magistrates' Court be given oversight as to the application of the Charter to clients in the criminal justice system.

Recommendation 4

That judges in criminal matters be required to enquire as to the Charter compatibility of administrative decisions relating to the criminal justice system.

Recommendation 5

That criminal lawyers be educated as to the potential application of the Charter in the treatment of persons in contact with the Criminal Justice System

1.3 Declarations of inconsistent interpretation and invalidity

In the area of criminal law, declarations of inconsistent interpretation, are virtually worthless in the criminal space.[‡] Judges post-*Momcilovic* have been advised to avoid making such declarations in criminal cases, out of a concern for undermining the perception of the integrity of the criminal justice system. Declarations of inconsistency have thus been relatively unused.

1.4 Scope of application - public authorities

Currently, the Charter applies only to ‘public authorities’ but has no application to private entities. The Charter should be extended to include private entities such as incorporated organisations such as church and community groups, to ensure that their policies and procedures align with Victoria’s human rights commitments as per the Charter. At present an arbitrary and unnecessary distinction exists between government and non-government providers of the same services.

In the situation of clients of the VALS, this means that, for example, clients who are provided with housing through the Office of Housing are able to enforce Charter rights, but clients provided with Aboriginal housing or other social housing are not. There are other areas where this concern may also be live, such as private prison operators and other private providers of public services.

This is especially pertinent given the current Royal Commission into Institutional Responses to Child Sexual Abuse and the state Inquiry into the Handling of Child Abuse by Religious and non-Government Organisations, in which the human rights of children and young people were violated, with no governing body overseeing the compliance of such organisations with the application of fundamental human rights.

This is also the case for civil matters such as tenancy or workplace issues, where human rights as per the Charter – including, especially, cultural rights – can be breached. As it stands, the Charter cannot be invoked in matters where civil claims concerning (for example) private landlords and tenants, where human rights may have been breached.

The VALS has so far successfully argued to social housing providers that they are subject to Charter Rights, however it would be helpful if this could be clarified.

[‡] *Momcilovic v The Queen* [2011] HCA 34

Case Study 1: Tenancy and Cultural Rights

Lorna[§] lived in transitional housing owned and leased by a non-Aboriginal community organisation, ABC Inc, after escaping family violence. She lived with and cared for her grandson and intellectually disabled brother. A condition of her tenancy was that she engage with community services. In January her nephew died of a drug overdose in her presence at the property. Lorna went back to her country for a couple of weeks of 'sorry business' to grieve her nephew. When she returned she started receiving warnings to engage with services, however she was overwhelmed with family responsibilities, trauma and grief. Her engagement decreased and she stopped answering the door for fear of eviction. A possession order was made and the police came to her door with a warrant. She got in touch with us. We made an application for an urgent review and stay. We then successfully made arguments to ABC that they had failed to engage with her cultural rights and the rights of her grandchild and family members in their eviction process by failing to support her to recover from her grief. These arguments significantly turned around ABC's approach to the client. They allowed the review, withdrew the possession application, engaged an Aboriginal support service and started again.

Recommendation 6

That the Charter should be extended to include organisations that are publicly funded to provide public services. That a broader scope of application to private agencies, organisations and individuals be investigated, in order to protect the human rights of Victorians in the private sphere, and ensure accountability for individuals, entities and organisations which have a responsibility to the public.

2 Cause of Action

The Charter does not provide a stand-alone cause of action. The dilution that this brings to its application further disempowers people from pursuing charter compliance.

The VALS would welcome a stand-alone cause of action for breaches of Charter rights. Charter rights are already appropriately limited and we do not believe that there would be a 'flood' of litigation, since there has been no such flood to date.

Such a cause of action could have appropriate processes and limitations. Other jurisdictions have creative alternative dispute resolution processes to avoid unnecessarily costly or vexatious actions

[§] Not her real name

(such as unfair dismissal, residential tenancy and equal opportunity laws). This would have immense value in making the Charter rights of Victorians accessible to all.

Recommendation 7

That an investigation into an appropriately bounded stand-alone cause of action for breaches of Charter rights be made with a view to such a cause of action being implemented in the near future.

3 Section 19(2): Aboriginal Cultural Rights

The Victorian Charter of Human Rights and Responsibilities Act (2006) acknowledges Aboriginal Cultural Rights in Section 19, stating in section 2:

Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of the community –

- a) To enjoy their identity and culture; and
- b) To maintain and use their language; and
- c) To maintain their kinship ties; and
- d) To maintain their distinct spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

While the inclusion of cultural rights is commendable, the VALS maintains that these remain an aspirational, not applicable, section of the Charter. In essence, cultural rights for Aboriginal Victorians as outlined in the Charter are rarely considered in either statutory law making, or in a court of law.

3.1 Individual and Collective (Group) Cultural Rights

Article 1 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) acknowledges the collective rights of Indigenous peoples, stating: 'Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.'

It is unclear, though, whether the Charter seeks to include the collective (group) rights of Aboriginal people within the context of cultural, or other, rights. This would of course impact on many aspects of the application of the Charter, in particular 19(2d) in respect to cultural rights concerning

traditional connections with country. Obviously, Aboriginal cultural protocols dictate that traditional ownership of country is allocated to the appropriate cultural group, and not the individual. As such, it remains to be clarified, if collective rights can be argued under the Charter, as per the UNDRIP.

The VALS would suggest that section 19(2) be amended to seek clarity around the issue of individual versus collective cultural rights, using Article 1 of the UNDRIP as a basis for any such amendment.

The VALS strongly maintains that while individual Aboriginal persons should be able to access cultural rights as per the Charter – such as the right to learn and practice language, for example – that the Charter be extended to acknowledge unique collective rights, in particular regard to traditional ownership and cultural use of country.

Recommendation 8

That the Charter be extended to acknowledge and include collective Aboriginal cultural rights as per the United Nations Declaration on the Rights of Indigenous Peoples.

[3.2 Education and Awareness](#)

The VALS argues that Victorian public sector workers – by whom the Charter must be considered – do not fully appreciate or understand exactly what constitutes Aboriginal culture and cultural rights in this context. At the same time, and partly as a consequence of this, Aboriginal communities in Victoria are not aware of their cultural rights under the Charter, nor fully understanding of their potential application. Both of these scenarios limits the effectiveness of Section 19(2) in so far as breaches of cultural rights can, and are, made in ignorance of the Charter. Furthermore, that Aboriginal communities remain unaware of the Charter and its implications is a denial of their rights in the first instance.

Recommendation 9

That the Victorian Government employ Aboriginal community advisors to prepare and execute ongoing cultural safety and cultural competency education programs for public sector staff, to increase understanding and awareness of Victorian Aboriginal culture and cultural rights as it applies to the Charter.

Recommendation 10

That the Victorian Government embark on a series of workshops and consultations to Aboriginal communities around Victoria to educate and raise awareness about cultural rights as included in the Charter.

3.3 Community Consultation: Bills at SARC

While the Charter includes cultural rights for Aboriginal Victorians, it is unclear how these are taken into account in statutory law making. A fundamental principle in the application of all Indigenous rights is that of self-determination. As such, it is against the fundamental application of cultural rights if Members of Parliament and other associated public sector workers are drafting laws that may impact on Aboriginal cultural rights without prior consultation. The VALS maintains that appropriate and particular community consultation be carried out in cases whereby cultural rights may be impinged upon.

Case Study 2: Limitations of Actions Amendment (Criminal Child Abuse) Bill 2014

In 2014, the VALS made a submission regarding the Limitations of Actions Amendment (Criminal Child Abuse) Bill 2014. The VALS recommended that 'cultural abuse' be included in the definition of 'criminal child abuse' alongside physical, sexual and psychological abuse. This recommendation was made in order to recognise the cultural loss suffered by Aboriginal Victorians who were removed from family, land, language and culture when placed into institutions.

However, the Bill was passed and did not include cultural abuse, which the VALS would argue is a clear breach of the Charter Section 19(2) parts a, b, c and d. Furthermore, no mention of Section 19 or 'cultural rights' was mentioned in the Statement of Compatibility prior to the Bill's passing, even though the Parliament was notified of the potential breach via the VALS submission.

No further clarity of the VALS submission or potential breaches of cultural rights were pursued by the Parliament. Had the VALS been contacted for open discussion and consultation, this would have ensured that the Charter, as it applied to Aboriginal cultural rights, is utilised in partnership with Aboriginal community members – upholding a fundamental principle of cultural rights, that of self-determination.

Recommendation 11

That the Charter be amended to require that Victorian Aboriginal community organisations be consulted by SARC where a Bill engages the cultural rights of Aboriginal people.

3.4 Community Consultation: Statements of Compatibility

Part 3, Division 1 of the Charter provides that a member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility with the Charter to be tabled in respect of that Bill.

As outlined above, the VALS would contend that where a Bill may impinge upon, or engage cultural rights as per Section 19(2), that relevant Aboriginal community organisations must be consulted as to the impacts and applications in the preparation of a Statement of Compatibility. This will ensure that The Victorian Aboriginal community are appropriately engaged with the application of the Charter and cultural rights.

Recommendation 12

That Victorian Aboriginal community organisations be consulted in the preparation of Statements of Compatibility where cultural rights under s.19(2) are engaged.

4 New rights

4.1 Children's Rights

Aboriginal children are far more likely to be placed in out of home care than non-Aboriginal children and are highly vulnerable to the loss of their place in the culture that they were born to. The *Children, Youth and Families Act 2005* already provides for Aboriginal Child Placement Principles, yet it has been found recently that the substantial majority of Aboriginal children in care don't have a cultural plan, as required by these principles.

The VALS advocates for the Charter to include specific rights for children as outlined in the United Nations Convention on the Rights of the Child (CRC), in particular *Article 3* which states: in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Inclusion of specific reference to Children is in line with the existing Section 19(2) in so far as maintaining and ensuring that the cultural rights of Aboriginal children are protected. VALS needs to be able to adequately pursue foster care agencies for their neglect of the cultural rights of Aboriginal children.

Recommendation 13

Section 23 of the Charter be expanded to include broader protection of children's rights as outlined in the United Nations Convention on the Rights of the Child (CRC).

Recommendation 14

Section 19(2) be amended to include special mention of the rights of Aboriginal children to ensure connection to culture, land, language and community.

[Case Study 3: *Betrayal of Trust* - Recommendations for Redress](#)

The 2013 State Inquiry into the Handling of Child Abuse by Religious and Other non-Government Institutions produced the *Betrayal of Trust* report, passed down by the Families and Community Development Committee. The Committee recommended that the Victorian Government review the functions of the Victims of Crime Assistance Tribunal (VOCAT) to consider its capacity to administer a specific scheme for victims of criminal child abuse (Recommendation 28.1, Part H).

The Victorian Aboriginal Legal Service supports a redress scheme that would benefit the Victorian Aboriginal Community, many of whom have been affected by child removal and subsequent institutional abuse. This is also in line with Charter arguments as per the specific cultural rights of Aboriginal Victorians, and our ongoing support for the rights of Aboriginal children.

Currently, the Victorian Aboriginal Legal Service is in consultation with the Department of Justice concerning the potential impacts or opportunities such a redress scheme may have for the Aboriginal community in Victoria, and to ensure that any redress scheme is compatible with the Charter.

[4.2 Women's Rights](#)

Aboriginal and Torres Strait Islander women represent some of the most marginalised and disadvantaged people in the Victorian community. The VALS therefore strongly advocates for the inclusion of the human rights of women within the Charter, with reference to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In particular, the inclusion of the human rights of women would strengthen the Charter in reference to the current Royal Commission into Family Violence and any potential legislation that may develop from that.

Recommendation 15

That the Charter be amended to include a section referencing the human rights of women as per the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

4.3 Land, Water and Resources: Cultural Rights in Application

The VALS is concerned that, while the Charter recognises the inherent connection and right to the land, water and other natural resources (Section 19, 2) that this acknowledgement is not taken into consideration when formulating legislation concerning national parks, waterways, and environmental impacts. For example, in July 2014, Parks Victoria introduced a revised fee structure for camping and accommodation in national, state and other parks and reserves. New fees applied at some sites where there were already fees for camping in the park and in some other areas, fees were introduced for the first time.

The VALS is concerned that in instances such as these, the relevant Traditional Owner groups were not consulted. While Traditional Owners who have recognised native title rights or traditional owner rights which include the right to camp are exempt from paying camping fees in national and state parks within their agreement areas, the VALS would contest that in instances such as these, the Traditional Owner groups be consulted as to any developments of changes to laws and policies concerning their lands. Similarly, economic or environmental developments of Native Title or recognised Traditional Owner lands should be made in consultation with the relevant cultural groups, as per the Charter.

Recommendation 16

As per the Charters acknowledgement of Aboriginal cultural rights to land, waters and natural resources, that Native Title and Traditional Owner groups be consulted as to any environmental or economic developments.