

2<sup>nd</sup> June, 2014

Mr Michael Brett Young  
Independent Reviewer  
Charter Review Secretariat  
Level 24, 121 Exhibition Street  
Melbourne VIC 3000

Dear Mr Brett Young,

Thank you for the opportunity to submit our comments in relation to the review of the *Charter of Human Rights and Responsibilities Act 2006*. In particular, we welcome the opportunity to comment on ways to strengthen and improve the operation of the Charter, and commend the government's ongoing commitment to human rights in the State of Victoria.

### **Our submission**

This is a joint submission of the Springvale Monash Legal Service (SMLS) and academics from the Faculties of Law and Arts at Monash University. A brief background of SMLS appears below.

#### ***Springvale-Monash Legal Service***

Established in 1973, Springvale Monash Legal Service (SMLS) is a community organisation that provides free legal advice, assistance, information and education to disadvantaged members of the community.

In addition to its generalist practice, SMLS provides a range of specialist legal clinics covering employment law, civil litigation, child support, family violence and sexual assault. Together with its paid staff, which include a dedicated community development worker, SMLS relies on the contributions of a large team of volunteer lawyers as well as Monash University law students.

SMLS aims to empower and support members of the community to use the law and the legal system to protect and advance their rights and broaden their awareness of their responsibilities; to redress imbalances in access to justice through the provision of legal assistance and information, community legal education and law reform; and to develop the confidence, skills and ethics of law students through clinical legal education in a community environment. Our mission is:

- To make the legal system accessible to disadvantaged members of the community.
- To challenge systemic disadvantage within the community.
- To advocate for and assist service users to advance their rights and broaden their awareness of their responsibilities.
- To develop the confidence, skills and ethical conduct of Monash law students through participation in the clinical legal education program.

SMLS is situated within the City of Greater Dandenong, however the provision of free, quality legal services are not subject to geographical boundaries and clients from all over Victoria are welcome to attend.

SMLS clients are predominantly located in the City of Greater Dandenong (CGD), which has a population of more than 135,000 people. CGD is the most culturally diverse local government area in Victoria, with approximately 60% of residents born overseas from over 150 different birthplaces.

### Effectiveness of the ‘public authorities’ provision

Section 38 of the Charter provides that ‘public authorities’ must act compatibly and give proper consideration to the human rights contained in the Charter. Unfortunately and in our experience, there are often practical problems with the operation of Section 38 that limit its effectiveness. These include but are not limited to the following:

**1. Lack of transparency:** We are aware of situations in which, for instance, public authorities generate correspondence indicating that they have taken the Charter ‘into account’, but with little or no information as to how they have done so. In our view, it is important as a matter of principle that decisions made by public authorities be as transparent as possible, particularly where human rights issues are concerned.

*Accordingly, we recommend:* better education and training for employees in public authorities as to their obligations under Section 38, including but not limited to the requirement for a more detailed explanation of the ways in which the Charter has been taken into account in decision making, which sections of the Charter have been considered and how. In our view this will not be an onerous requirement, especially when one considers that inadequate initial explanations often lead to more correspondence in any event, as citizens and lawyers simply request more detail on the interpretation and application of Section 38.

**2. Tokenistic interpretations and applications:** In our experience, public authorities can sometimes interpret the Charter in ways that appear tokenistic, simplistic or perverse. We include two examples of the way this might happen, based on our work and research:

*Example 1: Alcohol programs*

In early 2015, the Southern Metropolitan Region (SMU) of the Victoria Police Service – in conjunction with a number of stakeholders – introduced a new pilot program for alcohol diversion. According to materials produced by the SMU, the strategy:

- Represents an alternative in which Victoria Police **protect human rights when dealing with problem drinkers.**
- SD3 Greater Dandenong has identified significant issues surrounding problem drinkers who are regularly arrested for offences directly related to excessive alcohol consumption.
- The current situation around problem drinking is extremely serious and has the potential to become an entrenched problem affecting the broader community.

(our emphasis)

Under the pilot program, police aim to reduce recidivism for offences such as public drunkenness, through allowing those offenders adjudged to be ‘alcohol dependent’ to complete an alcohol treatment program designed to address ‘alcohol abuse, addiction and provide education to prevent a relapse’. Materials prepared by SMU state that:

- This strategy **minimises the impact of systemic discrimination and protects the individuals** [*sic*] **human rights**.
- It has the potential to change perceptions including cultural attitudes.

(our emphasis)

The strategy includes no other detail as to how ‘human rights’ are conceptualised, how the strategy minimises the impact of systemic discrimination or how it otherwise ‘protects’ human rights. It is also not clear whether key stakeholders envisage the pilot to prioritise or protect the human rights of people adjudged to be ‘alcohol dependent’ or to be experiencing an ‘addiction’, or members of the wider community thought to be adversely impacted by the actions and behaviours of these offenders. *It is difficult to tell, in other words, whose human rights are claimed to be protected here, or how these protections are being afforded.*

*Accordingly, we recommend:* At the very least, there is a need for much more transparency in the application of the Charter to programs initiated by public authorities such as these. There is also a need, arguably, for mechanisms that allow those effected to challenge the way their human rights are being conceptualised in these contexts. This is, we submit, particularly important for traditionally vulnerable and marginalised groups such as those captured by the current SMU pilot. There is a wealth of academic research exploring the experiences and needs of people who use alcohol and other drugs habitually, as well as those determined to be ‘dependent’ or to be experiencing an ‘addiction’. It has been widely argued that approaches that treat ‘addiction’ or ‘dependence’ as a disease requiring treatment are not necessarily any better than traditional approaches that criminalise such conduct (e.g. Brook and Stringer 2005; Fraser and Seear 2011; Seear and Fraser 2014a, 2014b; Fraser, Moore and Keane 2014) and that these approaches, in effect, may run counter to human rights, depending upon how ‘human rights’ is here conceptualised.

It is not enough, in other words, for public authorities to simply unilaterally assert a particular interpretation of human rights without appropriate mechanisms for affected populations and communities to engage in genuine dialogue about how their rights are being conceptualised. Indeed, to return to the present example, research suggests that people who are described as ‘addicts’ and subjected to coerced, mandated or prescribed treatment ostensibly for their benefit may be just as stigmatised and marginalised by these approaches as by other more punitive ones (Brook and Stringer 2005). This is not to say that we encourage more punitive approaches. Rather, it is important to recognise that the Charter may be sometimes used as a means to justify more paternalistic policy and regulatory responses in ways that are arguably counter to broader conceptualisations of human rights and that entrench, rather than remove, stigma.

#### *Example 2: Supervised Treatment Orders*

Supervised Treatment Orders (STOs) were introduced under the Australian state of Victoria’s *Disability Act (2006)*. STOs are civil orders determined by the Victorian Civil and Administrative Tribunal (VCAT). They are orders which only apply to people with intellectual disabilities, and in particular, only to those who meet the following criteria:

- they have ‘previously exhibited a pattern of violent or dangerous behaviour causing serious harm to another person or exposing another person to a significant risk of serious harm’ (*Disability Act 2006*, Part 8, Section 191, 6a);

- they pose ‘a significant risk of serious harm to another person which cannot be substantially reduced by using less restrictive means’(*Disability Act 2006*, Part 8, Section 191, 6b);
- they require a treatment plan that ‘will be of benefit to the person and substantially reduce the significant risk of serious harm to another person’ (*Disability Act 2006*, Part 8, Section 191, 6c);
- they are ‘unable or unwilling to consent to voluntarily complying with a treatment plan to substantially reduce the significant risk of serious harm to another person’ (*Disability Act 2006*, Part 8, Section 191, 6d); and
- they require detention in order ‘to ensure compliance with the treatment plan and prevent a significant risk of serious harm to another person’(*Disability Act 2006*, Part 8, Section 191, 6e).

One of the core requirements placed on Tribunal Members when determining STOs is to consider Victoria’s *Charter of Human Rights and Responsibilities Act (2006)* (hereafter the Charter), and to determine: are these rights limited when imposing an STO?

Yet, as recent research conducted by Spivakovsky (2014) demonstrates, the way Tribunal Members apply the Charter in STO hearings raises certain questions about how this ‘transparent’, ‘accountable’ and ultimately ‘protective’ safeguard operates. For example, in some hearings, the presence of the Charter appears primarily perfunctory, as something which is ticked-off as part of the decision-making process. For instance, the Tribunal Member in AC (Guardianship) [2009] VCAT 753, comments:

In her submissions Ms. Mitchell made brief but important reference to the Charter of Human Rights and Responsibilities Act 2006 ... It has not been necessary for me to comment further about that. My decision obviously cannot involve any limitation on AC’s human rights.

And the Member in the hearing of LM (No2) (Guardianship) [2009] VCAT 2480 simply states:

In deciding the above issues, section 38 of the Charter of Human Rights and Responsibilities Act 2006 (the Charter) requires me to give proper consideration to any relevant human rights of LM.

Having done so, with respect to the current circumstances, I agree with Member Grainger’s reasoning in her decision about LM and the limitation on LM’s rights are justified after taking into account the considerations set out in section 7(2) of the Charter.

In these hearings, and others like them, it is unclear exactly how this safeguard operates and has been applied. In what ways did the Member in AC (Guardianship) [2009] VCAT 753 ensure AC’s human rights were not limited by the decision? Moreover, what was the ‘proper consideration’ the Member in the hearing of LM (No2) (Guardianship) [2009] VCAT 2480 undertook?

There are also questions about how Tribunal Members that use the Charter in their decision making. For example, as Spivakovsky (2014) demonstrates, in the hearing of LM (Guardianship) [2008] VCAT 2084, the Tribunal Member concedes there is potential for STOs to appear discriminatory because there is no equivalent order in Victoria for

someone who does not have an intellectual disability, but who demonstrates the same patterns of dangerous, risky, and harmful behaviour. However, the Member quickly clarifies, these claims of discrimination simply do not apply in this case. As they explain:

I find that the limitation on LM's right to "equal and effective protection against discrimination" is justified after taking into account the considerations set out in section 7 (2) of the Act. Firstly, it is clear from the wording of section 191 (6) that one of the purposes of detaining a person with an intellectual disability pursuant to a STO is to protect members of the public from the possibility that the person with the intellectual disability may cause them serious harm. It also seems to me that another justification for the detention of people with an intellectual disability in these circumstances is to protect them from the serious legal implications that would follow if they seriously harmed another person. In LM's case, she has already been convicted of a number of serious offences and whilst she was released on an undertaking to be of good behaviour for a period of 12 months, it presently appears necessary to detain LM whilst she is receiving treatment to reduce the risk that she may re-offend. Further, the STO can only be made if there is no "less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve" (see section 191 (6) (e) of the Act) and I have found this to be the case.

Thus, in cases like this it is apparently justifiable to impose an STO and limit the rights of people with disabilities to equal and effective protection against discrimination, because of the potential they may become subject to a form of detainment which would otherwise limit their rights to freedom of movement and their right to liberty and security of the person. However, it is also justifiable to limit *the exact same rights* to freedom and liberty under an STO, because this civil form of detainment is less restrictive than a criminal form of detainment, and therefore adheres to the rules by which human rights are allowed to be limited. Accordingly, as Spivakovsky (2014) argues, in cases like this the function of the Charter appears to be perverted. That is to say, while Tribunal Members and other interested parties argue that the use of the Charter in STO decision-making ensures people with disabilities are not detained on questionable grounds, the above evidence suggests that what the Charter actually ensures is that the questionable grounds upon which STOs detain people with disabilities are viewed as justifiable, acceptable, and protective under the Charter.

*Accordingly, we recommend:* that there are clearer guidelines provided to public authorities who use the Charter in their decision-making. Such guidelines should outline the need to move beyond using the Charter as a perfunctory check-list, and offer examples and instructions for how public authorities can meaningfully engage with the concepts of the Charter. As previously stated, it is not enough for public authorities to simply unilaterally assert a particular interpretation of human rights without appropriate mechanisms for affected populations and communities to engage in genuine dialogue about how their rights are being conceptualised.

## **Access to justice**

As noted earlier, SMLS has a long history of working with and advocating for the rights of marginalised and vulnerable communities. One of the principal concerns of our organisation is enhancing access to justice for these cohorts.

**1. Improving accountability:** We have concerns that the Charter may not be as readily accessible to marginalised and vulnerable people in Victoria and that in this sense may be counterproductive to the principle of universal human rights. As we noted earlier, although the onus to give ‘proper consideration’ to the Charter rests with public authorities, those decisions are not often transparent or sufficiently detailed. Although it is presently open to members of the community to seek a more detailed response from a public authority as to how it dispensed with its obligations under Section 38, this assumes that the people have knowledge about the Charter to begin with, and/or access to a lawyer who can properly advise them of their right to do so. For people from culturally and linguistically diverse communities, those living with mental illness cognitive impairment, alcohol or other drug problems, young people, victims of family violence and the like, these expectations will often be unrealistic. Although it is possible to initiate legal action invoking the Charter, the mechanisms for seeking remedies under the Charter will often be prohibitive, particularly where they are expensive or time consuming.

*Accordingly, we recommend:* Improvements that place a greater onus on public authorities to properly dispense with their obligations under the Charter, including but not limited to:

- A requirement that correspondence from relevant public authorities contain information about the existence of the Charter in Victoria, how it has been interpreted and applied in this instance, and the right of the recipient of that correspondence to seek further detail on the application of the Charter from the relevant authority;
- Embedding an auditing requirement for public authorities on the interpretation and application of the Charter, so that the job of ensuring compliance does not fall to Victorian citizens and/or their lawyers. We do not have a strong view on which mode of accountability would work best.
- Improving access to Charter arguments through low-cost jurisdictions such as VCAT (see below).

**2. Granting Charter powers to VCAT:** It is well known that in *Director of Housing v Sudi* [2011] VSCA 266 the Supreme Court of Appeal determined that the Victorian Civil and Administrative Tribunal (VCAT) had severely limited capacity to hear Charter arguments and rule on them. We respectfully submit that the result in *Sudi* undermines the aims and objectives of the Charter, presenting major obstacles to access to justice, particularly for vulnerable and marginalised members of the community. VCAT is a low-cost and readily accessible forum for many marginalised Victorians. A number of our clients have disputes regularly heard in VCAT. Many of the VCAT lists represent an inexpensive, less formal and more timely means of resolving disputes. These are often extremely important considerations for our clientele, including those from lower socioeconomic backgrounds and people from culturally and linguistically diverse communities.

*Accordingly, we recommend:* We strongly submit that the result in *Sudi* should be overturned and that VCAT should be granted the power to hear and rule on Charter arguments.

#### **Other recommendations**

We otherwise endorse the recommendations of our colleagues from the Human Rights Legal Centre (HLRC) regarding the operation of SARC, the need for clarification

regarding the definition of a 'public authority' under the Act, the need for a wider range of legal remedies and the Castan Centre for Human Rights on the need for the Charter to incorporate a wider range of human rights.

## Conclusion

As SMLS noted in its last inquiry submission (dated 14<sup>th</sup> June 2011), there has not been, in our experience, an influx of litigation as a result of the introduction of the Charter. We consider it highly likely that this will continue to be the case going forward, irrespective of whether VCAT's jurisdiction to hear Charter arguments is restored. In practice, it is likely that Charter arguments will simply be run alongside existing arguments. There are also options to at least introduce less litigious and costly mechanisms (such as the ombudsman) that would ensure accountability public authorities are strengthened and improved.

We would welcome the opportunity to discuss any aspect of our submission with you further.

Yours sincerely,



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