

Rights, Responsibilities and Respect

The Report of the Human Rights Consultation Committee

Summary and Recommendations

After six months of listening to Victorians of all ages and backgrounds across the State, it is clear that a substantial majority of the people we heard from want their human rights to be better protected by the law. While Victorians do not want radical change, they do support reform that will strengthen their democracy and Victoria's system of government. In this area, they see Victoria playing a leading role among the Australian States.

Many people want to see their human rights better protected to shield themselves and their families from the potential misuse of government power. For even more people, however, the desire for change reflects their aspiration to live in a society that continues to strive for the values that they hold dear, such as equality, justice and a 'fair go' for all.

The idea of a community based upon a culture of values and human rights is one that we heard again and again during our consultations. Victorians sought not just a new law, but something that could help build a society in which government, Parliament, the courts and the people themselves have an understanding of and respect for our basic rights and responsibilities.

A Charter of Human Rights and Responsibilities

Based upon what we have heard, we recommend that the Victorian Parliament enact a Charter of Human Rights and Responsibilities. This Charter would not be modelled on the United States Bill of Rights. It would not give the final say to the courts, nor would it set down unchangeable rights in the Victorian Constitution. Instead, the Victorian Charter should be an ordinary Act of Parliament like the human rights laws operating in the Australian Capital Territory, New Zealand and the United Kingdom. This would ensure the continuing sovereignty of the Victorian Parliament.

The United Kingdom has a system of law and government similar to Victoria and its *Human Rights Act 1998* has been a success without giving rise to the litigation and other problems sometimes associated with the United States Bill of Rights. Its law has also proved effective in balancing issues such as the need to fight terrorism with the democratic and other principles required for a free society.

Victoria's Charter of Human Rights and Responsibilities should be written in clear language. It should also include a preamble that sets out the community values that underpin it. In this form, the Charter could be used in schools and for broader community education, such as for new migrants to Victoria.

The Charter would also 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.

Which rights?

We recommend that the Charter protect those rights that are the most important to an open and free Victorian democracy, such as the rights to expression, to association, to the protection of families and to vote. These rights are contained in the *International Covenant on Civil and Political Rights* 1966, to which Australia has been a party for many years. We have said that some of the rights in this instrument need to be modified or even not included to make sure that the Charter best matches the contemporary aspirations of the Victorian people.

The rights in the Charter would not be absolute. The Charter would make it clear that these rights can be limited, as occurs in other nations, where this can be justified as part of living in a free and democratic society. This would mean that our elected representatives 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 distribute limited funds amongst competing demands. We also consider that the Charter should recognise the power of the Victorian Parliament, not just to balance such interests, but to override the rights listed in the Charter where this is needed for the benefit of the community as a whole.

Many Victorians said that the Charter should also contain rights relating to matters such as food, education, housing and health, as found in the *International Covenant on Economic, Social and Cultural Rights* 1966, as well as more specific rights for Indigenous people, women and other groups. While we agree that these rights are important, we have not recommended that they be included in the Charter at this stage. Based on what we have been told by the community, we think that the focus should be on the democratic rights that apply equally to everyone.

This conclusion needs to be seen in light of our recommendation that the Charter include a mechanism for review and change. It would enable these rights and other issues to be considered again down the track. Indeed, we do not expect that the Charter would remain unchanged, but that it would be updated and improved with the benefit of experience and in line with community thinking. The Charter should be the start of incremental change, not the end of it.

Dialogue on Human Rights

An important aim of the Charter of Human Rights and Responsibilities would be to create a new dialogue on human rights between the community and government. The Charter would mean that rights and responsibilities would be taken into account from the earliest stages of government decision-making to help prevent human rights problems emerging in the first place. The key aspects of this dialogue, as adapted and improved from best practice in the Australian Capital Territory and nations such as the United Kingdom, Canada and New Zealand, would be:

- The **community** would receive the benefit of the rights listed in the Charter.
- Public servants would take the human rights in the Charter into account in developing new **policies**.
- **Public authorities** like government departments would be required to comply with the Charter. If they fail to do so, a person who has been adversely affected by a government decision, as is possible now under Victorian law, would be able to have the decision examined in court. There would be no right to damages.
- Government departments and other public authorities could undertake **audits** of their programs and policies to check that they comply with the Charter.
- Where decisions need to be made about new laws or major policies, submissions to Cabinet would be accompanied by a **Human Rights Impact Statement**.
- When a Bill is introduced into the Victorian Parliament, it would be accompanied by a **Statement of Compatibility** made by the Attorney-General that would set out with reasons whether the Bill complies with the Charter. Parliament would be able to pass the Bill whether or not it is thought to comply with the Charter.
- The Parliament's **Human Rights Scrutiny Committee** would have a special role in examining these Statements of Compatibility. It would advise Parliament on the human rights implications of a Bill.
- Victorian courts and tribunals would be required to **interpret** all legislation, so far as is possible to do so, in a way that is consistent with the Charter. In doing so, they would need to take account of why the law was passed in the first place.
- The Attorney-General and Victorian Human Rights Commissioner would be able to **intervene in a court or tribunal** that is applying the Charter to put submissions on behalf of the government and the public interest. Community and other groups might also be given leave to intervene.
- Where legislation cannot be interpreted in a way that is consistent with the Charter, the Supreme Court would be able to make a **Declaration of Incompatibility**. This

would not strike down the law and Parliament could decide to amend the law or to leave it in place without change.

- Where the circumstances justify it, Parliament would be able to pass a law that **overrides** the rights in the Charter. This would prevent a Declaration of Incompatibility being made in respect of the law for five years. The override could be renewed.

When should the Charter commence?

We recommend that the Charter come into force on 1 January 2007, except for those provisions that impose a new obligation upon public authorities. As in the United Kingdom, more time should be given to prepare for this latter change, and this part of the Charter should start on 1 January 2008.

Our consultation

We have reached these conclusions after an intensive process of consultation with the Victorian community. This was the task set for us by the Victorian Government's *Statement of Intent* released in April 2005. Our community discussion paper and summary, which set out the questions that we hoped to answer, were sent in electronic and hard copy form to nearly 23,000 people. In addition, thousands of people accessed our website. By working with community networks and with the cooperation of many Victorian organisations, we have managed to reach many thousands more people.

The Committee participated in 55 community consultation meetings, information sessions and public forums and 75 consultations with government and other bodies. We talked to people ranging from community groups in Mildura, to Indigenous people in Warrnambool, to the victims of crime in Melbourne and to the Country Women's Association in Gippsland. We have travelled throughout the State to make sure that people from all walks of life have had an opportunity to be involved.

And Victorians have certainly wanted to have their say! Over the last six months, we have received 2524 written submissions from across the community. These submissions, whether received via the internet, written on the back of a postcard or set out in a letter, amount to the highest number of submissions ever received for a process in Australia that has looked at this issue. By comparison, the committee that considered a bill of rights for New South Wales in 2000–2001 received 141 submissions.

Overall, 84 per cent of the people we talked to or received submissions from (or 94 per

cent if petitions and the like are included) said that they wanted to see the law changed to better protect their human rights. As should be the case in a democracy, whether or not this now occurs is a matter for the Victorian Government and the Victorian Parliament.

Professor **George Williams** (Committee Chair)

Rhonda Galbally AO

Andrew Gaze

The Hon Professor **Haddon Storey** QC

Recommendation 1

Victoria should enact a new law to better protect and promote human rights.

Recommendation 2

The new law should be an ordinary Act of Parliament.

Recommendation 3

The new law should be called the Charter of Human Rights and Responsibilities.

Recommendation 4

The Charter of Human Rights and Responsibilities should contain a preamble that emphasises rights, responsibilities and respect and that recognises the special significance of human rights to Indigenous peoples as the traditional owners of the land.

Recommendation 5

The Charter of Human Rights and Responsibilities should protect civil and political rights. The Charter should state that, in protecting these rights, it does not limit or exclude any of the other rights that a person may hold.

Recommendation 6

The starting point for the Charter of Human Rights and Responsibilities should be the civil and political rights contained in the *International Covenant on Civil and Political Rights* 1966. Where necessary, the language should be modernised in line with the language used in the ACT *Human Rights Act* 2004 or modified as required for the Victorian context.

Recommendation 7

The following rights from the *International Covenant on Civil and Political Rights* 1966 should be dealt with in the Charter of Human Rights and Responsibilities as follows:

- A provision protecting the right to life should provide that, for the purposes of the Charter, the provision applies from the time of birth.
- A non-discrimination provision should refer to the grounds of discrimination listed in article 26 of the *International Covenant on Civil and Political Rights* 1966, as well as to ‘other status provided for under the *Equal Opportunity Act* 1995 (Vic)’. It should also contain a sub-section similar to section 19(2) of the *New Zealand Bill of Rights Act* 1990, which provides that special measures taken to assist disadvantaged

groups do not constitute discrimination.

- A provision protecting people from being unlawfully deprived of their property.
- A provision protecting the rights of minorities to enjoy their culture, practise their religion and use their language, which should draw upon the principles of multiculturalism contained in the *Multicultural Victoria Act 2004* (Vic).
- Indigenous rights should be protected through the recognition of specific cultural rights. The preamble should also recognise Indigenous rights.
- A right to self-determination should not be included in the Charter as a free-standing right, but it should be reflected in the preamble to the Charter.
- A right to found a family should not now be included in the Charter.
- Other civil and political rights should be included as adapted for the Victorian context.

Recommendation 8

The Charter of Human Rights and Responsibilities should state that the rights it protects ‘may be subject only to such reasonable limits set by Victorian laws that can be demonstrably justified in a free and democratic society’. This provision should also provide specific guidance on the factors to be taken into account in this balancing process.

Recommendation 9

The Charter of Human Rights and Responsibilities should provide that human rights belong to all people in Victoria and that only individual persons have human rights.

Recommendation 10

The Charter of Human Rights and Responsibilities should bind ‘public authorities’.

Recommendation 11

The definition of a ‘public authority’ should include government departments, statutory authorities, Victoria Police, and local government. It should also extend to all persons or bodies that perform public functions on behalf of the State of Victoria, when they are performing those public functions.

The definition should not include the Victorian Parliament in regard to proceedings in Parliament, nor should it bind the courts in their development of the common law.

The Charter should include a power to make regulations that add or remove organisations, or classes of organisations, from the category of public authority.

Recommendation 12

All ‘public authorities’ should be required to comply with the Charter of Human Rights and Responsibilities.

Recommendation 13

For legislative changes and policy and other decisions, the responsible Minister should ensure that a Human Rights Impact Statement is included in Cabinet submissions. The requirement for and details of such a Statement should be set out in the Cabinet Handbook. The Statement should include:

- a statement of the purpose of the Bill, regulation, policy or proposal;
- a statement of its effect upon any of the human rights in the Charter; and
- a statement of any limitation placed upon any human right in the Charter by the Bill, policy or proposal, the importance and purpose of this limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether there is any less restrictive means to achieve the purpose.

Recommendation 14

In regard to each Bill, the Attorney-General should present a Statement of Compatibility to Parliament. The Statement should set out whether or not, in the opinion of the Attorney-General, the Bill is consistent with the Charter. In doing so, the Statement should address the same matters as would be required in respect of a Human Rights Impact Statement.

Where appropriate, a member of Parliament introducing a private members Bill should make a Statement of Compatibility in the same form.

For each regulation tabled in Parliament, information should similarly be provided, in an appropriate form, regarding the compatibility of the regulation with the Charter.

Recommendation 15

The Charter of Human Rights and Responsibilities should include an override clause. The clause should provide that the Victorian Parliament may, in exceptional circumstances, override a Charter right by expressly declaring in the law it is intending to pass that an Act or provision is to operate notwithstanding that it is inconsistent with the Charter.

Where the Victorian Parliament uses this power, the Supreme Court should not be able to issue a Declaration of Incompatibility in respect of that Act or provision for five years after the Act or provision comes into force.

After this time, Parliament should again be able to state that the Act or provision is to continue to operate notwithstanding the Charter. Any subsequent renewals should also operate for five years.

Recommendation 16

The Scrutiny of Acts and Regulations Committee should be conferred with additional terms of reference to consider and report on matters arising under the Charter of Human Rights and Responsibilities, including questions referred to it by either House of Parliament, whether legislation is compatible with the Charter and consideration of any Declarations of Incompatibility made by a court.

The Committee should be able to report on Bills within ten sitting days of their introduction into Parliament or before their enactment, whichever is the later.

The Committee should be provided with sufficient resources to ensure that it can provide an appropriate level of advice and support to Parliament. Where possible, the Committee's work with respect to human rights should allow for input and submissions from the public.

The Committee should be renamed the 'Human Rights Scrutiny Committee'.

Recommendation 17

All Victorian courts and tribunals should be required to interpret legislation in a way that is compatible with the Charter. In doing so, courts and tribunals should be directed to take account of the purpose of the legislation. Where relevant, international law and the judgments of foreign and international courts and tribunals should be considered.

Recommendation 18

In a proceeding before a court or tribunal in which a question of law is raised as to the interpretation of a Victorian law in light of the Charter, the question may be referred by that court or tribunal to the Supreme Court for determination where:

- the referral occurs before the final determination of the proceeding by the court or tribunal;
- one of the parties to the proceeding applies for the matter to be referred; and
- the court or tribunal considers it an appropriate matter for determination by the Supreme Court.

Notice of such a referral should be given to the Attorney-General and the Victorian Human Rights Commissioner. Such notice should also be provided where the Supreme Court (other than on a referral) or the County Court is considering a question as to the

interpretation of a Victorian law in light of the Charter.

Recommendation 19

If the Victorian Supreme Court is satisfied that an Act, subordinate legislation or provision of either cannot be interpreted in a way that is consistent with the human rights listed in Charter, it may make a Declaration of Incompatibility.

Only the Supreme Court should have the power to make a Declaration of Incompatibility.

Where a Declaration of Incompatibility is made, it should not affect the validity or continuing operation or enforcement of the Act or subordinate legislation.

The Supreme Court should not make a Declaration of Incompatibility unless it is satisfied that a notice has been given to the Attorney-General and the Victorian Human Rights Commissioner that the Court is considering making such an order.

Recommendation 20

The Attorney-General and Victorian Human Rights Commissioner should have the right to intervene in any proceeding before any court or tribunal that involves the application or interpretation of the Charter. Other persons should be able to intervene in such matters at the leave of the court or tribunal, subject to such directions and conditions as the court thinks fit.

Recommendation 21

Where the Supreme Court makes a Declaration of Incompatibility

- a copy of the Declaration should be provided to the Attorney-General within seven days;
- the Attorney-General should arrange for the declaration to be laid before each House of Parliament on or before the sixth sitting day of that House after receiving the Declaration;
- the Human Rights Scrutiny Committee should inquire into and report on the Declaration within three months of the declaration having been laid before each House of Parliament; and
- the Attorney-General should prepare a written response to the Declaration to be presented before each House of Parliament within six months of having first presented the Declaration to Parliament.

Recommendation 22

The Victorian Government should implement and resource the following human rights education strategies:

- Public servants should have access to human rights training and education.
- Judges and tribunal members should have access to training and education by the Judicial College of Victoria.
- Parliamentarians and their staff should have access to training and education provided by Parliament.
- Members of the legal profession should have access to training and education by their legal education providers.
- Community, business and schools education strategies should be developed by the relevant government departments, the Victorian Human Rights Commissioner, local government and community based organisations.

Recommendation 23

There should be a Victorian Human Rights Commissioner (a member or Chairperson of the Equal Opportunity Commission Victoria). The Commissioner should have the following functions:

- to develop and deliver education programs about human rights and the Charter;
- to present the Attorney-General with an Annual Report on the operation of the Charter (which should then be tabled in Parliament) which should include consideration of any Acts that have been passed with override clauses and consideration of any Declarations of Incompatibility that have been made;
- to review the effect of Victorian laws on human rights every four years and report in writing to the Attorney-General on the results of the review (which should then be tabled in Parliament);
- where requested, to conduct audits of government departments and other public authorities to determine the consistency of programs and practices with the Charter;
- where the Victorian Human Rights Commissioner considers it necessary to do so, to intervene in proceedings that involve the Charter in any court or tribunal in Victoria; and
- to undertake systemic reviews of human rights issues, when such an inquiry has been referred to it by the Attorney General.

Recommendation 24

A Department of Justice Human Rights Unit should be created that is responsible for:

- issuing guidance to government departments and agencies to ensure increased

awareness of and compliance with the Charter;

- the vetting of policy and legislative proposals to ensure compliance with the Charter;
- providing assistance to government departments in their preparation of the Human Rights Impact Statements to be provided to Cabinet with policy and other proposals; and
- providing assistance to the Attorney-General in the preparation of Statements of Compatibility for new legislation.

Recommendation 25

Victorian government departments should include information in their annual report on what they are doing to comply with the Charter.

Recommendation 26

The Victorian Government should issue policy instructions to departments to develop human rights action plans.

Recommendation 27

The Charter should not disturb any of the remedies that a person may be entitled to under the existing law.

Recommendation 28

A public authority should not be considered to have acted unlawfully if it could not have acted differently, in accordance with law.

Recommendation 29

The range of matters the Ombudsman may consider should be clarified to include Charter rights.

Recommendation 30

A person who claims that a public authority has acted unlawfully by acting in a way that is incompatible with the Charter should be able to:

- apply to a court for judicial review of the decision of the public authority to act in the way it did; and
- apply to a court for a declaration that the act of the public authority was unlawful,

where the existing requirements for those proceedings are satisfied.

Recommendation 31

None of the remedies available in relation to any conduct made unlawful by the Charter should enable the award of damages unless a right to damages was available under the existing law.

Recommendation 32

The Victorian Government should consider how best to implement appropriate and accessible advocacy support as part of its commitment to the Charter.

Recommendation 33

The Charter should commence on 1 January 2007, except that those provisions dealing with the duty on public authorities to comply with the Charter (and the consequences of any breach) should commence on 1 January 2008.

Recommendation 34

The Charter should be reviewed four years after its commencement. The review should include consultation with the public and should consider matters including:

- whether the Charter should also protect human rights contained in other international instruments to which Australia is a party, such as the *International Covenant on Economic, Social and Cultural Rights*, *Convention on the Rights of the Child* and *Convention on the Elimination of All Forms of Discrimination Against Women*;
- whether, following consultations with Victorian Indigenous communities, a right to self-determination should be included in the Charter, and, if so, the appropriate definition and scope of that right;
- whether the protection from discrimination provided by the Charter should include additional grounds;
- whether changes should be made to how government departments are affected by the Charter, such as whether regular audits of their programs for compliance with the Charter should be made mandatory; and
- whether the remedies available under the Charter should be expanded, especially in light of access to justice considerations.

Recommendation 35

The Charter should again be reviewed eight years after its commencement. At that time, a decision should be made about whether further reviews are necessary and the timing of those reviews.