

Briefing Paper:

Key Reform Proposals for Strengthening the Victorian Charter

This Briefing Paper has been developed by key human rights, community and legal organisations with significant experience and expertise in relation to the operation of the Charter, and who represent the views of many marginalised and disadvantaged members of the Victorian community. The paper outlines recommendations that have unanimous agreement between these organisations and identifies seven key priority areas for reform of the Charter to strengthen and enhance its operation and the protection and promotion of human rights in Victoria.

A list of organisations that support these joint positions outlined in this paper is attached. More detailed positions of each organisation are canvassed in their individual submissions.

Recommendations to make the Charter more accessible

A Free-Standing Cause of Action

Currently, section 39 of the Charter is unnecessarily complex and has led to much confusion. As a result, it acts as a barrier to individuals being able to access a remedy for human rights breaches. Section 39 should be replaced with a clear and accessible provision that establishes a free-standing cause of action. Such a provision should operate in a similar way to discrimination complaints under the *Equal Opportunity Act 2010* (Vic).

The Charter should be amended to provide that a breach of section 38 gives rise to a standalone ground of judicial review. Individuals should also be able to rely on Charter rights in legal proceedings brought under any other existing cause of action, including as either an applicant or defendant.

Guidance for the drafting of such a provision can be drawn from both the *Human Rights Act 2006* (ACT) and the *Human Rights Act 1998* (UK). VCAT is an appropriate forum for bringing Charter complaints or determining Charter unlawfulness and should be conferred with original jurisdiction to do so.

Individuals should be able to bring legal proceedings under the Charter, irrespective of whether they have brought a dispute to the VEOHRC (see further recommendations below).

In terms of remedies, the Charter should be amended to provide powers to all courts and tribunals (including VCAT) to provide any appropriate relief or remedy for breach, including damages where appropriate. Courts and tribunals already are entrusted with these powers and undertake this role on a daily basis. Particularly in light of the recent *Bare* decision, failure to comply with section 38 of the Charter should constitute (or be able to constitute) jurisdictional error.

Role of VEOHRC and the Ombudsman

Both VEOHRC and the Ombudsman have integral roles to play in the Charter's operation. In addition to its current roles and functions, the Charter should be amended to expand VEOHRC's role to include:

- jurisdiction to provide dispute resolution services for human rights disputes under the Charter, modelled on Part 8 of the *Equal Opportunity Act 2010* (Vic);
- own-motion powers to audit public authorities for compliance with the Charter;

- a research function relating to the operation of Charter, similar to that under the *Equal Opportunity Act 2010* (Vic); and
- an expanded education function.

The Ombudsman should retain her current jurisdiction to enquire into, or investigate, whether an administrative action is incompatible with a human right set out in the Charter.

Inclusion of ESC rights

The human rights protected in the Charter should be expanded to include the economic, social and cultural rights. Economic and social rights are the rights that matter most to many Victorians and yet are also the rights that are the most vulnerable. In large part, the Victorian Charter in its first eight years of operation has had its greatest relevance and impact in relation to economic and social rights, particularly in areas such as housing and mental health. Individuals are already using the Charter to make complaints about breaches of social and economic rights, and so protecting these rights would not significantly increase the number of complaints that are brought. The inclusion of economic and social rights is highly likely to enhance the development of laws and policies and decisions that are made by public authorities.

Recommendations to clarify and simplify the Charter's operation

Definition of Public Authorities

The Charter should retain its current broad and flexible definition of a “public authority”. However, consideration should be given to how the definition could be clarified to provide certainty to functional public authorities and to rights holders. Options for providing such clarity include:

- amending the Charter to include a note within section 4 of the Charter, along similar lines to section 40A(c) of the *Human Rights Act 2004* (ACT), which specifies that certain functions “are taken to be of a public nature”; and/or
- clarifying the effect of outsourcing, based on the principle that a plaintiff be able to pursue a claim against the direct service provider, rather than be required to trace the Charter obligations back to a core public authority; and/or
- amending the Charter to include a provision allowing organisations to *opt-in* to the obligations on public authorities, along similar lines to section 40D of the *Human Rights Act 2004* (ACT).

In addition to these options, non-legislative options include recommendations that an online register of public authorities be established and that greater training, support and resources be provided to assist functional public authorities.

Statutory Construction (section 32) and Limitations on Rights (section 7)

The operation of section 32 has become both complex and uncertain. The Charter should be amended to clarify that section 32(1) is intended to be a rule of statutory interpretation that is stronger than the principle of legality and one that imposes a positive obligation to interpret statutory provisions in the most human rights compatible way, so far as it is possible to do so consistent with the purpose of the statutory provision. This clarification could be achieved through either a note or amendment to the wording of section 32(1).

The role that the limitations provision in section 7(2) plays in relation to section 32(1) also requires clarification. One option would be to amend the term “compatible with human rights” used in sections 28, 32 and 38 to “compatible with human rights as permissibly limited under section 7”.

Section 32(2) should be strengthened to provide that, in interpreting a statutory provision, courts must consider relevant international law.

Another amendment that would ensure consistency and clarification would be to amend section 36 to replace the term “inconsistent” with “incompatible”.

These amendments are straightforward changes that would play an essential role in clarifying and simplifying the Victorian Charter in order to improve and strengthen its effective operation.

Notification and Intervention Provisions

There is currently a perception (and on occasion reality) that the notification and intervention provisions in the Charter can contribute to increased delays, costs and complexity of legal proceedings. VEOHRC plays an important role in undertaking its intervention function under section 40. The notification provision in section 35 is essential for the VEOHRC to adequately fulfil its intervention power. However, concerns about the delay involved in the exercise of the notification provision should be avoided by exploring options to streamline the notification process. Options to do so could include limiting the notice and intervention provisions in the Charter to give the courts discretion to order parties to give notice and permit intervention in cases of general importance, or where the interests of justice otherwise require it, or amending practice notes issued by courts to provide guidance on a more streamlined process.

Embedding a human rights culture

In order to promote a stronger human rights culture within Victoria and the Victorian public sector, a range of complementary approaches are required, including those discussed in this Briefing Paper. These measures include:

- changes to technical aspects of the Charter’s current operation, which would have the effect of making the Charter more accessible and effective;
- including stronger and clearer remedial provisions for allegations of breaches of the Charter;
- providing greater systemic powers to VEOHRC; and
- increased education and training for the public sector and the community.

It is important that adequate funding for training and education is provided on an ongoing basis and beyond “start up” or “implementation” costs. Lessons on embedding a strong human rights culture across government could be drawn from other examples of successful cultural change, such as the introduction and institutionalisation of freedom of information laws and privacy laws.

Contact:

Ben Schokman
Human Rights Law Centre
Phone (03) 8636 4451
Email ben.schokman@hrlc.org.au

Katie Miller
Law Institute of Victoria
Phone (03) 9607 9497
Email president@liv.asn.au

This Briefing Paper is endorsed by the following organisations:

Castan Centre for Human Rights Law <http://www.monash.edu/law/centres/castancentre>

The Castan Centre for Human Rights Law promotes and protects human rights through its world-renowned public scholarship. The Centre works in the key areas of research, teaching, public education, policy and student programs and actively participates in public debates.

Federation of Community Legal Centres <http://www.communitylaw.org.au/>

The Federation of Community Legal Centres is the peak body for 50 community legal centres (CLCs) in Victoria providing free legal help to clients facing economic and social disadvantage. CLCs assist over 100,000 Victorians every year on a broad range of legal and human rights issues, including family violence, family law, tenancy, infringements, and credit and debt.

Human Rights Law Centre <http://hrlc.org.au/>

The Human Rights Law Centre works to strengthen the legal protection of human rights at the national, state and territory levels by contributing to policy development and running significant human rights cases in the courts. The HRLC has undertaken a range of activities in relation to the Victorian Charter, including casework and litigation, providing legal advice and assistance, performing policy analysis and advocacy, and carrying out education and training.

Justice Connect Homeless Law <https://www.justiceconnect.org.au/>

Justice Connect's Homeless Law is a specialist legal service for people experiencing or at risk of homelessness. Homeless Law provides legal information, advice and representation to approximately 400 clients per year, as well as strategic advocacy to achieve systemic change.

Law Institute of Victoria <http://www.liv.asn.au/>

As the peak body for the Victorian legal profession, the LIV represents more than 19,000 lawyers and people working in the law in Victoria, interstate and overseas. The LIV promotes justice for all, advancing social and public welfare in the operation of the courts and legal system as well as advancing education and public confidence in the legal profession and in law-making.

Liberty Victoria <http://www.libertyvictoria.org/>

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia and is actively involved in the development of Australia's laws and systems of government.

Victorian Council of Social Service <http://vcoss.org.au/>

VCOSS is the peak body of the community sector in Victoria. VCOSS works to ensure that all Victorians have access to and a fair share of the community's resources and services, through advocating for the development of a sustainable, fair and equitable society. VCOSS members reflect a wide diversity, ranging from large charities, sector peak organisations, small community services, advocacy groups and individuals involved in social policy debates.