Submission by the Victorian Equal Opportunity and Human Rights Commission to the National Human Rights Consultation

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Victorian Equal Opportunity
& Human Rights Commission

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INTRODUCTION

INTRODUCTION

> *"This is an historic day for Victoria. Today the government fulfils its commitment to provide better protection for human rights for all people in Victoria through the enactment of a charter of rights and responsibilities that will strengthen and support our democratic system ...*
>
> *This Bill is about those rights and values that belong to all of us by virtue of our shared humanity ... this Bill brings human rights to the Victorian community in a relevant and practical way. It enshrines values of decency, respect and human dignity in our law, and lays the foundation for protecting human rights in the daily lives of all Victorians."*
>
> The Hon Rob Hulls, Attorney-General
> *Second reading speech, Charter of Human Rights and Responsibilities Bill*
> 4 May 2006

In June 2006, the Victorian Parliament made history by passing the *Charter of Human Rights and Responsibilities Act 2006* (referred to as 'the Charter' throughout this submission). With the passage of the Act, Victoria became the first Australian state to adopt a comprehensive human rights charter – a landmark step not only for the people of Victoria, but also for the protection of human rights in Australia.

Two years earlier, the Australian Capital Territory had become the first Australian jurisdiction to enact human rights legislation by passing the *Human Rights Act 2004* (ACT) and Victoria's historic action provided a strong impetus for other Australian jurisdictions to also consider human rights legislation. As Victoria's Attorney-General, The Hon Rob Hulls, observed: "Since Victoria took up the human rights mantle, other jurisdictions have been inspired to do the same".[1]

At the end of 2007:

- The Tasmanian Government was considering a recommendation by the Tasmanian Law Reform Institute that the state should adopt a Charter of Human Rights.
- The Western Australian government was considering a recommendation by the Committee for a Proposed WA Human Rights Act that the state should adopt such an Act.
- The platform of the newly elected Federal Government included a commitment to consult with the community about the best way to recognise and protect the human rights enjoyed by Australians.

While Tasmania remains actively committed to pursuing human rights legislation, further developments at the state level have stalled. This makes the current national consultation process even more vital. Not only because it honors the commitment of the Federal Government, but also because it responds to ongoing and increased awareness about human rights in Australia, and a growing concern that these rights should be formally protected. Most recently, this was evidenced in the outcomes of the Australia 2020 Summit, where the adoption of a national Charter of Human Rights (similar to those introduced in Victoria and the Australian Capital Territory) was recommended by three separate summit groups considering the following themes:

- Strengthening Communities, Supporting Families and Social Inclusion;[2]
- The Future of Australian Governance;[3] and
- Australia's Future Security and Prosperity in a Rapidly Changing Region and World.[4]

For Victoria, the enactment of the Charter was a response to community concerns and aspirations, and a clear commitment by government regarding how it would conduct itself in the future. The Charter asserts the central importance of human rights considerations within the activities of government and creates a framework for the practical integration of human rights analysis within the processes that lead to the creation of laws, the development of public policy and the delivery of public services.

The Victorian Equal Opportunity & Human Rights Commission ('the Commission') has a number of specific functions designed to help ensure that the commitment of the Charter is realised:

- reporting annually to the Attorney-General on the operation of Charter;
- providing ad-hoc advice and conducting human rights reviews upon request;
- providing education about human rights and the Charter;
- intervening in court and tribunal proceedings involving questions related to the Charter; and
- assisting the Attorney-General with the review of the Charter in 2011.

Having now exercised these functions for 2½ years, the Commission is positioned to make a uniquely evidence-based contribution to this consultation. In this submission, which argues uncompromisingly for the adoption of a national human rights instrument, we put forward arguments based on Victoria's experience of the operation of the Charter. We are able to demonstrate that many of the arguments raised to oppose a national human rights instrument simply do not withstand rigorous scrutiny. They contradict the demonstrated experience of Victoria, the Australian Capital Territory and all of the jurisdictions that we commonly look to as a comparator or guide. Advocates for human rights reform are routinely challenged to "make the case" for change. This demand is reasonable, and this submission is a direct response to it. We urge the Committee to apply the same expectation to those arguing for the status quo, and reject those arguments that are based merely on assertion as opposed to evidence.

So briefly, what does the evidence from Victoria tell us?

1 The Hon Rob Hulls, Attorney-General for Victoria, *State of human rights: charter to make a difference*, Media release, 28 December 2007.

2 Department of the Prime Minister and Cabinet, *Australia 2020 – Australia 2020 Summit Final Report*, May 2008, p 172 and 191
3 Ibid p 308
4 Ibid p 367 and 378

After 12 months of preparation, the Charter came into full effect on 1 January 2008. Evidence gathered by the Commission for its yearly reports on the operation of the Charter[5] already demonstrates that it is working effectively and has achieved a great deal in its first year of full operation. It also shows that Victoria is making steady progress towards building a culture where human rights are recognised, respected and protected throughout our community.

Victoria's experiences with the Charter during 2008 show very clearly the substantial, community-wide benefits of adopting human rights principles across government. Already, we are seeing improvements in the responsiveness of state and local government services, in the quality of public sector decision-making and in the protection of vulnerable people and groups. We are also seeing the development of – and a growing interest in – a community dialogue about human rights in Victoria. Perhaps most importantly, we are starting to get a sense of the value of a human rights-based approach in supporting liveable, caring communities – places where people are given a 'fair go', the opportunity to participate in community life and the chance to realise their full potential. This is proof that the Charter is much more than a 'bureaucratic exercise'.

For some people, these changes may not extend far enough or may be too slow in coming. However, the fact that the Charter makes consideration of human rights part of the law of Victoria for the very first time is – in itself – a very significant development that offers a unique opportunity for positive change over time. The reality is that developing a mature human rights culture will not happen overnight, especially as Australia is well behind other countries in formally adopting human rights instruments and principles. We should not forget that this consultation is occurring 60 years after the signing of the Universal Declaration of Human Rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms has also been in force for nearly 60 years. Canada enacted a Charter of Rights and Freedoms more than 25 years ago, the United Kingdom adopted its *Human Rights Act* a decade ago and New Zealand enacted its *Bill of Rights Act* in 1990.

These – and other – human rights instruments are now firmly in place. But it took many years for these countries to develop frameworks that reflect their individual histories, circumstances, institutions and cultures. This experience shows that building a strong human rights culture – and a society where people are aware of and actively assert their rights – takes time. Historically, Australians have not been brought up to be assertive about our rights. Given this history, which suggests that Victoria might be expected to make relatively slow advances in some areas of human rights, it is surprising that we have made as much progress as we have in just two years.

In many instances, this progress is not dramatic or spectacular – but it is groundbreaking nonetheless. The Charter is having an impact on the operations of every government department in Victoria, on most local councils, on many public sector agencies and authorities, on our courts and legal system, and on a range of community organisations. These impacts range from reinvigorating existing practices through to substantial changes in the way organisations operate, make decisions, deliver services and deal with people. The Charter is also encouraging new ways of thinking about human rights, including exploring innovative approaches to giving people a say in decisions that affect them.

Victoria's experiences over the last two years are proof that – at heart – human rights instruments are about ensuring that people are treated with dignity and respect, and have the information and support they need to stand up for their rights. When governments adopt human rights principles, it is not only disadvantaged people, groups and communities that reap the benefits – all of us who use government services on a regular basis benefit from these services becoming more responsive to our individual needs. While many of us may never need the active protection of a human rights instrument, there may be occasions when we find ourselves caught up in unusual, stressful or traumatic circumstances – perhaps a serious injury or illness, or the loss of a job or housing, or involvement with the courts or police. At these times, we will almost certainly appreciate an effective human rights framework being in place.

Victoria is only at the start of our journey towards developing a human rights culture. But, after several years of developing, implementing and monitoring the Charter, we can say with confidence that there are significant benefits in working towards a system of government that gives equal weight to human rights, alongside economic, social and environmental considerations. We can demonstrate that a human rights framework delivers real and lasting improvements in public policy, decisions and services. We can show that focusing on human rights principles improves the development and interpretation of our laws. Finally, we can demonstrate that adopting such a framework is not something to be feared or avoided – but something that can make a real and lasting difference in protecting our rights and freedoms, and improving our quality of life.

These are not easy times for Australian governments as they grapple with the major and unprecedented challenges of the global financial crisis, climate change, an ageing population, increasing global competition and rapid social and technological change. In this difficult environment, developing a strong, mature human rights culture in Australia will be a long-term exercise. But that should not deter or discourage us. Committing to and investing in human rights through the adoption of a national human rights instrument is something that will ultimately improve our capacity to meet existing challenges and those that lie ahead – ensuring that we move into the future as a fair, successful and proudly diverse community.

5 A copy of the Commission's reports covering both 2007 and 2008 are attached to this submission.

PART ONE

A NATIONAL HUMAN RIGHTS INSTRUMENT – WHY DO WE NEED ONE AND WHAT WOULD IT ACHIEVE?

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WHY AUSTRALIA NEEDS A HUMAN RIGHTS INSTRUMENT

The Current Protection of Human Rights in Australia is Inadequate

In the setting of a national consultation regarding the best means by which to protect human rights, it is important to begin with what might seem to be an acknowledgement of the obvious: Generally, the point of disagreement in this debate is not the importance of rights themselves, but more often how they are best articulated, promoted and enforced. Given that Australia is a relatively healthy and robust democracy there is a common view that current political and legal structures are sufficient to protect human rights (however they are defined) or at least a view that there is no real problem or issue that requires fixing.

Australia has an understandable sense of confidence in our Westminster system of government that has worked and continues to work well, and within which the institutional components have each taken on various responsibilities for the safeguarding of rights. Despite these efforts however, of itself our system of government is not sufficiently equipped to fully promote and ensure respect for human rights. The relationship between the judiciary and the legislature provides a clear example of this. The eminent English jurist Lord Denning once wrote:

> *it is fundamental to our society to see that powers are not abused or misused. If they come into conflict with freedom of an individual or with any other of our fundamental freedoms, then it is the province of the judge to hold the balance between the competing interests.* [6]

As a judge who was widely recognised for shaping and developing the common law in order to promote fairness and justice, Lord Denning's words reflect much more than sentiment. However, they must be read and understood with an appreciation of the limits faced by the judiciary when it is the actions of either the executive or legislature from which protection is required. In 1973 then Attorney-General and Senator Lionel Murphy summarised these limits in the course of introducing a Human Rights Bill in the federal parliament in the following terms:

> *Although we believe these rights to be basic to our democratic society, they now receive remarkably little legal protection in Australia. What protection is given by the Australian Constitution is minimal and does not touch the most significant of these rights. The common law is powerless to protect them against the written laws and regulations made by Parliament, by Executive Government under delegated legislative authority, and by local government and other local authorities. The common law exists only in the interstices of statutory legislation.* [7]

Senator Murphy's assessment remains valid today, and has been repeatedly endorsed. In 2001, for example, the NSW Parliamentary Standing Committee on Law and Justice in its Inquiry into a Bill of Rights for NSW, whilst acknowledging the important role played by the common law, also recognised that many rights do not exist at common law, and those that do can be overridden by the legislature at any time. [8]

More recently in Victoria, when enacting the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), Victorian Attorney-General Rob Hulls conceded that the existing protections of human rights in Victoria were not sufficiently robust and a specific human rights legal framework was necessary. In his second reading speech, the Attorney-General noted that "there are gaps in the existing legal protection of human rights", and that the bill followed a comprehensive consultation undertaken across Victoria, which revealed "overwhelming community support for a change in Victorian law to better protect human rights".[9]

The Consequences of having Inadequate Mechanisms for the Protection of Human Rights

In broad terms, the consequences that flow from failing to adequately protect human rights within our system of government are two-fold. Firstly, serious breaches can and do occur. Secondly, there is the cost of lost opportunity – in other words the failure to realise the benefits that flow from ensuring governmental actions and decision-making accord with human rights principles.

Human Rights Breaches

The justifiable pride in Australia's relatively strong human rights record can trigger blindness to both the historical and contemporary evidence that proves we are far from perfect. Professor Larissa Behrendt addresses this blindness forcefully in the following observation:

> *It is not enough to say that our human rights standards are better than other countries who have more brutal and systemic abuses of rights than those that occur on Australian soil…it is not enough that we are better than the worst offenders on a human rights report card; we should be the best society that we can be.* [10]

In challenging this blindness, it is critical to emphasise that we are not talking about trifling, technical breaches of human rights, but rather breaches of a profound and significant nature. Examples include:

6 Denning, LJ *The Family Story* (1981) p 179, referred to in North, J *Restoring rights and liberties and restraining executive power in a climate of fear*, Law Institute Journal, May 2005, p 24.

7 Reproduced in the Parliamentary Hansard of the ACT Legislative Assembly, in the second reading of Chief Minister and Attorney-General J Stanhope, for the *Human Rights Bill* 2003, 18th November 2003.

8 *A NSW Bill of Rights* NSW Standing Committee on Law and Justice, 2001 available at http://www.parliament.nsw.gov.au. See also Thampapillai, V *Why it's time for a Bill of Rights – Law Society urges debate* Law Society Journal April 2005, p 67.

9 Hulls, Rob, Attorney-General for Victoria, Second Reading Speech, Charter of Human Rights and Responsibilities Bill, 4 May 2006, p 1290.

10 Professor Larissa Behrendt, *Shaping a nation: Visionary leadership in a time of fear and uncertainty*, presented as the 9th John Curtin Prime Ministerial Library Anniversary Lecture, 5 July 2007, available at http://john.curtin.edu.au/events/speeches/behrendt.html

- in 2004 the High Court held immigration laws that meant individuals could be subject to indefinite detention were a valid exercise of legislative authority[11];
- in 2004 the federal parliament acted to further entrench discrimination against same-sex couples with the passage of the *Marriage Legislation Amendment Act* 2004 (Cth);
- in 2005 the federal parliament acted to curtail civil liberties and fundamental rights such as the right to the presumption of innocence, in the interests of our national security, with the passage of the *Anti-Terrorism Act (No. 2)* 2005;
- in 2006-7, Australian citizen Cornelia Rau was detained pursuant to Australia's migration laws, and permanent resident Vivien Alvarez-Solon was deported from Australia;
- legislation in some states and territories has from time to time imposed a regime of mandatory imprisonment for even minor categories of property offences;
- legislation in some states also provides for the continued detention of individuals who have served a sentence of imprisonment, but are assessed as being at risk of re-offending, without a human rights based analysis to address whether the balance between the rights of the individual vis-à-vis the rights of the community has been appropriately struck;
- nation-wide reform of state based tort laws reduced or removed the rights of individuals to seek compensation in certain circumstances;
- significant gaps persist federal anti-discrimination laws which currently do not provide protection from discrimination on the basis of sexual orientation or gender identity; and
- the UN Human Rights Committee's 2009 report on Australia states that many of the Northern Territory emergency intervention policies breach the human rights of Aboriginal people, in particular the suspension of the *Racial Discrimination Act 1975* (Cth) and the failure to consult with Indigenous communities about how to effectively respond to their needs.

In the Commission's view, the examples extracted above demonstrate the serious need to ensure enhanced protection for human rights. This is not only about promoting improved realisation of human rights in the future, but also about safeguarding what we already enjoy. As these examples illustrate, in responding to particular issues, when not required to do so, decision makers can fail to consider, or deliberately overlook, human rights considerations. As the former Chief Justice of Australia Sir Gerard Brennan has previously commented:

> *The exigencies of modern politics have sometimes led Governments to ignore human rights in order to achieve objectives which are said to be for the common good.*[12]

When human rights are under serious or imminent threat by the actions of government, by then it is likely to be too late to reconsider our preferred mechanisms for their protection. It is critical to ensure that the institutional framework of government enshrines mechanisms that offer a form of insurance, in terms of protecting against regression, as well as a source of aspiration – a challenge to do better.

In the context of a federation such as Australia, it is important to clarify that the move by some states and territories to adopt a human rights instrument does not mitigate the imperative for an instrument at the national level to both protect and promote rights. Not only is it illogical that human rights protections be defined by a person's state or territory of residence, those state and territory human rights instruments that have been enacted lack any capability to influence those matters that are under the exclusive control of the Commonwealth, or indeed Commonwealth activities in those areas under joint state and federal power. Accordingly, while Victorians and residents of the Australian Capital Territory enjoy important protections in relation to the conduct of their state and territory governments, in a broad range of areas including social security, national security, health, education, taxation, immigration and telecommunication there is no such protection, or it is incomplete. National protection of human rights is not only required to complete the picture, but also to provide national leadership and encourage change in those states and territories yet to consider or act on this issue.

Lost Opportunities and Benefits

Throughout this submission the Commission will refer to evidence that demonstrates the significant benefits associated with the adoption of a national human rights instrument. Benefits experienced collectively at a systemic level, as well as the tangible benefits and advancements experienced by individuals in their own lives. For present purposes, it is sufficient to refer to the broad assessments that have been made of the operation and impact of human rights instruments of two highly comparable jurisdictions – New Zealand and the United Kingdom.

In New Zealand, an independent evaluation of human rights protections (namely the *Bill of Rights Act 1990*) commissioned by the Associate Minister for Justice in 2000, described the broad benefit of such a framework in the following terms:

If taken into account early in the policy-making process, human rights tend to generate policies that ensure reasonable social objectives are realised by fair means. They contribute to social cohesion and, as the Treasury's Briefing to the Incoming Government (1999) observes:

> *Achieving and maintaining a sense of social cohesion and inclusion is an important aspect of welfare in the broadest sense... Fairness to all parties involved extends both to the processes by which things are done and to the outcomes themselves. Social cohesion is low when individuals or groups feel marginalised.*[13]

11 *Al-Kateb v. Goodwin* [2004] HCA 37.
12 Sir Gerard Brennan, 'The Constitution, Good Government And Human Rights,' *Human Rights Law Resource Centre*, 12 March 2008, available at www.justinian.com.au/files/brennanhumanrights.pdf.
13 *Re-evaluation of Human Rights Protections in New Zealand* (11 August 2000) at paras 206-207, reproduced in *The Guidelines on the New Zealand Bill of Rights Act 1990: A guide to the rights and freedoms in the Bill of Rights Act for the Public Sector,* New Zealand Ministry of Justice 2004.

The UK *Human Rights Act 1998* has been the subject of similarly positive assessments. The Chairman of the UK Audit Commission has commented:

> *Time and again we observe in those public bodies, fast increasing in number, which have adopted and embedded human rights principles in their everyday operations, that they provide much higher levels of service to the public.*[14]

This is not an issue on which the evidence is inconclusive or incomplete. Consistently across comparable jurisdictions that have implemented human rights instruments the results demonstrate their significant contribution to enhanceing the effectiveness of public administration. As the more detailed material below illustrates, human rights compliant decision-making and action is improved decision-making and action, not because human principles prescribe or dictate certain outcomes, but because they provide a framework for analysing and fully understanding often seemingly intractable issues, in order to identify the best possible response. It seems illogical that as a nation we would seek to ignore such opportunities.

Human Rights Reform is not a Competition

In advancing the position that our current political and legal structures are inadequate to safeguard and promote human rights, it is important to address one of the misconceptions that repeatedly underlies many of the arguments raised in opposition to the adoption of a national human rights instrument, namely, that it would somehow threaten or undermine our existing system of democratic government. The reasoning is that human rights are individualistic and focussed on minorities, and their protection operates as a fetter on the legitimate exercise of power by governments who enjoy the support of a majority of the constituency, particularly through an alleged transfer of power to the judiciary.

We address each of these misconceptions in greater detail in subsequent parts of this submission. By way of background to that analysis, however, it needs to be understood that far from minimising or dismissing the strengths of our political and legal systems, identifying their limitations is about fostering an understanding of how to build on the firm foundation that they provide in order to make our system of government both complete and more effective.

A national human rights instrument is not in some form of competition with democratically elected governments and the rule of law, rather it completes the democratic framework and in fact relies upon both democracy and the rule of law in order to realise its objectives. The complementary nature of this relationship is most effectively illustrated by another common argument advanced in opposition to a national human rights instrument.

Frequently it is asserted that the past experiences of the former Eastern bloc dictatorships, and presently, countries such as Zimbabwe where egregious human rights abuses were or are common place despite the existence of comprehensive human rights instruments, illustrates their lack of effectiveness. Tragically, the facts underlying this argument are not in dispute, but their interpretation is. A human rights instrument can only work when it operates alongside democratic governance and the rule of law, it is the failing of the political and legal systems in such countries rather than the failing of the human rights instruments themselves that results in such abuses. The system of government that we enjoy today is not at risk of being diminished by the effective protection of human rights – rather it provides an essential platform for their protection, and is enhanced when this occurs.

WHAT WOULD THE ADOPTION OF A NATIONAL HUMAN RIGHTS INSTRUMENT ACHIEVE?

A Human Rights Based Approach to the Role of Government[15]

In order to fully appreciate the opportunities and benefits afforded by the adoption of a national human rights instrument, it needs to be understood as being much more than a list of abstract principles or directives regarding what government can or cannot do. A human rights instrument is a catalyst for cultural change in the operation of government, it represents a clear commitment by government to conduct itself with respect for the human rights of all those subject to its authority.

> *In his second-reading speech for the Charter, the Attorney-General noted that the Charter "brings human rights to the Victorian community in a relevant and practical way. It enshrines values of decency, respect and human dignity in our law, and lays the foundation for protecting human rights in the daily lives of all Victorians".*[16]

The objective of the Charter and human rights instruments more broadly, is frequently described as that of building a culture of human rights across society. While this is correct, the realisation of a culture of human rights is dependent upon the actions, attitudes and awareness of all members and segments of the community, many of whom do not have direct obligations or functions under such enactments. In this context, human rights instruments recognise that government – through its actions and leadership, and in all its forms – plays an integral part in fostering a culture of human rights. In this regard, a national human rights instrument can be conceptualised as a compact between government and the community regarding how it will exercise the authority with which it has been vested. For this reason, it requires public authorities to recognise and comply with human rights obligations and to promote a human rights based approach to the work of government.

14 Excerpt from a 2004 speech by J Strachan quoted in Butler, F *Improving Public Services: Using a Human Rights Approach. Strategies for Wider Implementation of the Human Rights Act Within Public Authorities*, a report for the UK Department of Constitutional Affairs by the Institute for Public Policy Research, June 2005, available via www.ippr.org.

15 The material in pages 10-15 of this submission is extracted from Victorian Equal Opportunity & Human Rights Commission, *The 2008 report on the operation of the Charter of Human Rights and Responsibilities – Emerging Change,* March 2009, pg 13-17.

16 The Hon Rob Hulls MP, Op cit pg 1295.

What is a human rights based approach to government?

A human rights based approach to government requires equal consideration of what government is doing (or is going to do) and how it intends to do it.

In determining *what* to do (sometimes described as 'human rights programming'), governments must recognise that their actions invariably involve engaging with the rights of the community or particular segments of the community, and that they bear an obligation to protect, promote and fulfil those rights. In determining *how* to take action, a human rights based approach requires governments to appreciate the importance of strategy, process and methodology in making decisions and the significant influence these exert on the ultimate success, utility and acceptance (including the perceived legitimacy) of government initiatives. Where governments incorporate human rights considerations into the strategies, processes and methodologies they use to make decisions, their subsequent practical actions and services are more likely to respect and incorporate human rights.

The core principles or components of a human rights based approach to government are frequently summarised in the acronym PANEL:

Participation
Accountability
Non-discrimination and attention to vulnerable groups
Empowerment
Linking planning, policies and practices to human rights principles and standards.

Participation – People and communities must be involved alongside government in the assessment of issues, decision-making and the implementation of strategies. Participation needs to be active, free and meaningful. Participants must be able to shape and influence the decision-making process, as well as contribute significantly to the delivery and monitoring of initiatives. Genuine participation will require the allocation of time and resources; however, it is essential to understanding the human rights implications of a particular issue, building capacity within communities, and avoiding treating individuals and communities as passive recipients of welfare.

Accountability – To achieve results, clear accountabilities must be set. However, in the context of human rights, the notion of accountability extends beyond articulating responsibility and answerability: it actively involves individuals and groups in processes designed to monitor and evaluate performance. Where performance is assessed as unsatisfactory, the same individuals and groups must be involved in identifying the reasons for the unsatisfactory results. Perhaps most critically, unsatisfactory performance must be remedied.[17]

Non-discrimination and attention to vulnerable groups – A human rights based approach to government requires particular consideration of the needs of marginalised and vulnerable groups – especially those that experience high levels of discrimination and that have fewer economic, social and political resources than others. This consideration must extend beyond the context of access to service initiatives and engagement with programs. Vigilance must be exercised to ensure active participation by these groups: they must be a part of the accountability matrix and their experience in engaging with programs and with government should be empowering.

Empowerment – Empowerment can be a long-lasting benefit of initiatives designed and implemented in accordance with a human rights based approach. Individuals and communities that experience a particular engagement with government as empowering emerge more aware of their rights and with an understanding of how those rights are claimed or exercised – including that they are matched by corresponding responsibilities. This empowerment and awareness equips people with a broader set of tools and strategies for responding to future challenges.

Linking planning, policies and practices to human rights principles and standards – A human rights 'lens' or perspective must be applied when planning and implementing the work of government in order to understand the human rights implications and obligations associated with particular initiatives and decision-making. Adhering to human rights standards establishes minimum guarantees based upon international benchmarks. Importantly, adherence to human rights principles and rights-oriented strategies also promotes the attainment of broader social objectives. Sometimes, human rights will be realised progressively rather than immediately; however, rights must not be diminished, and progress must be maintained and protected.

Many of these principles and objectives are familiar to public authorities, service providers and others. The advantage of a human rights based approach is that it brings them together in a cohesive framework, where their relationships with each other are highlighted and – perhaps most importantly – where the process and content of accountability is made more rigorous through the application of external benchmarks. For these reasons, a human rights based approach to government should not be regarded as intimidating or dismissed as merely the implementation of new bureaucratic processes. Instead, it should be seen as improving, reinforcing and reinvigorating principles and values that are already familiar, but that may be vulnerable to being overshadowed if not comprehensively integrated into organisational activities and decision-making.[18]

What are the benefits of a human rights based approach to government?

Adopting a human rights based approach means that not only is government complying with its human rights obligations, but that it has also moved from 'technical compliance' to 'principled compliance'.

Technical compliance centres around the avoidance of human rights breaches: the relevant authority examines what it has

17 For a detailed analysis of the concept of accountability see Potts, H., *Accountability and the Right to the Highest Attainable Standard of Health*, University of Essex Human Rights Centre and Open Society Institute Public Health Program, 2008.

18 Department of Health and the British Institute of *Human Rights, Human Rights in Healthcare – A Framework for Local Action*, March 2007, p 20.

always done, or already intends to do, and seeks to identify and avoid potential breaches of any human rights within those activities. Technical compliance is a sound first step, but it falls significantly short of principled compliance.

Principled compliance is a comprehensive and consistent human rights based approach to government. Principled compliance focuses on human rights obligations as the starting point for determining strategic priorities. In this way, the human rights based approach results in the promotion of rights rather than simply the avoidance of breaches of obligations.

The benefits of a human rights framework extend beyond compliance with obligations. The Commission recognises the ongoing expectation placed upon human rights advocates to demonstrate why the fulfilment of human rights is desirable and should be accorded priority within government. In this part of our submission, we respond to this challenge in two ways: Firstly, by examining the evidence concerning the positive impact of a human rights based approach at the systemic level, and secondly, highlighting a range of case studies that illustrate how individuals experience the positive results of government acting in accordance with human rights principles.

Evidence of the Systemic Impact of a Human Rights Based Approach to the Role of Government

Human rights and community liveability

In October 2007, the Victorian Treasurer requested the Victorian Competition and Efficiency Commission (VCEC) to undertake an inquiry into enhancing Victoria's liveability.[19] For the purposes of the inquiry, VCEC developed the following working definition of liveability:

> *Liveability reflects the wellbeing of a community and represents the many characteristics that make a location a place where people want to live.*[20]

This notion of liveability was examined in economic as well as social terms. In particular, VCEC noted the link between liveability and competitiveness that arises as a consequence of liveability being a key factor in the ability of a region, state, city or community to attract labour and capital.[21] VCEC identified three primary drivers of liveability:

- Economic strength and markets;
- Governments; and
- Human rights.[22]

VCEC summarised the link between the three drivers in the following terms:

> *Markets are the main providers of goods and services and in doing so generate employment, all of which provide a foundation for the liveability of a community. Governments provide an institutional framework for oversighting markets and ensuring that the needs of communities are met and community goals pursued. Human rights are the fundamental values with which communities, governments and markets operate.*[23]

This 'macro' appreciation of the influence and importance of human rights was also reflected at a 'micro' level. VCEC reported that, based on its public consultations, it was convinced that while Victorians are concerned with their own liveability, their perception of this liveability is influenced by the extent to which other people are getting a 'fair go'.[24] This appreciation of well-being as extending beyond one's personal circumstances to encompass a consideration of community values is also reflected in the comments of the Victorian Premier:

> *...It is a mix. It's about a good economy, but more than that, it's about the sort of values that make up a society – values like fairness, a fair go, traditional values, caring, strong communities. And it's about opportunity – making sure wherever you come from, whatever your family background, you've got the opportunity to go on and do well in life.*[25]

The emerging business case for a human rights based approach to government

In January 2008, the UK Ministry of Justice published the final report of the *Human Rights Insight Project* initiated by the Department of Constitutional Affairs in December 2006. The project was prompted by a perception that the objectives of the UK *Human Rights Act* 1998 were not being realised. In particular, there was a growing sense that public authorities were not moving beyond a mindset of strict compliance with the Act to a more holistic and proactive integration of the principles of the Act into day-to-day operations. This failure to move away from technical compliance was seen as undermining the Act's central objective of ensuring that the conduct and service provision of public authorities was habitually and automatically responsive to human rights considerations, recognised individual needs and took steps to protect vulnerable groups and individuals. [26]

The framework of the *Human Rights Insight Project* was rigorous. It was based upon an acknowledgement that the critical first step of legally enshrining human rights obligations had achieved as much as it could with regard to cultural change – namely strict legal compliance – and that moral arguments alone would be insufficient to move 'stalled' public authorities beyond this point. Accordingly, a central plank of the project's methodology was to identify evidence for use in demonstrating a business case that highlighted the benefits and strengths of mainstreaming and actively promoting human rights. [27]

19 Information related to the inquiry is available on the VCEC website www.vcec.vic.gov.au
20 Victorian Competition and Efficiency Commission, *A State of Liveability: Enhancing Victoria's Liveability*, Draft Report: Key Messages and Overview, May 2008, p xvi.
21 Ibid p xxviii.
22 Ibid p xxix.
23 Ibid p 24.
24 Ibid p 22.
25 Ibid p 9.
26 Human Rights Insight Project, Ministry of Justice Research Series 1/08 January 2008, p 4.
27 Ibid p 6-7

The project identified four evidence-based indicators of the business case for a human rights based approach to government: [28]

Service user satisfaction
Research established that individuals regard the principles underpinning human rights as very important in their dealings with government. As a corollary to this, a focus on individual responsiveness to service use was shown to be more conducive to effectiveness than a focus on targets, through-put and efficiency.

Improved service user outcomes
Qualitative research demonstrated that where staff in public authorities had an implicit or explicit understanding of human rights principles, they were likely to act in a manner and identify options and strategies that secured better outcomes for their clients and service users.

Staff job satisfaction
Research identified heightened levels of concern when organisational operations were not felt to be acting in accordance with human rights principles. On the flip-side, satisfaction increased when individuals were perceived as being treated properly. Overall, a human rights framework was identified as a factor in the engagement of staff by reminding them of their original motivation for choosing a particular career.

Ease and quality of staff decision-making
Qualitative evidence demonstrated two positive impacts of a human rights framework upon decision-making. When such a framework was applied, it increased levels of confidence in the decisions that were being made. Where a human rights framework had not been applied in the first instance, it could be used to raise concerns more effectively and negotiate alternate and improved outcomes.

Evidence of the operational benefits of integrating and adhering to human rights principles

While a human rights based approach has relevance and is applicable across the broad spectrum of government activities, certain aspects of government responsibility are in the forefront of human rights concerns because of their engagement with complex, multi-dimensional rights considerations. These responsibilities include the operation of correctional services, policing and the delivery of health services. Comprehensive, practice-based international and domestic evidence is available to demonstrate that a proactive human rights based approach has much to offer in each of these areas.

Correctional Services
As its name implies the International Centre for Prison Studies (based at London's King's College), researches and advises on prison management and operational issues across the globe. The Centre's researchers and advisors have extensive and often concurrent experience of prison operations in a range of political, social and economic settings. The introduction to the Centre's manual for prison staff, endorsed by The Right Hon Jack Straw, the UK Minister then responsible for prison management, states:

> *The International Centre for Prison Studies carries out all its practical prison management projects within the context of human rights. It does so for two reasons. The first is that this is the right thing to do. The handbook demonstrates in many chapters the importance of managing prisons within an ethical context which respects the humanity of everyone involved in a prison: prisoners, prison staff and visitors. This ethical context needs to be universal in its application and the international human rights instruments provide this universality.*
>
> *There is also a more pragmatic justification for this approach to prison management: it works. This approach does not represent a liberal or soft approach to prison management. The members of the handbook advisory group and others involved in writing this handbook have worked in some of the most problematic prisons in the world. They are convinced that this style of management is the most effective and safest way of managing prisons. Time and again staff of the Centre have found that first line prison staff in different countries, from a variety of cultures, respond positively to this approach. It relates the international standards to their daily work in a manner which is immediately recognisable.*[29]

Domestically, a similar approach is endorsed and reflected in the framework used by the Office of the Inspector of Custodial Services (OICS) in Western Australia. The OICS aims to promote continuous improvement in custodial services to improve public confidence in the corrections system, reduce re-offending and ensure that the justice system provides value for money. The core assumption of the *Code of Inspection Standards* used by OICS is that human rights are integral to good prison management and that this is the case whether issues are viewed from the perspective of prisoners, prison staff or the public interest. The Code states:

> *The observance of human rights is integral to good prison management and the most effective and safest way of managing prisons. Human rights are a universal, inalienable and indivisible birthright of all members of the human family. A prisoner's fundamental human rights are not forfeited because of their imprisonment and are in fact limited only in so far as is demonstrably necessitated by the fact of imprisonment.*[30]

The ACT Human Rights and Discrimination Commissioner has also used human rights principles as the foundation for two extensive inquiries into the design and delivery of correctional services in the Territory: *Human Rights Audit of Qamby Youth Detention Centre* (June 2005) and *Human Rights Audit on the Operation*

28 Ibid p 12-13

29 Coyle, A, *A Human Rights Approach to Prison Management: Handbook for Prison Staff*, International Centre for Prison Studies, King's College London, 2002, p 11.
30 Office of the Inspector of Custodial Services Western Australia, *Code of Inspection Standards for Adult Custodial Services*, April 2007, p iii.

of ACT Correctional Facilities under Corrections Legislation (July 2007).[31]

Policing

The Commission's 2007 report on the operation of the Charter referred to the findings of the Independent Commission on Policing in Northern Ireland (the Patten Report) and what it regarded as the fundamental link between good policing and human rights. The Patten Report not only provides a potent illustration of the contribution that can be made by incorporating a human rights based approach in the resolution of seemingly intractable issues, it also reflects an emerging international consensus that human rights based policing is not 'soft-policing', but *effective* policing.

Chapter Four of the Patten Report commences with a strong endorsement of a human rights based approach to policing. This endorsement is based upon the expectations of the community, as well as evidence of the effectiveness of such an approach:

> *It is a central proposition of this report that the fundamental purpose of policing should be, in the words of the Agreement, the protection and vindication of the human rights of all. Our consultations showed clear agreement across the communities in Northern Ireland that people want the police to protect their human rights from infringement by others, and to respect their human rights in the exercise of that duty. ... There should be no conflict between human rights and policing. Policing means protecting human rights.*[32]

Reference is then made to a range of jurisdictions where developing and sustaining a human rights culture within police organisations has been recognised as "a vital enterprise, good for society and good for policing": [33]

- the Council of Europe's *Police and Human Rights* program covering 40 member nations between 1997 and 2000;
- the long running and ongoing initiative of the Royal Canadian Mounted Police to overhaul its policing ethos and align it with human rights principles; and
- police organisations in more than 50 countries that had engaged the John Jay College in New York to provide *Human Dignity* training to serving police officers.

The report summarises the objective of its human rights related recommendations in the following terms:

> *...police should perform functions within the law and be fully respectful of human rights both in the technical sense and in the behavioural sense. Technically they should know the laws well and master policing skills, for example how to interview suspects, so that they are less likely to be tempted to resort to unethical methods in order to get results. Behaviourally, they should perceive their jobs in terms of the protection of human rights. Respect for the human rights of all, including suspects, should be an instinct rather than a procedural point to be remembered.*[34]

In Victoria, the link between policing and a human rights based approach is recognised and endorsed. The outgoing Chief Commissioner of Police, Christine Nixon, has been a member of the Human Rights Leadership Group convened by the Department of Justice since it was first established. In December 2008, Victoria Police also hosted the Inaugural Australasian Human Rights and Policing Conference, bringing together representatives from a range of jurisdictions and perspectives to explore the intersection between modern policing and human rights. Finally, in his 2007/08 Annual Report, the Director, Police Integrity (Michael Strong), specifically endorsed the framework and approach employed in the Patten Report.[35] The Office of Police Integrity is also identifying opportunities afforded by a human rights approach to enhance the effectiveness of policing practice and procedure, including the development of guidelines based on human rights standards. [36]

Health care

In her foreword to *Human Rights in Healthcare – A Framework for Local Action*, Rosie Winterton, the UK's then Minister of State for Health Services stated:

> *Quite simply we cannot hope to improve people's health and well-being if we are not ensuring that their human rights are respected. Human rights are not just about avoiding getting it wrong, they are an opportunity to make real improvements to people's lives. Human rights can provide a practical way of making the common sense principles that we have as a society a reality.*[37]

The framework was developed through collaboration between the UK Department of Health and the British Institute of Human Rights and addresses three questions:

- Why is a human rights based approach beneficial to the provision of health services?
- What do human rights mean in the day-to-day context of health service provision?
- How can health service providers use and implement a human rights based approach at all levels?

The rationale for the framework was straightforward and went considerably further than technical compliance with the law:

> *Put simply, a lack of understanding and respect for people's human rights is bad for their health. On the flip-side, the use of a human rights based approach by NHS*

31 Both reports are available at www.hra.act.gov.au.
32 Independent Commission on Policing for Northern Ireland, *A New Beginning: Policing in Northern Ireland*, 1999, p 18, available at www.nio.gov.uk.
33 Ibid p 19.
34 Ibid p 21.
35 Office of Police Integrity Victoria, *Annual Report 2007/08*, 30 June 2008 pp 33-34.
36 See for example Office of Police Integrity Victoria, *Policing and Human Rights – Standards for Police Cells*, December 2008; and Barton, D. and Tait, S., *Human Rights and Cultural Change in Policing*, Paper presented to the Inaugural Australasian Human Rights and Policing Conference, 8-10 December 2008. Both papers are available at www.opi.vic.gov.au.
37 Department of Health and British Institute of Human Rights, Op cit p 3.

Trusts can significantly improve people's health outcomes by directly supporting the delivery of more effective, better quality, 'person-centred' health care.[38]

Evidence of the Benefits Experienced by Individuals

With the benefit of over a decade of human rights protection, the United Kingdom has comprehensively documented the positive impact of human rights cultural change on the experiences of vulnerable people and groups within the community. In 2005, the Institute of Public Policy Research prepared a report for the UK Department of Constitutional Affairs in which it made the following observation:

A human rights approach helps put the user of public services at the heart of their design and delivery. Users of services will have disparate and individual needs but in one sense they are uniform in that they are all, without exception, entitled to human rights protection. When services are designed with the user in mind, it encourages a recognition that people are entitled to be treated fairly and with dignity and respect.[39]

One year later, the Department for Constitutional Affairs reported that the *Human Rights Act* had resulted in:

...a positive and beneficial impact upon the relationship between the citizen and the State, by providing a framework for policy formulation [and by promoting] *a shift away from inflexible or blanket policies towards those which are capable of adjustment to recognise the circumstances and characteristics of individuals.*[40]

Similar conclusions were expressed in far less bureaucratic terms by the British Institute of Human Rights:

[There is a fallacy that the Act] is only for lawyers, or for 'chancers' seeking to frustrate our justice system. The 15 case studies in this report directly challenge this perception. They demonstrate a rich variety of ways in which the Act is being used by groups and people themselves to challenge poor treatment and, through this, to improve their own and others' quality of life...The case studies show how human rights language is being used by and on behalf of a wide range of people, including young people, older people, victims of domestic violence, parents, asylum seekers, people living with mental health problems, and disabled people, in [a variety of] areas.[41]

Here in Victoria, while the Charter has only been in full operation since the beginning of 2008, examples are already emerging of its positive impact for a broad range of individuals and groups within our community whose past experience had been one of human rights limitations rather than realisation and promotion.

Man with physical disability gains access to additional care funds [42]

A man with a physical disability was living independently with the support of a personal attendant carer funded by a government department. As the man's disability support dollars dried up, his ability to take part in community activities was whittled away to the point that he was unable to leave his house for several months. A departmental official told the man that he had already used more than his allocated resources and could not access any more funding. However, after the man's advocate raised human rights concerns, a more senior employee within the department offered additional resources to enable the man to leave his house and to participate in the community.

Young man with intellectual disability supported to live with his family [43]

A 23-year-old Iraqi refugee with a severe intellectual disability and autism was placed in supported accommodation where there were no Arabic speaking workers. Moreover, during his time in the supported accommodation facility, the young man's ability to observe his religion (by, for example, eating Halal food) was significantly limited as was his ability to contact his family. After a visit home, it became apparent to his family that the young man was frightened of another resident with whom he shared a room and that he was lonely, bored and unhappy. After his advocate raised the Charter with the relevant public authority, the young man was supported to continue living in his family home where he wished to reside.

Access to health care for mental health patient [44]

A man with a mental health condition was being held in a secure facility where he was unable to access the treatment he needed for a liver condition. The man's advocates argued that the facility's failure to ensure access to treatment affected a number of the man's human rights and they were able to successfully negotiate a medical appointment at the local hospital.

Local council decides against 'move on' local laws [45]

Business vendors in a regional city were calling on the local council to introduce a 'move on and stay away' by-law that would apply to people displaying a range of antisocial behaviours. After considering the human rights impact of such a law, the council rejected the proposal on the grounds that it would disproportionately affect

38 Ibid p 6.

39 Butler, F., *Improving Public Services: Using a Human Rights Approach. Strategies for Wider Implementation of the Human Rights Act Within Public Authorities*, a report for the UK Department of Constitutional Affairs by the Institute of Public Policy Research, June 2005, available at http://www.ippr.org.

40 Department of Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006), pp 4, 19.

41 *The Human Rights Act – Changing Lives*, The British Institute of Human Rights, p 6, available at www.bihr.org.uk.

42 ABC Radio National, Australia Talks with Paul Barclay, Charter of Human Rights, 29 January 2009.

43 Youth Affairs Council of Victoria, reported in the Human Rights Law Resource Centre, *Victorian Charter of Human Rights Case Studies: How a Human Rights Act can Promote Dignity and Address Disadvantage*, available at www.hrlrc.org.au .

44 Human Rights Law Resource Centre Bulletin, November 2007, Number 19, p 14.

45 Eugene Duffy, *Move on powers rejected*, Bendigo Advertiser, 22 August 2008.

already marginalised groups such as homeless people and indigenous residents and that it would restrict people's right to occupy public place.

Service provider considers the rights of a difficult client [46]

A welfare organisation experiencing problems with a client who had been violent and threatening towards staff initially responded by excluding the client from the premises and its services. A direct care worker objected on the basis that while staff had a right to be safe at work, the client's rights should also be considered. The care worker negotiated with management to allow the client to access some services and instituted a method for monitoring the client's behaviour to prevent safety risks to staff.

Including human rights in local government planning [47]

Following the release of a draft four-year community plan by a local council, a community group raised concerns that nowhere in the plan was there mention of human rights or the council's obligations under the Charter. The council agreed to most of the group's recommendations in relation to its Charter obligations, including its obligations to review its decision-making processes, ensure equality in the provision of and access to council services and facilities, review its code of conduct for staff and councillors as well as to proactively promote consultation and feedback opportunities via a range of accessible means.

Children with autism gain entitlement to disability assistance [48]

A 13-year-old boy with Aspergers Syndrome was ineligible to receive disability support services because autism spectrum disorders were not considered to be a disability by the relevant department. The boy's mother applied to VCAT for a review of the decision, advocating for an inclusive interpretation of 'disability' in light of the rights contained in the Charter. Before the application reached VCAT, the Victorian Government advised it would acknowledge autism spectrum disorders as a disability and committed to an additional $2.75 million in funding.

Human Rights Protections are Relevant to the Entire Community

As the above case studies illustrate, the effective protection of human rights is particularly important for those within society who are marginalised and vulnerable. Indeed, the success of any human rights instrument should be assessed by its ability to provide effective protection for those most disadvantaged and least empowered. However, this should not lead to the perception that a national human rights instrument is only relevant to marginalised and disadvantaged individuals and groups – it is relevant to all members of the community. As Geoffrey Robertson has observed in relation to the *Human Rights Act* in the United Kingdom:

> *The Human Rights Act in Britain exposed numerous gaps in the common law – especially for disadvantaged groups. The main beneficiaries, however, have been ordinary citizens, given additional protection against unfair treatment.*[49]

At best, the misconception that human rights instruments are about minority interests leads to a failure to appreciate their universal relevance and importance. At worst, it is another inaccuracy that feeds into the argument noted previously that human rights instruments are anti-democratic and restrict the legitimate activities of government.

Those who are fortunate enough that their life experience positions them to be able to characterise human rights concerns as being of little or no direct relevance need to remember that for any person, circumstances can change tragically and unexpectedly. As the Commission observed in its 2008 report on the operation of the Charter:

> *While many of us may never need the active protection of the Charter, there may be occasions when we find ourselves caught up in unusual, stressful or traumatic circumstances – perhaps a serious injury or illness, or the loss of a job or housing, or involvement with the courts or police. At these times, we will almost certainly appreciate how fortunate we are that Victoria has an effective human rights framework in place.*[50]

Human rights are not about the experience of "others", they are the principles that shape the community we all live in. In his opening address to the Commission's Everyday People *Everyday Rights Human Rights Conference 2009*, Archbishop Desmond Tutu expressed this principle in eloquent and moving terms:

> *We in South Africa have sought to adopt something that comes out of our African culture – called Ubuntu – the essence of being human - where we say a person is a person through other persons, and that when we dehumanise another, whether we like it or not, we dehumanise ourselves. For our humanity is caught up in that of one another, and so when we subvert the rights of another, we affect our own as well. We are all part of one indivisible human rights family.*

The allegation that attention to "minority interests" is somehow anti-democratic involves a simplistic conflation of democracy with majoritarianism. While it is true that legitimate governments are formed by the will of the majority of voters at free and fair

46 Victorian Council of Social Services, *Using the Charter in policy and practice: action taken and planned in response to the Victorian Charter of Human Rights and Responsibilities*, 2008.

47 The Victorian Equal Opportunity & Human Rights Commission, *Your Rights Your Stories*, available at www.humanrightscommission.vic.gov.au .

48 Human Rights Law Resource Bulletin, Number 33, January 2009, p 27.

49 Geoffrey Robertson QC, *The Statute of Liberty: How Australians Can Take Back Their Rights*, Vintage, 2009, p 20.

50 Victorian Equal Opportunity & Human Rights Commission, Op cit, p 3.

elections, it does not translate to a licence for that government to do whatever it wishes while in office. Were this the case we would have no need for much of the Constitution, and government would operate above the rule of law – few would dispute that this would be unacceptable.

Democratically elected governments must adhere to certain principles and standards. This is particularly so when called on to make decisions that impact on those who are vulnerable, marginalised, or simply smaller in number. As has been recently observed in the United Kingdom:

> *Majority rule is a basic principle of democratic government, with legislatures elected by the majority to represent their interests. It has long been recognised, however, that the rights and freedoms of individuals, particularly their human rights, risk being overridden when the interests of the majority prevail and that it is to the benefit of all that the interests of minorities should be protected. We all possess the potential to be part of a minority at some point in our lives.*[51]

SUMMARY

Australia has a strong democratic history and robust government institutions of which it is justifiably proud and confident. However, this is not synonymous with comprehensive and effective protection of human rights. Our system of government is currently insufficiently equipped to monitor and guarantee compliance with the principles that many would regard as central to the legitimate exercise of governmental authority.

The Federal Constitution provides a structure for the operation of government, and regulates the relationship between federal and state governments. Its virtual silence on human rights, however, means there are considerable gaps in defining and developing the relationship that exists between government and the community. While governments are held accountable in periodic free and democratic elections, of itself this cannot ensure that the myriad of policy, administrative and legislative decisions made over the life of a particular government are scrutinised to ensure adherence to the human rights principles that internationally, we have pledged our adherence to as a nation.

In this context, a national human rights instrument is an addition to, if not the missing piece of our democratic framework, rather than the threat or competitor that it is sometimes alleged to be. A human rights instrument is far more than a list of prohibitions or obligations, it is a tool for fostering a culture of human rights where government leads by example in developing awareness of the obligations that each of us have to respect the equality and dignity of others.

51 United Kingdom Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework*, March 2009, p 31.

PART TWO

WHICH RIGHTS SHOULD BE PROTECTED IN A NATIONAL HUMAN RIGHTS INSTRUMENT?

PART TWO: WHICH RIGHTS SHOULD BE PROTECTED IN A NATIONAL HUMAN RIGHTS INSTRUMENT?

BACKGROUND

The imminent review of the first four years of operation of the Victorian Charter places certain constraints on the Commission's ability to contribute to this particular aspect of the consultation. Under section 44 of the Charter the review is required to consider the possible expansion of the Charter to include additional rights, including but not limited to those derived from:

- the International Covenant on Economic, Social and Cultural Rights;
- the Convention on the Rights of the Child;
- the Convention on the Elimination of All Forms of Discrimination Against Women;
- as well as the right to self-determination.

One of the Commission's functions under the Charter is to assist the Attorney-General with the review, as such, it is important that the Commission has a genuinely open mind in relation to these matters. What we can say quite clearly, however, is that a national human rights instrument should protect those rights which the community states they want protected – it is not for government to chose or arbitrate on what is or is not included.

In the remainder of this part of our submission, we provide observations based upon both the consultation preceding the enactment of the Charter, and its subsequent operation, that we believe are relevant to the Committee's deliberations on this question. In doing so, it is important to acknowledge one over-arching principle.

While we understand the need to ask this question and separately consider different 'bundles' of rights, this must occur within an awareness of the principle of indivisibility. The protection and full realisation of any particular right is dependant on the protection and realisation of all rights. Accordingly, reducing the scope or coverage of a human rights instrument not only has implications for excluded rights, but also included rights. While it may not be achievable as a first step, comprehensive and complete protection of human rights (whatever form that takes) should be our ultimate objective.

CIVIL AND POLITICAL RIGHTS

It would seem a relatively safe assumption that if a national human rights instrument is adopted it will, at the very least, enshrine civil and political rights. Each of the instruments from other jurisdictions that are being looked at for guidance and as a precedent cover civil and political rights; the scope and content of such rights is more readily understood; and mechanisms for their enforcement and promotion are less controversial. In this context, the feature of the Victorian Charter that we wish to highlight is its inclusion of a comprehensive reasonable limitations provision.

It may seem contradictory to suggest that within an instrument designed to protect and promote civil, political and some cultural rights, one of the Charter's most significant features is the approach it has adopted in relation to defining the scope for limiting those rights. However, from the Commission's perspective this is in fact the case.

Central to the complexities associated with human rights is the need to balance rights with other interests, and balance competing rights where conflict arises. The Charter does not proscribe certain outcomes, what it does is provide a comprehensive and rigorous framework for assessing whether actual or proposed limits on rights are permissible. The relevant provision is section 7, which recognises that rights can be limited, but only when the limitation is pursuant to law, and can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. The Charter then articulates a number of non-exhaustive factors that need to be considered when assessing the reasonableness of a particular limit on a human right. Those considerations are:

- the nature of the right to be limited;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose (i.e. whether the limitation is likely to achieve its purpose); and
- whether there are any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The Commission has repeatedly emphasised that this particular aspect of the Charter should be regarded as a valuable resource and something that can make an important contribution to decision-making. The framework of section 7 not only provides direction as to the issues that need to be considered in reaching a decision on whether a particular limit on a right is appropriate, it also draws out the inter-connections between those considerations. Compared to a vague direction to do what is "reasonable" (a common approach under anti-discrimination law) or what is "appropriate in the circumstances", the reasonable limitations framework provides genuine assistance and can foster increased confidence in decision-making. In doing so it can provide a path for navigating complex issues that might otherwise seem intractable.

The practical impact and opportunities associated with this have been highlighted in observations made by Victoria's Disability Services Commissioner in relation to the long-standing debate in the disability service sector concerning how best to balance service providers' duty of care to both service users and staff, with the freedom and liberty of individuals. The Commissioner, Mr Laurie Harkin, has observed:

> *A theme that has arisen is a lack of clarity amongst providers about the need to balance their duty of care with human rights. Bodies can be challenged when balancing their various roles (e.g. funder, policy maker,*

and service provider) often taking a risk averse approach to service delivery. Some providers have commented that the duty of care is always paramount. The message needs to get through that service providers have an onus to look at issues more broadly and apply a balanced consideration that includes awareness of human rights impacts. [52]

It is important to acknowledge that section 7 does attract criticism for contemplating limits on all the rights enshrined in the Charter. This approach is contrary to that under international law and in a number of other jurisdictions (e.g. the United Kingdom) where certain rights, such as the prohibition against torture, are absolute and unable to be limited. Balancing this concern is the argument that in relation to those rights regarded as absolute under international law, it would be extremely difficult to establish under a section 7 analysis that a limitation was reasonable and justified.

This may be the case, however even if it is, there remains the important issue of symbolism and education – some rights are so fundamental and at the core of what we stand for as a community that they are diminished by even contemplating the possibility of their being limited. In the Commission's view, while a national human rights instrument would benefit from the inclusion of a reasonable limitations framework modelled on section 7 of the Charter, it should not apply to enshrined rights regarded as absolute under international law.

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Recognition and equality before the law

One aspect of the Victorian Charter that should not be replicated federally is its approach to the concept of discrimination as used in section 8, which enshrines the right to recognition and equality before the law. Section 8(2) guarantees enjoyment of human rights without discrimination, while under section 8(3) all people are entitled to the equal protection of the law without discrimination, and equal and effective protection against discrimination. Section 3 of the Charter defines discrimination in the following terms:

> ***"discrimination"****, in relation to a person, means discrimination (within the meaning of the* ***Equal Opportunity Act 1995****) on the basis of an attribute set out in section 6 of that Act.*

The range of attributes covered by section 6 of the *Equal Opportunity Act* is broad and includes:

- age
- breastfeeding
- carer status
- disability/impairment
- gender identity
- industrial activity
- lawful sexual activity
- marital status
- parental status
- physical features
- political belief or activity
- pregnancy
- race
- religious belief or activity
- sex
- sexual orientation
- personal association with someone who has, or is assumed to have, any of these characteristics.

Given the breadth of coverage of the *Equal Opportunity Act*, the scope of section 8 of the Charter is similarly wide. However, an equivalent approach federally – i.e. to link the definition of discrimination in a national human rights instrument to the types of discrimination covered by federal anti-discrimination laws – would result in significant gaps in the right to recognition and equality before the law.

Presently there are comprehensive federal Acts covering discrimination on the basis of race, sex, disability and age. There are no similar protections against discrimination on the basis of, for example, gender identity, political belief / activity, religious belief / activity or sexual orientation. The adoption of a national human rights instrument is in fact an opportunity to begin remedying glaring gaps and deficiencies in the coverage of federal anti-discrimination law. A broad formulation of the right to recognition and equality before the law, modelled on the approach adopted under international law[53] would be an important first step.

52 Victorian Equal Opportunity & Human Rights Commission 2008, op cit, p 45.

53 See for example article 2.2, *International Covenant on Civil and Political Rights*.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The question of whether or not to enshrine economic, social and cultural rights (**ESCRs**) in human rights instruments tends to attract considerably more controversy than the inclusion of civil and political rights. At the heart of this debate is the question of the extent to which courts and tribunals have a role in matters concerning the allocation of resources – which many regard as the sole province of the executive and legislature.

Testing the Objections and Negotiating a way Forward

In Part Three of this submission we address the myth that human rights instruments draw the judiciary into complex social policy issues they are ill equipped to deal with. As we explain by reference to Victorian experience, courts already have to deal with such matters and a human rights framework is simply an added resource to assist them undertake that role. A similar misconception exists in the debate concerning ESCRs – the reality is that courts already have to handle matters the economic implications of which can be enormous.

The United Nations Committee on Economic, Social and Cultural Rights states that:

> *It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.* [54]

Former High Court Justice Michael Kirby, supports this view, commenting that:

> *Arguments of inconvenience and potential political embarrassment for the Court should fall on deaf judicial ears ... This Court, of its function, often finds itself required to make difficult decisions which have large economic, social and political consequences.* [55]

By way of example, early this year the High Court was called upon to adjudicate on whether the Commonwealth was able to distribute individual, economic stimulus payments totalling billions of dollars. [56] More generally, existing state and federal anti-discrimination laws already require government services including education and housing to be provided in a non-discriminatory manner, with courts and tribunals authorised to arbitrate on alleged breaches. Such matters have not triggered constitutional tension, nor have they unduly limited the legitimate role of government in determining resource allocation. The experience of South Africa, which has enshrined ESCRs as well as environmental rights in its constitution, provides further evidence of the workability of legal protection of these rights.

Despite the availability of evidence to demonstrate that many concerns related to enforceable ESCRs are unfounded, the Commission acknowledges that even if there is public support for their inclusion in a national human rights instrument, there may be a need to negotiate a means of doing this that accommodates concerns – particularly on the part of government. One straightforward option would be to delay the commencement of those parts of a national human rights instrument covering ESCRs, thereby enabling government and the bureaucracy further time to familiarise itself with and prepare for their application. Another alternative – more controversial in that it might fall below the expectations of the community – would be to develop a different framework for the protection and promotion of ESCRs to that applicable to civil and political rights.

A further scenario that might confront the Committee is that the level of confusion and/or dispute regarding ESCRs is such that it is not possible or would be premature to try and distil a conclusive position from this consultative process. If this were the case the strategy adopted in Victoria would seem highly relevant – i.e. for a national human rights instrument to include a commitment to revisit the question of whether, and if so how to best protect ESCRs. As is happening in Victoria, the intervening period could be used to develop and disseminate information to facilitate an informed and progressive debate at that time.

SPECIFICALLY ARTICULATED HUMAN RIGHTS

Whilst human rights are universal, owed to all people by virtue of being human, particular groups within society are especially vulnerable to human rights violations. Accordingly, the international community has regarded it as necessary to articulate in more detail, and in specific conventions and declarations, what certain rights mean for those individuals and groups, which by implication assists in identifying the circumstances or contexts in which the risk of violations is particularly acute. Examples include:

- Convention on the Elimination of All Forms of Racial Discrimination;
- Convention on the Elimination of All Forms of Discrimination Against Women;
- Convention on the Rights of the Child;
- Declaration on the Rights of Indigenous Peoples;
- Convention on the Rights of Persons with Disabilities; and
- the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

54 United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, UN E/C.12.1998/24 (1998) [10].
55 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 414.
56 *Pape v The Commissioner of Taxation of the Commonwealth of Australia* (currently unreported – decision handed down on 3 April 2009).

As noted at the beginning of this part of our submission, the 4-year review of the Charter is required to consider the incorporation of additional provisions that would elaborate on and reinforce the protection it provides to vulnerable groups that have experienced a history of rights violations. Our view is that this mechanism warrants replication federally if the submissions received by the Committee fail to demonstrate a consistent view or suggest a level of confusion.

In making the recommendation that questions concerning the inclusion of such provisions should be deferred, the Victorian Human Rights Consultation Committee made the following comments:

> *The Committee recommends that these rights not be included in the Charter at this stage. As noted above, the Committee considers that it is appropriate to take an incremental approach to rights protection and that it is preferable to start with a Charter that applies to all people generally, rather than incorporate rights from more detailed and specific human rights instruments such as CEDAW and CRC.*
>
> *The Committee recommends that the four year review process include consideration of whether the Charter should be expanded to include other rights such as women's rights and children's rights.* [57]

And further:

> *As indicated in earlier Chapters, the Committee considers that the Charter should be reviewed after a period of time. The Charter can only be the beginning of a journey towards the better protection of human rights in Victoria. As such, regular reviews are necessary to assess whether the Charter is working effectively and to ensure that it continues to reflect the values and aspirations of the Victorian community.* [58]

The Commission appreciates that this outcome may have disappointed some who contributed to the consultation, however, we do believe the approach was balanced and effective. Firstly, it has allowed time for further, more informed debate in relation to these issues. As the Committee noted, what the incorporation of these specific provisions might look like is not immediately clear given there are fewer precedents available from other jurisdictions where the universal approach to human rights instruments remains predominant. In this context, there is a risk of both advocacy for, as well as opposition to such provisions being misinformed.

In light of this, and in anticipation of the 4-year review, the Commission has adopted a particular approach to its function of providing the Attorney-General and parliament with a yearly report on the operation of the Charter. Specifically, we are using each of our reports as an opportunity to begin exploration of these possible expansions to the Charter in more detail. In our 2008 report we examined the human rights of children and young people (with a focus on their right to participate), this year we are examining the rights of women, while our plan for 2010 is to consult in relation to economic social and cultural rights, and the right to self-determination. Our report based initiatives are just one introductory part of what will be needed to consult the Victorian community as part of the 4-year review, however, it is building a foundation for greater engagement and informed consultation on these important matters.

Secondly, the deferral of the possible inclusion of these provisions needs to be understood in the context of the formulation of the interpretive obligation in section 32 of the Charter (covered in detail in Part Three of this submission), which has ensured that these vitally important instruments of international law exert an influence on the operation of the Charter in its current form. Section 32(2) of the Charter includes a mandate to consider international human rights jurisprudence when developing the meaning or content of the rights it enshrines. Accordingly, for example, the particular content of the right to freedom of movement [59] for people with disabilities, will be elaborated on by article 19 of the *Convention on the Rights of Persons with Disabilities* (which covers independent living) and the body of law which that article will generate in the future.

Importantly, this is not to suggest the inclusion of such provisions is without significance or is superfluous. Particularising the obligations that are owed to marginalised groups in the community is empowering for them, and reinforces the nature of the human rights obligation that is owed to them. What this interpretive mechanism achieves is a meaningful role for these human rights instruments, while allowing the time required to resolve the question of their formal incorporation.

INDIGENOUS RIGHTS INCLUDING THE RIGHT TO SELF-DETERMINATION

As a particular category of specifically articulated human rights, Indigenous rights are more than a response to a common history of dispossession and violations of rights, they are a recognition of the particular place or status of Indigenous people as the original custodians of the land. As such, deferring the question of whether a national human rights instrument should recognise and enshrine Indigenous rights is problematic.

Recognising and making a commitment to the human rights of Indigenous Australians within a national human rights instrument is an important step in promoting broad community understanding of what it means to engage with Indigenous communities as a people with an inherent right to self-determination and self-management, incorporating an entitlement to:

- respect for distinct cultural values and diversity;
- recognition of the political identity of Indigenous nations and peoples, their representatives and institutions;

57 *Rights, Responsibilities and Respect – The Report of the Human Rights Consultation Committee*, December 2005, p 30.
58 Ibid, p 135.

59 Section 12, Charter.

- respect for Indigenous peoples' connection with and relationship to land;
- ensuring that Indigenous peoples themselves actually have, feel and understand that they have choices about their way of life;
- respect for and promotion of Indigenous participation and control; and
- Indigenous representation and participation in our democratic processes.

While it is an issue formally beyond the scope of this consultation, the Commission wishes to emphasise that enshrining Indigenous rights in a national human rights instrument is only one part of the response that is needed to start addressing the historic and ongoing violations of those rights. In particular, Constitutional recognition is also essential. As Mr Tom Calma, the Australian Human Rights Commission's Aboriginal and Torres Strait Islander Social Justice Commissioner and Race Discrimination Commissioner commented last year:

> *The enactment of a Charter of Rights does not mean that we no longer demand the recognition of the distinct status of Indigenous Australians. Indigenous peoples are the First Peoples of this land not simply a dispersed collection of disadvantaged communities or a minority group with special needs. The unique status of Indigenous peoples should be recognised in the Constitution as a prerequisite for a genuine process of reconciliation and the promotion of a human rights culture... I strongly support the introduction of an Australian Charter of Rights because it provides protection to all Australians. I also think a Charter would provide a convivial environment to progress the struggle of Indigenous people towards the more substantive rights pertaining to our status as a people.* [60]

In Victoria, constitutional amendments in 2004 inserted the following recognition in the preamble to the Victorian Constitution:

> ***1A. Recognition of Aboriginal people***
>
> *(1) The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.*
>
> *(2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established —*
>
> *(a) have a unique status as the descendants of Australia's first people; and*
>
> *(b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and*
>
> *(c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.* [61]

The Charter subsequently built upon this. Its Preamble acknowledges:

- human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

And section 19, which enshrines cultural rights, provides:

> *(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their 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 distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.*

However, disappointingly for many in the Aboriginal community, recognition and inclusion of the right to self-determination in the Charter was deferred until the 4-year review. This was done on the recommendation of the Human Rights Consultation Committee which observed:

> *The Committee is concerned that, in the absence of settled precedent about the content of the right as it pertains to Indigenous peoples, the inclusion of a right to self-determination may have unintended consequences. The Committee wants to ensure that any self-determination provision contains some detail about its intended scope and reflects Indigenous communities' understanding of the term. This is not something that can be achieved in a Charter that must be general in its terms and operate across all of the varied communities in Victoria.* [62]

As with the deferral of other matters under the Charter, the Commission acknowledges the opportunities afforded by this approach. The Commission has recently engaged Professor Larissa Behrendt of Jumbunna Indigenous House of Learning to develop a community-targeted resource explaining the right to self-determination, and the practical implications of enshrining it in a human rights instrument. This will be published as part of our 2009 report on the operation of the Charter, and then be used as a resource to inform community consultation during 2010.

60 Tom Calma, National Race Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Human Rights Law Resource Centre's Annual Human Rights Dinner, 4 April 2008, pp.4-5, available at www.hrlrc.org.au.

61 The *Constitution Act 1975* (Vic) was amended by the Constitution *(Recognition of Aboriginal People) Act 2004* (Vic).

62 Op cit, p 39.

In our view, the minimum level recognition of Indigenous rights in a national human rights instrument should be to replicate the approach under the Victorian Charter, i.e.:

- recognition of the particular importance of human rights to Indigenous people;
- specific articulation of cultural rights vis-à-vis Indigenous identity, culture, language, kinship and relationship to land; and
- a commitment to considering the inclusion of the right to self determination within a defined timeframe.

In making this recommendation, however, it is critical to emphasise that with regard to the recognition of the right to self determination, there are currently opportunities available federally that were not available in Victoria during 2005/06. As the Committee will be aware, at the invitation of the Federal Government the Aboriginal and Torres Strait Islander Social Justice Commissioner has convened a steering committee to make recommendations on the establishment of an effective and sustainable National Indigenous Representative Body. [63] The steering committee is required to report to government by the end of July 2009 with the intention being that an interim body will commence in August 2009.

Clearly, the outcomes of this initiative are relevant to the approach taken within a national human rights instrument to recognition of the right to self-determination. In our view, while there may still be merit in revisiting fuller recognition of the right to self-determination in a defined period, the re-establishment of a genuinely representative Indigenous body is a critical step and provides a real opportunity for a national human rights instrument to incorporate at least partial recognition of self-determination from the outset.

ENSHRINING RESPONSIBILITIES

A question that regularly arises in the context of debate concerning which rights should be enshrined and protected in a national human rights instrument is whether such an instrument should also articulate responsibilities. This is an important question, however, from the Commission's perspective the discussion tends to merge two distinct issues that it is important to consider separately. The first requires engaging with, and responding to, the frequent charge that human rights are individualistic and that the "me or I" mindset they generate needs to be tempered. The second issue, is whether there are in fact universal obligations or duties that warrant articulation as part of the over-arching set of principles that are regarded as fundamental to our community.

The Collective Nature of Human Rights

While the Commission appreciates how public discourse has generated a concern that human rights are about the individual, we regard such views as incorrect, and that the enactment of a national human rights instrument (and in particular an associated education strategy) is an overdue opportunity to address the myths, and foster an appreciation of the collective nature of human rights. In the 2005 inaugural *Alice Tay Lecture on Human Rights and Law*, Professor Jim Ife observed:

> *We need to be talking about 'our rights' as the manifestation of the social bonds that hold us together. And the idea of 'human rights' seeks to link all people together in this way, out of a shared sense of our common humanity. In this sense, human rights, far from being by nature individualist as some writers have suggested, are inherently collective. Human rights only make sense within human community, and strong human rights require strong communities.* [64]

The collective character of human rights and inextricable link between rights and responsibilities is recognised in the Charter, and its approach offers an effective blueprint for a federal human rights instrument. Because there is not a separate part of the Charter titled "Responsibilities", some critics have suggested this recognition extends no further that its title, however, this ignores a number of provisions as well as fundamental aspects of its operation.

The Preamble to the Charter, which articulates the fundamental principles upon which it is based, and sets the tone for its interpretation and operation, states:

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others.

The formulation of certain rights further recognises their link to responsibilities. Section 15(3) states:

> *Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary-*
>
> *(a) to respect the rights and reputation of other persons; or*
>
> *(b) for the protection of national security, public order, public health or public morality.*

However, it is the reasonable limitations provision in section 7 (explained in detail above), with its recognition that rights can be limited, provided to do so is demonstrably justified in a free and democratic society based on human dignity, equality and freedom, which embeds the collective nature of human rights, and the fundamental importance of concurrent responsibilities, in the entire fabric of the Charter and its operation. The cumulative effect of these provisions was articulated by Justice Bell of the

63 Information regarding this initiative, including the *Getting it Right* consultative strategy that has informed the work of the steering committee, is available via www.humanrights.gov.au.

64 Professor Jim Ife, *A Culture of Human Rights and Responsibilities*, presented at the inaugural Alice Tay Lecture on Human Rights and Law (2005), available at http://www.anu.edu.au/hrc/freilich at pp.5-6 and 8.

Supreme Court of Victoria, in a recent decision in his capacity as President of the Victorian Civil and Administrative Tribunal:

> *Thus, as the Preamble declares, the Charter has communitarian purposes that go beyond the individual. Those purposes include strengthening respect for the rule of law and our fundamental democratic institutions. This strengthens society itself, and every individual in society. Laws and public institutions that respect individual human rights are deserving of society's respect. Now the interests of people and groups living in society sometimes conflict and must sometimes be balanced. Therefore, in certain cases, human rights might need to be limited. That is why, under the Charter, human rights are not seen to be absolute. But they can only be limited according to a stringent standard of justification.* [65]

Identifying Universal Obligations and Duties for Inclusion in a National Human Rights Instrument

Interestingly, the United Kingdom is currently engaged in debate and consultation on this precise issue.[66] One aspect of that debate involves examining the misconception we have addressed above, that rights are individualistic and divisive, and the Victorian Charter is in fact referred to as a model that draws out the inter-relationship between rights and responsibilities. [67] In addition, the Ministry of Justice has drawn upon a number of European and supra-national examples of instruments that have endeavoured to articulate and enshrine broad, high-level responsibilities regarded as fundamental to their relevant communities. [68]

The Commission is not opposed to a national human rights framework ultimately including recognition of core responsibilities, however, we do believe a decision on this would be premature and requires further, specific consultation. While there are clearly examples upon which to draw, they are far less comprehensive and developed, and need to be better understood. The process of consultation on this issue also needs to be particularly nuanced.

By way of illustration, the current consultation in the United Kingdom has commenced from the very clear starting point that adopting a broader, more specific articulation of responsibilities must not be misunderstood as identifying the conditions upon which the enjoyment of fundamental human rights will become contingent. [69] This is a critically important message and fundamental to understanding the relationship between rights and obligations. However, for some the core principle that fundamental rights cannot be forfeited is controversial and would be regarded as significantly diminishing any recognition of responsibilities. For present purposes, what this demonstrates is the need for far more comprehensive and informed consultation on these questions.

SUMMARY

While it may not be achievable as a first step, comprehensive and complete protection of human rights must be our ultimate objective. This is because human rights are inter-connected and indivisible – the full realisation of particular rights is dependant on the protection and realisation of all other rights.

The experience of the Victorian consultation process that resulted in the enactment of the Charter suggests that at the conclusion of this federal consultation it is possible there will be some issues on which there is a significant divergence of views or confusion. In particular regarding economic, social and cultural rights, and the articulation of particular human rights obligations vis-à-vis specific groups in the community with a shared history of rights violations. If this is the case, a legislated commitment to revisiting these matters could be appropriate.

In our view, the minimum level recognition of Indigenous rights in a national human rights instrument should be to replicate the approach under the Charter, i.e.:

- recognition of the particular importance of human rights to Indigenous people; and
- specific articulation of cultural rights in relation to Indigenous identity, culture, language, kinship and relationship to land.
- a commitment to considering the inclusion of the right to self-determination within a defined timeframe (subject to opportunities to recognise this right that may emerge from the work of the Aboriginal and Torres Strait Islander Social Justice Commissioner concerning the establishment of a National Indigenous Representative Body).

It would be premature to articulate specific responsibilities within a national human rights instrument, however, a reasonable limitations framework modelled on that contained in the Victorian Charter, is an effective means of recognising the collective and communitarian character of human rights.

65 *Kracke v Mental Health Review Board & Ors* (General) [2009] VCAT 646 at para 26.
66 Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework*, March 2009.
67 Ibid, p 26.
68 Ibid, p 19-30.
69 Ibid, p 18 (para 2.22).

PART THREE

HOW SHOULD A NATIONAL CHARTER PROMOTE AND ENFORCE RIGHTS?

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A DIALOGUE MODEL OF HUMAN RIGHTS PROMOTION

Human rights instruments, including Victoria's Charter, aim to generate compliance with, as well as the promotion of human rights through what has been characterised as a human rights dialogue. In order to facilitate this dialogue all three arms of government – the executive, the legislature and the judiciary – have particular obligations with regard to human rights. Through the execution of these obligations, a public 'conversation' or exchange of views about human rights protection takes place between the three branches of government that promotes compliance and builds an appreciation of what human rights mean in a practical sense.

While firmly supporting the dialogue model, the Commission believes that it is incomplete when framed in purely intra-governmental terms. For a human rights dialogue to generate meaningful compliance, the broader community's human rights concerns and aspirations must be known and understood. For this to occur, community input and a community perspective must feature prominently as part of a rigorous and informed dialogue. The Commission regards promoting greater awareness of human rights and the community's capacity to engage with the dialogue as central to its role under the Charter, in particular our education and reporting functions. We explore this further below in the outline of how the Commission's reporting function has played out over the past 2½ years, and also in Part Four of this submission which examines the critical importance of human rights education.

A human rights dialogue can be conceptualised as both cyclical and iterative:

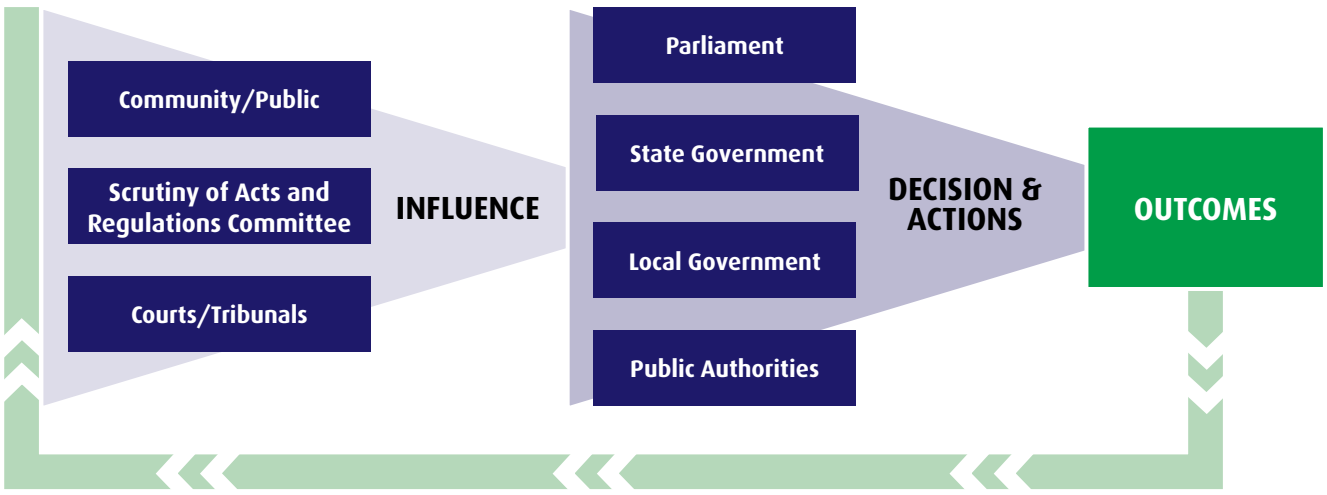
The Dialogue Model in the Victorian Charter as a Blueprint for a National Human Rights Instrument

In the remainder of this part of our submission, we outline the key mechanisms of the human rights dialogue that have been introduced by, and which continue to evolve under the Charter. Specifically:

- obligations on parliament to consider human rights when enacting new legislation;
- an express duty to act compatibly with human rights and consider human rights when making decisions;
- interpreting and applying all laws compatibly with human rights; and
- future roles and functions for the Australian Human Rights Commission.

In relation to each of these mechanisms we provide a brief explanation of how each aspect is intended to operate, as well as evidence of its practical impact and significance, based upon evidence gathered and analysed by the Commission pursuant to its functions under the Charter (in particular our reporting function). Overall, the Commission believes the framework of the Charter (which is largely based on similar human rights instruments in the Australian Capital Territory, New Zealand and the United Kingdom) provides a sound blueprint for the protection and promotion of human rights federally. In relation to mechanisms to remedy human rights breaches, however, we have highlighted challenges associated with the current Victorian approach, and particular issues the Committee needs to consider in this area.

A Human Rights Dialogue Model:



DEVELOPING NEW LEGISLATION IN COMPLIANCE WITH HUMAN RIGHTS

Placing parliament under an obligation to consider human rights when developing new legislation, and building human rights scrutiny into parliament's monitoring and review of delegated legislation is a key aspect of human rights instruments. It is a mechanism that must form part of a national human rights instrument.

Since 1 January 2007, the processes for developing new legislation in Victoria have incorporated scrutiny for compliance with human rights. This involves two requirements:

- Any member (usually the relevant Minister) presenting a Bill to parliament must provide a detailed statement addressing the compatibility or incompatibility of the Bill with the rights contained in the Charter.[70] In other words, the executive arm of government is compelled to not only consider human rights in the course of developing legislation; it must also place its thinking on the public record.
- In the course of reviewing proposed legislation, the Scrutiny of Acts and Regulations Committee (**SARC**) must report to the parliament as to whether a Bill is incompatible with the rights contained in the Charter. [71] SARC is an all-party committee drawing membership from both Houses; as such, it provides a mechanism for the legislature to add its perspective on the human rights aspects of a particular Bill. Alongside this function, the Regulation Review Subcommittee of SARC also has responsibility for ensuring statutory rules are developed compatibility with the rights contained in the Charter. [72]

Commonly it is argued that one of the reasons why Australia does not require a national human rights instrument is that rights are already protected by our parliaments. As this aspect of the Charter's operation highlights, a human rights instrument does not seek to usurp the role of parliament, but rather, enhance it by identifying and articulating the rights that parliament should be acting to safeguard, and defining rigorous procedures for it to execute that responsibility.

By way of illustration, prior to the enactment of the Charter SARC was already charged with responsibilities regarding the protection of rights. Specifically, section 17(a)(i) of the *Parliamentary Committees Act 2003* stated (and continues to state):

> *The functions of the Scrutiny of Acts and Regulations Committee are —*
>
> *(a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly —*
>
> *(i) trespasses unduly on rights or freedoms;*

While not suggesting that SARC was anything other than vigilant in the performance of this responsibility, the Commission's view is that it has been significantly enhanced by the subsequent addition of section 17(a)(viii) which elaborates on SARC's functions in the following terms:

> *(a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly —*
>
> *(viii) is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities*

By specifying which rights it is that SARC is required to monitor, including the scope and content of those rights, and how to assess the validity of any limitations on those rights, the scrutiny function becomes more thorough and rigorous. In our 2008 report on the operation of the Charter, we highlighted what we regarded as a specific example of the impact and effectiveness of this in our commentary on the *Evidence Bill 2007*:

> *A particular feature of the bill examined in detail by the statement of compatibility and SARC was the impact of clause 18 upon cultural rights. Clause 18 is directed towards situations where a witness may be required to give evidence against a person who is their spouse, de-facto partner, child or parent, and requires the court to consider the potential impact on the relationship of compelling the witness to give evidence. In relation to the protection of cultural rights contained in section 19 of the Charter, the question raised by the bill was whether clause 18 should recognise broader kinship ties that form part of Aboriginal culture. The Attorney-General's statement of compatibility concluded that any limit on cultural rights was reasonable. SARC referred this question to the parliament, noting that, even if clause 18 were expanded to recognise kinship ties, the courts would still retain a discretion to compel the giving of evidence. Parliamentary debate also considered this issue.*
>
> *In the Commission's view, there is a real possibility that this important issue may not have been examined as rigorously as it was, without the Charter's explicit recognition of cultural rights and the improved processes for human rights scrutiny of bills. This bill provides a sound illustration of the substantive contribution that the Charter makes to the scrutiny of legislation and to enhancing the role of parliament in protecting rights.*[73]

By way of contrast, we noted that the exclusion of human rights analysis from the *Abortion Law Reform Bill 2007* in fact served to illustrate the important contribution Charter-scrutiny can make to not only parliamentary but also broader community debate and monitoring of human rights. Because laws covering abortion and child destruction are "carved out" from the operation of the Charter, the Bill was not accompanied by a statement of

70 Section 28, Charter.
71 Section 30, Charter.
72 Section 21(1)(ha), *Subordinate Legislation Act 1994.*

73 Victorian Equal Opportunity & Human Rights Commission, 2008, op cit, p 73.

compatibility. Had one been prepared it would have needed to address questions regarding the extent to which the new legislative regime did or did not limit medical and allied health practitioners' right to freedom of conscience. The Commission observed:

> *Both the parliamentary and community debates regarding this bill demonstrated the relevance and contribution of human rights to important and controversial legislation. In particular, the reasonable limitations framework in section 7 of the Charter provides a clear, balanced and robust framework for debating and resolving issues concerning conscientious objections on the part of health service providers. It would have been valuable to have had the Minister's position on this and other human rights aspects raised by the bill as part of the material informing this debate from the outset.* [74]

The Impact of Legislative Scrutiny Provisions

The Commission has repeatedly acknowledged the positive impact of this aspect of the Charter from its commencement. Legislation is a powerful tool, not only through reflecting the standards that we adhere to as a community by prohibiting or mandating particular conduct, but also in terms of the message it sends concerning the appropriate exercise of government authority. As such, it is vital that legislation reflect a human rights orientation. It is also vital that this human rights orientation is considered and present at the outset, and in this regard, this aspect of the Charter is reflective of a theme recurrent in its provisions – that is the desirability of getting things right at the planning and development stage, as opposed to remedying human rights breaches after they have occurred.

Assessing the operation of these provisions is, however, a nuanced exercise. In our 2008 Charter report the Commission observed:

> *Assessing the parliamentary human rights dialogue is extremely difficult. In last year's report, the Commission noted that only one bill had been amended in response to comments by SARC; this year, we have been advised that no bills were amended on the basis of issues raised in SARC Charter reports. While this is an important indicator to monitor, it is inadequate by itself as an indicator of the depth and quality of parliamentary engagement around human rights.*
>
> *The Commission's view is that the value of parliamentary human rights scrutiny is determined as much by the extent to which differing views are discussed, as it is by simply recording the number of times a bill is or is not amended in response to concerns raised by SARC. Where parliamentary processes involve merely cursory consideration of human rights, there is little incentive for the government of the day to approach the development of legislation and policy in accordance with a human rights based approach. Many critics of the Charter argue that parliament is the institution that protects rights and that it can and should do so without a human rights instrument. However, the evidence emerging from 2007 and 2008 clearly demonstrates that the Charter further embeds and enriches the role of the Victorian Parliament in ensuring adherence to human rights. The Charter does this by providing a process for scrutiny and debate that did not exist previously.*
>
> *In this context, the Commission notes that various features of the parliamentary human rights dialogue have continued and developed from last year, contributing to the positive evolution of this dialogue:*
>
> - *Ministers (with the support of their departments), and members responsible for a private member's bill, have continued to approach the preparation of statements of compatibility rigorously, providing comprehensive assessments of engagement with, and limitations upon, human rights by individual bills. Of course, a statement of compatibility is the end-point of the process of human rights analysis of legislation, with the consideration of these issues needing to commence when a possible legislative initiative is first conceived. While greater effort needs to be made to facilitate community input into the scrutiny process, the Commission acknowledges that this is an area of strong performance. While there may be disagreement regarding conclusions concerning the human rights compatibility of particular bills, it seems clear that careful consideration is being given to each statement of compatibility.*
> - *Similarly, SARC continues to approach its role diligently and comprehensively, subjecting bills to thorough and independent multi-party scrutiny and, on many occasions, presenting a very different view or interpretation of the scope of particular rights, the reasonableness or otherwise of limitations on rights and the overall implications of the Charter for a particular legislative regime. The formal mechanisms of the parliamentary dialogue seem to be drawing out meaningful differences, complemented by SARC's selective use of requests to Ministers to respond to particular human rights concerns. Further, the content of a number of ministerial responses to SARC suggests that such requests are being given careful consideration. As noted above, the increased level of community engagement with SARC's processes is also a welcome and positive development.*
> - *If an appropriate measure of the value of the parliamentary human rights dialogue is the exchange of views on a bill, the 'third element' of the dialogue becomes critical. This element is the extent to which human rights issues are being identified from statements of compatibility and SARC reports, and debated during the passage of legislation through the Victorian Parliament. Accordingly,*

74 Ibid, p 72.

the Commission is encouraged to note that during 2008, debate concerning 13 bills involved active discussion about the human rights implications of those bills. While it is not possible to assert whether this number represents too few, too many or the 'correct amount', it is important to acknowledge that two years into this new aspect of legislative scrutiny, it appears that the Victorian Parliament is beginning to actively engage with the 'territory' of human rights.[75]

Any assessment is further complicated by an acknowledged "black-hole" that the Commission's 2007 report described in the following terms:

Statements of compatibility provide information about the 'end point' in the executive's human rights assessment; they do not disclose how significantly a provision in a Bill may have changed over the course of its development in response to human rights analysis. While acknowledging the difficulties in making some of these deliberations public, the Commission believes more information about this 'behind the scenes' analysis would enhance community understanding of the operation and impact of the Charter and the human rights dialogue emerging in Victoria. [76]

Regrettably, it has not yet been possible to identify a means by which this type of information can be accessed, compatibly with the principle of cabinet confidentiality.

Despite these gaps and difficulties, the Commission feels confident in asserting that this aspect of the Charter is working well and making a considerable contribution to the development of Victorian statutory law. Put at its simplest, over 2007 and 2008 a total of 202 Bills were subject to rigorous human rights analysis in the course of being drafted, and then during their passage through parliament. The fact is this would not have occurred in the absence of the Charter.

Override Declarations

To fully understand the operation of the parliamentary human rights dialogue that occurs under the Charter it is necessary to note the mechanism of override declarations, an important but thus far 'theoretical' aspect of the Charter. Under section 31 of the Charter, in exceptional circumstances parliament can enact legislation that includes an override declaration. An override declaration makes it clear that parliament intends that part or all of a particular Act has effect despite being incompatible with the Charter – and that the Charter has no application to that provision or Act. Override declarations expire five years after coming into operation, but may be re-enacted. Under section 41(b)(ii), the Commission is required to report on all override declarations made in a given year. Thus far no override declarations have been enacted.

Override declarations are one of the mechanisms designed to preserve the sovereignty of parliament – by expressly allowing it to enact laws that are incompatible with human rights and terminate the human rights dialogue. In the absence of any override declarations it is impossible to comment conclusively on the operation of these provisions. However, the Commission notes:

- it is positive that the mechanism is expressed to only apply in "exceptional circumstances". While this is not defined it clearly sets a high bar and it might be anticipated that any such declaration would be subject to a considerable level of political and public scrutiny; and
- the expiry and renewal mechanism builds in an automatic safeguard that requires both the justification for, and nature of the relevant incompatibility to be revisited (by contrast, legislation accompanied by a statement of incompatibility[77] continues to operate until repealed – albeit subject to the interpretive obligation under section 32 of the Charter).

While the Commission would be gravely concerned by overuse of this mechanism, it appears to represent an appropriate balance between the need for rigorous human rights safeguards, while at the same time permitting appropriate responses in exceptional situations.

A DUTY ON GOVERNMENT AND PUBLIC AUTHORITIES TO ACT COMPATIBLY WITH HUMAN RIGHTS AND CONSIDER HUMAN RIGHTS IN THE COURSE OF MAKING DECISIONS

Requiring public authorities to act compatibly with human rights and consider human rights in the course of making decisions is directed to two outcomes:

- making human rights part of the lived experience of individuals – the extent to which human rights principles are reflected in policies, conduct and service delivery across government, will largely determine the extent to which individuals and groups within the community experience the impact of a national human rights instrument; and
- making paramount, the principle or objective of getting things right in the planning stage, in order to avoid having to resolve human rights breaches at a later point in time.

An explicit and broad obligation to act compatibly with human rights, and give proper consideration to human rights when making decisions is critical to the effective operation of a national human rights instrument.

In Victoria, the executive arm of government and other public authorities [78] have been under a positive obligation of this type since 1 January 2008.[79] Some of the matters that have arisen before Victorian courts and tribunals over 2008 have begun to provide guidance as to the character and scope of the obligation placed on public authorities under the Charter. A particularly useful framework was articulated through the Attorney-General's

75 Ibid, pp 70-71.
76 Victorian Equal Opportunity & Human Rights Commission 2007, op cit, p 41.
77 Something that is permitted or contemplated by section 28(3) Charter.
78 Defined under section 4 Charter.
79 Section 38 Charter.

intervention in *Sabet v. Medical Practitioners Board of Victoria* [80] which identified three distinct concepts of relevance:

1. **Engagement**: whether or not a particular decision or course of conduct actually or potentially impacts upon one of the rights protected under the Charter.
2. **Limitation**: whether that impact is such as to restrict full realisation of the relevant rights.
3. **Justification**: an analysis of whether an identified limitation is reasonable and therefore permissible in accordance with the framework specified in s.7 of the Charter.

This elaboration of the legal framework established by the Charter has been of great assistance. Viewed in isolation, however, it can seem to marginalise human rights promotion as a somewhat technical exercise removed from daily engagement with individuals and issues. In terms of the intended impact of the Charter this would not be desirable. However, the Commission regards the notion of a human rights based approach to government articulated in Part One of this submission, as a bridge or connection between the legal framework now in place to promote human rights, and the day to day contexts within which agencies operate, and where the promotion of human rights is made real and meaningful.

Policies and service delivery frameworks that are developed within a human rights based approach will reflect the principles of participation, accountability, non-discrimination / attention to marginalised groups, empowerment and linkages to human rights standards. Where this occurs, then should the need arise we believe agencies would be well placed to demonstrate compliance with their legal obligations. More importantly, their approach to complying with their legal obligations will have a meaningful impact upon individuals and groups in the community with whom they engage.

Impact of the Positive Obligation to Comply with Human Rights

While the positive obligation to comply with human rights had only been in force for a relatively short period, our 2008 report on the operation of the Charter highlighted immediate impact:

> *The case studies provided to the Commission clearly indicate that the Charter is beginning to have an impact upon policy development and service delivery. Generally, that impact can be characterised as reinvigorating or reinforcing existing ethical frameworks and principles of practice. This is to be expected and is just as important as more dramatic change. The fact that human rights principles are readily recognisable does not make the Charter irrelevant or superfluous. The Charter makes a vital and fundamental contribution to the realisation of those principles by taking them out of the category of organisational values or best practice principles and articulating them within a clearly defined framework, as well as elevating them to the status of the law. It also provides a rigorous methodology for balancing individual rights with other, equally important, objectives and considerations where situations of apparent conflict arise. Finally, there is a world of difference between an aspiration and an obligation: this difference lies at the heart of a human rights based approach to government.*[81]

The Commission also noted that positive engagement with the Charter and the obligations public authorities have under it, was more than a matter of "window-dressing":

> *The current emphasis on social inclusion by the Victorian Government is commendable, as is the development of targeted responses to the particular needs of marginalised individuals and groups. Making the link between these initiatives and human rights is critical. Of course, simply referring to the Charter does not of itself guarantee the meaningful integration of human rights into policy development and implementation. However, using the language of human rights and articulating their relevance shows an understanding that the actions of government are a response to a fundamental obligation in relation to human rights – and much more than a discretionary priority. Importantly, a rights framework also acknowledges that marginalised individuals and communities are defined by much more than their disadvantage.*[82]

Definition of Public Authorities

A critical aspect of any positive duty regarding the rights enshrined in a human rights instrument is ensuring that it applies to a sufficiently broad range of entities. The structure and operation of modern government is increasingly complex and devolved, with many functions or responsibilities performed by entities quite distant from 'traditional' government bodies.

It is essential that a national human rights instrument is drafted in such a way as to extend human rights obligations to entities (be they public or private) that are undertaking governmental functions on behalf of the state. The relevant provision of the Charter is section 4, which has been drafted with an awareness of, and desire to avoid some of the complexities and undesirable outcomes that have arisen in other jurisdictions.

Interestingly, while it had been anticipated that the meaning and scope of section 4 of the Charter might have been tested early on in its operation, apart from the status of courts and tribunals, this in fact has not been the case. It is beyond the scope of this submission to examine section 4 in detail,[83] or make specific recommendations about the reach of a duty of compliance under a federal human rights instrument. Our key message is simply to stress the imperative of ensuring its reach is broad and flexible.

80 [2008] VSC 346.

81 Victorian Equal Opportunity & Human Rights Commission 2008, op cit, p 36.
82 Ibid, p 39.
83 An outline of the Commission's preliminary views on the scope of section 4 is available at http://www.humanrightscommission.vic.gov.au/publications/annual%20reports/.

INTERPRETING AND APPLYING ALL LAWS COMPATIBLY WITH HUMAN RIGHTS

An obligation on courts, tribunals and any other entity engaged in interpreting statutory provisions to do so compatibly with human rights operates alongside and to support Parliament's obligation to develop laws compatibly with human rights, and the obligation on public authorities to act compatibly with human rights. An interpretive duty also expands the scope of influence of a human rights instrument. In particular:

- By mandating new, human rights compatible interpretations of statutory provisions the section 32 obligation facilitates real change and improved human rights outcomes for individuals in situations where previous interpretations operated to limit rights.
- The obligation extends beyond courts and tribunals to any entity that is required to interpret and apply statutory provisions, requiring everyone to stop and reconsider previous interpretations of the law.
- It applies to the interpretation of all statutory provisions without need for a nexus to any public authority. Accordingly, it means that human rights considerations can be relevant in the context of statutory provisions regulating conduct by private entities and individuals, as well as those applicable to the resolution of private disputes.

While the cause of significant debate, human rights interpretive obligations are an essential component or mechanism to develop meaningful and robust human rights dialogue, and the protection and promotion of rights. An interpretive obligation must form part of a national human rights instrument.

Section 32 of the Charter states:

> *So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.*

Section 32 does not operate in isolation, but alongside a range of associated provisions that facilitate and define the role of courts and tribunals in the human rights dialogue. These include:

- Where a question of law regarding the application of the Charter, or the interpretation of a statutory provision in accordance with the Charter, arises in proceedings before a court or tribunal, the relevant court or tribunal can refer the question of law to the Supreme Court in certain circumstances (section 33).
- The Supreme Court is empowered to make a declaration of inconsistent interpretation where it is of the opinion that a statutory provision cannot be interpreted consistently with a human right (section 36).
- Where a person is already able to seek relief or a remedy in relation to an act or decision of a public authority on the ground that the act or decision was unlawful, the Charter can now be used in support of that claim (section 39).
- Both the Attorney-General and the Commission are empowered to intervene in proceedings before courts and tribunals where a question of law arises regarding the application of the Charter, or the interpretation of a statutory provision in accordance with the Charter (sections 34 and 40).

Our submission examines a number of these provisions in more detail below, but it is important to firstly address a number of misconceptions associated with the duty to interpret laws compatibly with human rights, and more generally, mandating courts and tribunals to engage in the human rights dialogue. While these provisions have only been in operation in Victoria since the beginning of 2008, in our report on the operation of the Charter we noted that there was already an emerging body of evidence to refute a number of the objections raised to this component of human rights instruments and the human rights dialogue they seek to foster:

> ***Legislating to protect human rights creates a "tsunami" of litigation:*** *the first response to this is that this simply is not the case. Victoria's experience over 2008 is one of very limited impact – human rights considerations were integrated into a small number of proceedings over the course of the year, and no matters were initiated solely on the basis of the Charter becoming fully operational. This mirrors the experience of the ACT where the concern is that the Human Rights Act was being under-utilised, leading the Territory Government to introduce amendments to expand the way in which human rights concerns can be raised before the courts.*[84] *The second response is to challenge why it is that we should be so afraid of people using the courts to resolve human rights disputes. If people believe their human rights are being restricted, as with any other type of dispute it is generally better that the issue is resolved as early and informally as possible, but if that does not occur it is entirely appropriate that they be able to pursue their concern and have it determined by the courts. Access to independent courts for the resolution of private and public legal disputes is an essential ingredient of democracy.*
>
> ***A Charter restricts the operation of a democratically elected Parliament and transfers power to an unelected judiciary:*** *this also invites two responses. Firstly, it is again the demonstrable experience of Victoria, mirrored in the ACT, that the legislature continues to pursue its legislative platform, and the judiciary continue to interpret and apply the laws that are enacted. That interpretive exercise now involves the consideration of human rights, but only because that is what the legislature has instructed and authorised the judiciary to do. The balance across the three arms of government continues unchanged, however, the content of the exchange between them is expanded and enriched. In the federal context, the second point to note is that the Commonwealth Constitution already places limits on the*

84 Section 40C.

power of the Federal Parliament, and the High Court is regularly called upon to determine whether Parliament has moved beyond those limits and needs to be restrained. A statutory Charter of Human Rights does not vest courts with powers that are even remotely similar.

Engaging with human rights requires judges to become involved in matters of social policy for which they are not qualified, and being unelected, cannot be held to account: *this overlooks the fact that judges are already required to make decisions that have fundamental social policy implications and dimensions. A human rights Charter simply provides a transparent framework to use in their resolution – that framework having been set by Parliament. The case of* RJE v. Secretary to the Department of Justice *detailed above* [at page 98 of the 2008 report] *is a perfect example of this. Whether the Charter existed or not, judges would continue to be required to consider how the test for granting extended supervision orders in relation to serious sex offenders should be interpreted. At the heart of this legal issue is the complex policy question of the extent to which it is just and appropriate to hold people accountable for things they only might do in the future. The Charter did not create this issue for the courts, it did not convert a previously technical legal question into a free-ranging social inquiry, rather it provides the courts with an objective tool to assist them in their determination of the appropriate answer.* [85]

Declarations of Inconsistent Interpretation

The Charter's requirement that all statutory provisions be interpreted compatibly with human rights is not unlimited. Specifically, the endeavour to interpret statutory provisions compatibly with human rights must stop at the point at which such an interpretation would be inconsistent with the purpose of the relevant provision. In proceedings before any court or tribunal where a statutory provision cannot be interpreted compatibly with human rights, the relevant court or tribunal must apply the human rights *inconsistent* interpretation of the provision to determine those proceedings. However, should the proceedings be before the Supreme Court or Court of Appeal, the Court has an additional discretion to make a declaration of inconsistent interpretation. [86]

A declaration of inconsistent interpretation does not affect the validity of the particular statutory provision or the rights of any party to the relevant proceedings. [87] A declaration acts as a form of notification from the judiciary to the legislature that an aspect of Victorian statutory law is, in the view of the Court, inconsistent with human rights and needs to be scrutinised. The making of a declaration triggers the following process: [88]

- the declaration is forwarded to the Attorney-General;
- if the relevant statutory provision falls within the portfolio of another Minister. the Attorney-General must forward the declaration to that Minister, then
- within six months, the responsible Minister must respond to the declaration and the response must be tabled in Parliament and published in the Victorian Government Gazette.

Since the commencement of these provisions, the Supreme Court has neither made, nor advised that it was considering making, any declarations of inconsistent interpretation. Accordingly, it is difficult to evaluate the effectiveness or operation of such a provision. However, in the abstract, the Commission notes that the inclusion of the declaration provision is an integral feature of a robust human rights dialogue. Declarations highlight the Court's human rights reasoning in a matter, and brings Parliament's attention to why the Court considers that a provision of legislation is incompatible with human rights. This is essential for generating robust institutional dialogue, and it is achieved without upsetting or amending the constitutional roles and balance across the judiciary and legislature. Evidence from the United Kingdom also demonstrates that it is effective. In July 2006, at the time of the Department for Constitutional Affairs Review, all declarations issued under the *Human Rights Act* had resulted in the relevant legislative incompatibility being remedied.

Having emphasised the importance of such a mechanism, the Commission also acknowledges that in the context of this consultation it has given rise to significant angst in terms of whether it would require the High Court to perform a function incompatible with the Constitution – meaning that such a mechanism is not possible in a national human rights instrument. The Commission notes that there is a considerable divergence of views on this. However, a consultation convened by the Australian Human Rights Commission has identified a modified mechanism that is regarded as entirely compatible with the Constitution. Accordingly, the Commission is of the view that while replication of the Victorian mechanism might not be viable, its objective and purpose can be realised and incorporated in a national human rights instrument.

Linking Statutory Interpretation to International Human Rights Instruments and Jurisprudence

An important feature of the duty to interpret statutory instruments compatibly with the human rights enshrined in the Charter is the further mandate contained in section 32(2) which states:

> *International law and the judgements of domestic, foreign and international courts and tribunals relevant to a human right, may be considered in interpreting a statutory provision.*

The Commission regards this as an important feature of the Charter and one that should be replicated in a national human rights instrument. While the adoption of a domestic human rights instrument by any jurisdiction sends an important signal about its willingness to pursue local engagement with human rights, and explore and develop their local content and implications

85 Victorian Equal Opportunity & Human Rights Commission 2008, op cit, p 101-102.
86 Section 36(2), Charter.
87 Section 36(5), Charter.
88 Section 36(6)-(7) and section 37, Charter.

for domestic issues (summed up in the United Kingdom during the development and implementation of the *Human Rights Act* as "bringing rights home") it is important that this not occur in isolation.

Under a human rights framework, jurisdictions still retain significant autonomy and discretion regarding the development and implementation of particular initiatives, and thereby are able to accommodate and respond to domestic idiosyncrasies. However, their decisions and actions must be assessed against standards and benchmarks that are accepted by the international community as universal. A provision akin to section 32(2) of the Charter is one means by which these standards are incorporated into domestic decision-making and conduct.

Formalising or cementing the link between a national human rights instrument and international human rights standards would also help further realise one of the broader benefits associated with its adoption, namely the promotion of Australia as a good international citizen and human rights leader.

As highlighted this year by the United Nations Human Rights Committee, Australia is the only developed country that remains without any legislative or constitutional protection of human rights. This distinguishing characteristic does not sit comfortably with the Federal Government's reported desire for a more active role with the United Nations (in particular the pursuit of a seat on the Security Council), or its commitment to taking a leadership role in the Asia-Pacific region. In order to lead, it is necessary to demonstrate full commitment to the ideals one wishes to promote. Adopting a national human rights instrument is critical to positioning Australia to realise its international objectives. Linking the evolution of that instrument to developments in international human rights law and standards would add even further credibility to Australia's commitment to these ideals and its leadership in this area.

REMEDYING BREACHES OF HUMAN RIGHTS

The approach to individual remedies adopted by the Charter needs to be understood in the context of parameters that were set by the Victorian Government at the outset of the public consultation process that led to the enactment of the Charter, namely:

> *Consistent with its focus on dispute prevention, the Government does not wish to create new individual causes of action based on human rights breaches.*[89]

As the Commission noted at the time:

> *... the EOCV* [as we were then known] *believes the notion of enforcement of rights needs to be viewed far more broadly than in the narrow confines of individual causes of action – particularly given the growing appreciation that of itself the individual complaint mechanism in the EOA has not been an effective tool for systemic change and improvements. Respectfully, however, the EOCV submits that the Government position is unnecessarily narrow and that the objective of minimising litigation and focusing on prevention and resolution can in fact be realised without a blanket rejection of individual causes of action.*[90]

The Charter's approach to individual remedies will be revisited as part of the 4-year review of the Charter's operation that must be concluded by October 2011.[91] The Commission must approach that review with an open mind, accordingly, in this part of our submission we have chosen to identify issues and options that we regard as critical to the Committee's deliberations, and also highlight some of the particular questions that are beginning to crystallise in relation to the current Victorian framework.

In this context, the Commission maintains that while the desirable and legitimate focus of a national human rights instrument should be the prevention of human rights breaches through fostering a human rights based approach to the activities of government, it still requires effective mechanisms for resolving and remedying breaches when they occur. Some of these need to operate at the systemic level - this submission examines those mechanisms below in the context of the possible future role and functions of the Australian Human Rights Commission (**AHRC**). However, alongside systemic mechanisms there must be a means by which individuals can raise and pursue alleged breaches of their human rights. In the Commission's view, this necessitates consideration of both an administrative complaints process as well as a cause of action to pursue such matters in the courts.

An Administrative Process for Resolving Human Rights Complaints

A system of administrative complaint handling offers an opportunity to deal with matters in an accessible, low cost and informal setting, using appropriate/alternative dispute resolution strategies to encourage resolution of issues as near as possible to the local level. It may be that the inclusion of such a mechanism for complaints under a national human rights instrument will be far less controversial at the federal level. This is not only because of the broader terms of reference for the consultation on this issue, but also because the AHRC already has jurisdiction to handle some human rights complaints under the *Human Rights and Equal Opportunity Commission Act 1986* and that process might easily be adapted to handle complaints under a national human rights instrument. In Victoria there was no similar precedent.

For the sake of completeness, the approach ultimately adopted in Victoria involved consequential amendments made by the Charter to section 13 of the *Ombudsman Act 1973* meaning that the Victorian Ombudsman's complaint handling jurisdiction now includes the following:

> *(1) The principal function of the Ombudsman shall be to enquire into or investigate any administrative action taken in any Government Department or Public Statutory Body*

89 *Human Rights in Victoria – Statement of Intent* May 2005, p 3.

90 Equal Opportunity Commission Victoria, *Submission by the Equal Opportunity Commission Victoria in Response to the Human Rights Consultation Discussion Paper "Have Your Say About Human Rights in Victoria"*, August 2005, pp 55-56.

91 Section 44 Charter.

to which this Act applies or by any member of staff of a municipal council.

(1A) The functions of the Ombudsman under sub-section (1) include the power to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter of Human Rights and Responsibilities.

The Commission regards this articulation of the Ombudsman's role in relation to the Charter as positive. However, we also note the following:

- There is an argument that the amendments to the *Ombudsman Act* essentially only confirmed what would have happened by implication of the interpretive obligation of the Charter on the Ombudsman's pre-existing complaint handling jurisdiction. Briefly, the reasoning is that even without amendment the *Ombudsman Act* would need to be interpreted compatibly with human rights, and as a consequence of this, human rights principles would need to form part of the framework used by the Ombudsman to assess administrative actions. Interestingly, this argument has implications for any statutory monitoring or complaint-handling scheme in Victoria, and feedback provided to the Commission by a range of statutory authorities suggests they are incorporating the Charter into their responsibilities in this way.[92]
- While the Charter defines human rights obligations by reference to "public authorities", the Ombudsman's complaint handling jurisdiction, whilst broad, is defined differently by reference to "Government Departments" and "Public Statutory Body". Thus far the Commission is not aware of any detailed research that has examined how significant any gap between the Ombudsman's jurisdiction and the reach of the definition of public authority may be, nor is it aware of any anecdotal evidence of the different jurisdictional concepts being problematic. This is, however, an issue that is important and will warrant consideration as part of the 4-year review of the Charter.
- Undoubtedly, the greatest challenge that arises from not having a straightforward approach to enabling complaints about human rights breaches by public authorities is educative. Over many years governments have expanded the range of independent and specialist authorities charged with a responsibility to monitor and encourage compliance with a variety of legislative schemes. Generally, the public expect that where the law sets down standards or principles it will also set down a straightforward mechanism for members of the public to raise concerns that those standards are not being adhered too. The fact that human rights complaints cannot be raised with Victoria's human rights authority is an ongoing source of confusion.

A Stand-Alone Cause of Action

Section 39 of the Charter deals with remedies through the courts:

(1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

(2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right —

(a) to seek judicial review under the Administrative Law Act 1978 or under Order 56 of Chapter I of the Rules of the Supreme Court; and

(b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.

(3) A person is not entitled to be awarded any damages because of a breach of this Charter.

(4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.

This aspect of the Charter's operation is complex. In order for a person to be able to rely on section 39 to raise an allegation that their rights under the Charter have been breached, they must address two threshold requirements: First, that the entity taking the action or decision that has allegedly breached their rights fits within the definition of a public authority contained in section 4 of the Charter. Secondly, they must establish that they have an existing cause of action (independent of the Charter) that enables them to challenge the lawfulness of that public authority's act or decision. Interestingly, in recent amendments to the ACT *Human Rights Act* and its approach to remedies and causes of action a more permissive and arguably more straightforward formulation was adopted (section 40C):

(1) This section applies if a person —

(a) claims that a public authority has acted in contravention of section 40B; and

(b) alleges that the person is or would be a victim of the contravention.

(2) The person may —

(a) start a proceeding in the Supreme Court against the public authority; or

(b) rely on the person's rights under this Act in other legal proceedings.

92 See generally Victorian Equal Opportunity & Human Rights Commission 2007 and 2008.

It is our view that when the Charter is reviewed in 2011, and in the course of developing a national human rights instrument, the scope of remedies and a stand-alone cause of action needs to be approached not as an exercise in justifying their inclusion, but rather one of justifying any proposed limitation or exclusion. As noted above, access to independent courts to resolve legal disputes is a key element of democracy. Furthermore, not only does such an exclusion defy international human rights norms,[93] the source of concern is unclear given human rights instruments in other jurisdictions with either explicit or implied causes of action have not seen waves of unmeritorious litigation.

THE FUTURE ROLE AND FUNCTIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION

As Australia's national human rights institution, the AHRC is uniquely positioned to take on a range of critical responsibilities that would promote the effective operation of a national human rights instrument. Arguably, given such responsibilities would be supported by a more comprehensive framework for the protection of human rights than that which is currently in place, any new functions or responsibilities would further enhance the AHRC's existing compliance with the *Principles relating to the status and functioning of national institutions for the protection and promotion of human rights* ("Paris Principles").

Given the pivotal importance of human rights education, we address the possible educative role of the AHRC separately in Part Four of this submission. Here, we will comment briefly on possible new functions for the AHRC based on our experience of the functions vested in this Commission under sections 40 and 41 of the Charter.

Reporting on the Operation of a National Human Rights Instrument

It is our understanding that the Commission's role in reporting annually to the Attorney-General and parliament on the operation of the Charter is a unique function, there being no equivalent in the human rights instruments on which the Charter is based. We believe a similar reporting function should be vested in the AHRC under a national human rights instrument.

Our experience of this function is that it provides an opportunity to engage meaningfully with government about its practical strategies for implementing and adhering to the Charter. In turn this positions the Commission to not only identify gaps and offer suggestions regarding how best to incorporate the Charter, it also allows us to inform a range of stakeholders and the community about the impact of the Charter and the difference it is making. Charter reports also provide an opportunity to explore thematic issues and build understanding in both government and the community about the content and relevance of human rights.

Attached to this submission is a copy of our 2007 and 2008 reports on the operation of the Charter – both the full reports and the abridged version for community audiences. Also included is a brief summary of the framework we are implementing in relation to the report that will cover the 2009 calendar year.

The Provision of Advice and Conducting Reviews Upon the Request of the Attorney-General or a Public Authority

Currently the Charter enables the Attorney-General to seek advice from the Commission in relation to issues arising from the intersection of human rights with the common law and/or statutory provisions. In addition to this, any public authority can ask the Commission to review its programs and practices in order to make a determination regarding their compatibility with human rights.

To date, apart from one very small review, the Commission has not been called upon in relation to these functions, accordingly our capacity to comment is limited. At the time of the 4-year review a critical issue for consideration will be whether the Commission's powers to conduct reviews and provide advice should be reframed so as to be exercised at the Commission's discretion rather than dependant upon a request from the Attorney-General or a public authority. Our preliminary view is that such own-motion powers are preferable and in keeping with the independence that is essential to the operation of human rights commissions.

In relation to the AHRC it is critical to note that it already has extensive powers of inquiry and reporting under the *Human Rights and Equal Opportunity Commission Act* that it has used to great effect in the past. These powers have been exercised both at the Commission's own motion (e.g. the *National Inquiry into the Human Rights of People with Mental Illness*) and at the request of the government of the day (e.g. the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*). The adoption of a national human rights instrument would be an opportunity to review the current scope of these functions to ensure their ongoing effectiveness in responding to issues both large scale and discrete, as well as establishing any necessary links between these functions and the substantive and procedural provisions of a national human rights instrument.

Intervention in Relevant Proceedings before Courts and Tribunals

Under section 40 of the Charter, since the beginning of 2008 the Commission has been empowered to intervene in proceedings before any court or tribunal where a question of law arises concerning the application of the Charter or the interpretation of a statutory provision in accordance with the Charter. Section 34 of the Charter vests the Attorney-General with an identical function. To enable the Commission and Attorney-General to exercise their intervention function, section 35 requires a party to proceedings in the Supreme Court or County Court to notify both where a relevant Charter question arises, or where such a question is to be referred to the Supreme Court for its determination. In addition, under section 36 (4), the Supreme Court must ensure that both are given notice that it is considering a declaration of inconsistent interpretation and a reasonable opportunity to intervene. With

93 See for example article 2.3, *International Covenant on Civil and Political Rights*.

regard to matters in other courts and tribunals, we rely upon informal notifications in order to become aware of matters that may warrant intervention.

The Commission's approach to its intervention function

The Commission uses a detailed set of guidelines to make a decision about whether or not to intervene in matters – these guidelines are publicly available.[94] During 2008, the Commission received 35 notifications and decided to intervene in four matters. Details of these interventions are provided in our 2008 report on the operation of the Charter. [95]

The Commission regards its intervention power as vitally important to its role as Victoria's independent human rights monitor. Particularly in the early stages of the development of local human rights jurisprudence, the Commission offers an independent perspective on the operation of the Charter and the meaning of the rights it protects. This perspective can make a valuable contribution in individual proceedings, as well as to the Charter's broader operation. However, the Commission does not regard it as necessary that it be heard every time a Charter question arises. Rather, the Commission aims to use its intervention function strategically in order to promote the effective operation of the Charter and its integration into law and public policy in Victoria.

In *Kortel v. Mirik and Mirik*,[96] Justice Bell of the Victorian Supreme Court made a number of observations concerning the pivotal importance of the Commission's intervention role, in particular he noted:

- the Commission's responsibilities under the Charter (including its intervention role) are of fundamental importance to the protection of human rights;
- the Commission is independent of government and the significance of its intervention role is emphasised by that fact that its standing to intervene is framed in identical terms to that of the Attorney-General;
- whether a question arises that enlivens the Commission's intervention function is for the relevant Court to decide – it is not determined by the position of the parties; and
- interventions do not require leave of the Court. [97]

We believe it is essential that a national human rights instrument vest the AHRC with a similarly broad and unfettered power to intervene in relevant proceedings. Again, it is important to note that the AHRC already has an intervention power under the *Human Rights and Equal Opportunity Commission Act* that has been used to great effect. Any intervention function related to the operation of a national human rights instrument should complement and build on this function. In addition, any intervention function should operate alongside the AHRC's *amicus curiae* function under federal anti-discrimination laws.

94 Available at http://www.humanrightscommission.vic.gov.au/human%20rights/the%20victorian%20charter%20of%20human%20rights%20and%20responsibilities/.
95 Victorian Equal Opportunity & Human Rights Commission 2008, op cit, pp 97-98.
96 [2008] VSC 103.
97 At paras 14 and 16.

SUMMARY

The dialogue model of human rights that is enshrined in the Charter provides a robust and effective framework for the protection and promotion of human rights in a national human rights instrument. Its three primary mechanisms operate as an interconnected system for ensuring that across government human rights are considered and complied with.

1. Incorporating human rights scrutiny into the development of all legislation enhances the role of parliament in the protection of human rights; it reflects human rights principles in the rules we adhere to as a community; and it ensures balance in the exercise of power.

2. Requiring public authorities to act compatibly with human rights and consider human rights in the course of making decisions makes human rights principles part of the lived experience of individuals as they come into contact with government, it also reinforces the pro-active nature of human rights instruments and the primary objective of preventing rather than remedying non-compliance.

3. Ensuring all statutory provisions are interpreted compatibly with human rights extends the influence of human rights principles and provides the courts with a defined role within a robust human rights dialogue.

The experience of Victoria and the ACT provides the Committee with an opportunity to reconsider the most effective means of enabling breaches of rights to be remedied. Consideration needs to be given to an effective administrative process for resolving human rights disputes, as well as a cause of action to enable such matters to be pursued through the courts where necessary.

The existing role of the Australian Human Rights Commission positions it well to take on new functions under a national human rights instrument. Such functions should be developed and articulated in such a way as to complement the tools that are already available to the Commission to fulfil its current mandate.

PART FOUR

THE PIVOTAL IMPORTANCE OF HUMAN RIGHTS EDUCATION

PART FOUR: THE PIVOTAL IMPORTANCE OF HUMAN RIGHTS EDUCATION

BACKGROUND

Human rights education is an integral component of, and a specific obligation under many of the international human rights instruments to which Australia is a party.[98] The United Nations Decade for Human Rights Education spanned 1995-2004, informing this initiative, the UN *Guidelines for National Plans of Action for Human Rights Education* included the following definition of human rights education:

> *In accordance with those provisions, and for the purposes of the Decade, human rights education may be defined as training, dissemination and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes, which are directed towards:*
>
> *(a) The strengthening of respect for human rights and fundamental freedoms;*
>
> *(b) The full development of the human personality and the sense of its dignity;*
>
> *(c) The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups;*
>
> *(d) The enabling of all persons to participate effectively in a free society;*
>
> *(e) The furtherance of the activities of the United Nations for the maintenance of peace.* [99]

As is borne out by Victoria's experience with the Charter, the adoption of a national human rights instrument would provide a critical opportunity to refresh and expand on existing human rights education initiatives and must be accompanied by sufficient resources to enable educational needs to be met and opportunities fully capitalised.

In this part of our submission we examine two key aspects of human rights education – education targeting the community (both in schools and more broadly), as well as initiatives directed to government and the broader public sector. Like ourselves, we believe it is vital that the AHRC is given a broad mandate in relation to human rights education, however, the responsibility for human rights education needs to extend further, in particular to educational authorities and government.

HUMAN RIGHTS EDUCATION AND THE COMMUNITY

Community perspectives and understanding of human rights are critical components of the human rights dialogue envisaged by a human rights instrument. These instruments are often described as 'living documents' – that is, their meaning evolves over time to reflect and respond to contemporary issues, challenges and opinions. Parliament, courts and tribunals and government all provide an important perspective on the contemporary meaning of human rights, but this meaning can only be fully refined with input from the broader community.

As the former UN Commissioner for Human Rights, the late Sergio Vieira de Mello, observed:

> *The culture of human rights derives its greatest strength from the informed expectations of each individual. Responsibility for the protection of human rights lies with the states. But the understanding, respect and expectation of human rights by each individual person is what gives human rights their daily texture, their day-to-day resilience.* [100]

While human rights education strategies need to be integrated and complementary it can be useful to examine the particular opportunities and challenges that arise in relation to school-based human rights education for children and young people, and human rights education for the broader community.

School-Based Human Rights Education for Children and Young People

Human rights education in schools is about much more than simply teaching students the rights that are enshrined in a human rights instrument. While an awareness and understanding of human rights and the role of such an instrument is an important educative outcome, the objective and potential of human rights education extends much further:

> *Human rights education is an effective means to educate children from a very young age to develop respect for self, for other people and humanity, appreciation of diversity, valuing of freedom, equality and justice, determination, intelligent inquiry and a critical independent mind for reflective citizenship, upon global, moral, civic, and multicultural concerns, all of which compose the basis of a democratic society and humane citizenry.* [101]

In this context human rights education in schools needs to be viewed as extending far beyond a discrete, stand-alone unit, and instead regarded as a key dimension within a multi-faceted approach to citizenship or civics education. Furthermore, the obligations, values and rights that are being taught as part of the formal school curricula also need to be reflected and acted upon within the broader day-to-day life of the school community so that

98 See for example, article 13 *International Covenant on Economic, Social and Cultural Rights*, article 10 *Convention on the Elimination of All Forms of Discrimination Against Women* and article 29 *Convention on the Rights of the Child.*

99 General Assembly, A/52/469/Add.1, 20 October 1997, para 11.

100 Former UN High Commissioner for Human Rights, Sergio Vieira de Mello, opening address to the 59th session of the Commission on Human Rights, Geneva, 17 March 2003.

101 Frantzi, K *Human Rights Education: the United Nations Endeavour and the Importance of Childhood and Intelligent Sympathy*, International Education Journal, Vol 5, No 1 2004 at p 3.

the human rights learning is reinforced by direct experience: that is educating *for*, not just *about* human rights.

It is commonly asserted that with the advent of unprecedented and rapid technological change, worsening environmental degradation and climate change, as well as global terrorism and security risks, children and young people will eventually be in charge of a vastly different global environment. In this context, it has been observed that:

> *The new challenge is how to prepare young people for democracy in contexts that are quite different from those that have been known in the past. ... Young people need to know about democracy – how it works and what is worth defending. They need to understand the multiple ways in which democracy is being threatened – from both within the nation-sate and outside – and be able to respond to those threats in ways that ensure that the essential features of democracy remain intact. As well as being "active" citizens, young people in the future will need to be informed and compassionate citizens.* [102]

It is subsequently argued that the key objectives of educational strategies designed as a response to this challenge should be to:

- build social cohesion, inclusion and trust;
- develop respect for diversity; and
- develop critical thinking and problem-solving skills that enhance civic capacity. [103]

The link between these objectives and the communitarian dimension of human rights (examined in Part Two of this submission) is clear. The Commission is not suggesting that educational authorities are not already responding to these challenges, however, the adoption of a national human rights instrument – accompanied by appropriate resources – represents an unprecedented opportunity to develop a comprehensive, holistic and sustained response. A national human rights instrument can and should act as a catalyst for reflecting upon how we educate children around the notion of citizenship in a community that aspires to a culture of human rights, and further, it provides an objective benchmark or framework of values on which to plan and centre future education strategies directed toward this goal.

As noted already, using a national human rights instrument to promote and pursue a human rights oriented approach to traditional civics education results in far more than a generation of students who can recite its contents. It will contribute to equipping young people to be able to reflect on and critically assess events in our community, and form views and determine actions based on an understanding of social connectedness rather than the divisive perspectives of "I-You" and "Us-Them".[104] As comprehensive research in the United Kingdom has proved:

> *There is growing evidence that when children are respected as citizens they demonstrate the values, skills and behaviours that define active citizenship. Children who are taught about their contemporaneous rights and responsibilities in classrooms and in schools* [and communities] *that respect those rights by allowing meaningful participation, are children who display moral and socially responsible behaviours and feel empowered to act.* [105]

Human Rights Education for the Broader Community

The importance of engaging the community in the national human rights dialogue cannot be underestimated. Yet if we are to achieve our desired vision of a community that values social inclusiveness, the full exercise of democratic rights, equitable and just legal processes, and good government [106], a great deal of assistance will be required to develop an understanding and ownership of human rights, and of the benefits a national human rights instrument can bring ordinary people.

The critical importance of community engagement has been a central theme in commentary on the Victorian experience, both prior to[107] and following the Charter's introduction. The Commission's 2008 report on the operation of the Victorian Charter observed that: [108]

> *The human rights based approach to government... emphasises the critical importance of the community understanding human rights principles – both their scope and their relevance. In particular, human rights awareness is essential if individuals and groups are to participate meaningfully in the identification, design and delivery of policy and service initiatives, as well as being part of a robust and genuine accountability framework...the local dimension of universal human rights needs to be informed by the experiences and the priorities of those who have not enjoyed the full realisation of these rights.*

Evidence from other jurisdictions demonstrates how "deficiencies in training and guidance"[109] have had a negative impact on community engagement with human rights instruments. In the ACT for example, community engagement remained "slight" after two years of operation, with human rights being regarded as a "nebulous concept beyond the realm of everyday life"[110] , while in the United Kingdom, community attitudes to human rights are dominated by misrepresentation, misunderstandings, myths and rumours.[111]

102 Kennedy, K *Preparing Young Australians for an Uncertain Future: new thinking about citizenship education* Teaching Education, Vol 14 No 1 2003, p 54.
103 Ibid p 63.
104 Dewey, J *Human Nature and Conduct* (1922) referred to in Frantzi, K op cit, p 1.

105 Covell, K., et al, *If there's a dead rat don't leave it. Young children's understanding of their citizenship rights and responsibilities,* Cambridge Journal of Education, Vol 38, No 3, September 2008, p 323, citing Howe, R.B., & Covell, K. (2007), *Empowering children: Children's rights education as a pathway to citizenship,* Toronto, Canada, University of Toronto Press.
106 *Surface Tensions*, The Age, January 19th 2008.
107 See for example, *Rights, responsibilities and respect: the report of the Human Rights Consultation Committee*, Submission 840: Prof. Marcia Neave and Prof. Spencer Zifcak.
108 Victorian Equal Opportunity & Human Rights Commission 2008, op cit, p.67.
109 UK Joint Committee on Human Rights (2006) *Thirty-second report* para 67, available at http://www.publications.parliament.uk/pa.
110 ACT Council of Social Services (2006), 'Review of Human Rights Act 2004', available at http://www.actcoss.org.au/publications/Publications.
111 UK Joint Committee on Human Rights (2006).

Human rights education targeting non-government sectors, the general community and increasingly, local government and other public authorities has been the focus of our educative work under the Charter for the past 2½ years. The Commission has successfully delivered an integrated, creative and responsive human rights education strategy, that has engaged a range of communities and other educators. The success of our approach has been built upon simple messages, numerous applied resources, and proactive and targeted community engagement strategies that have increased understanding about the implications of a potentially powerful but complex legislative tool.

To date our educative strategies have included:

- the production and distribution of core awareness-raising material, the hosting of events, and the facilitation of community programs to disseminate the message that Victoria has a Charter that enshrines community values and provides a benchmark for assessing the actions of government;
- the delivery of tailored training on the operation, application and implementation of the Charter;
- the undertaking of targeted strategies to reach particular associations and non-government organisations in the community that are able to use the Charter to enhance their ongoing advocacy work and to improve the realisation of human rights for their stakeholder groups; and
- the development of a range of resources and tools to assist the community and non-government sector to better understand and use the Charter.

The Victorian Attorney-General noted in April 2008 that a culture of human rights would not be built in a year, and that more work is yet to be done in Victoria [112]. In recognition of the long-term investment required, the Victorian Commission has since received additional resources to enable human rights education to become a core component of its work. We would foresee a similarly critical role for an appropriately resourced AHRC to build upon its existing education strategies to meet the needs, and exploit the opportunities, associated with the adoption of a national human right instrument.

Following on from our comments regarding school-based human rights education, there is a clear relationship between understanding the importance and broad community relevance of human rights, and the extent to which the principles of active citizenship and participatory democracy are understood and resonate within the community. The link between these concepts is inherent, and somewhat "chicken and egg" in nature, i.e. there needs to be a level of engagement for the relevance of human rights to be appreciated, but equally, an awareness of the meaning of human rights for both individuals and communities can lead people to pursue greater involvement in a range of political processes. A key learning from the Victorian experience is that in many instances, people's lack of civics awareness, including the principles underpinning our system of government, has inhibited their understanding of the Charter, and human rights enforcement and promotion more broadly.

In order to be effective, particularly in the medium to longer term, information and education strategies designed to develop community understanding of a national human rights instrument needs to form part of, or be complemented by, a broader initiative to engage people more actively with the governance of their community. Again, this emphasises the essential importance of the enactment of a national human rights instrument being accompanied by adequate resources for the sophisticated education campaigns necessary to ensure its effectiveness and success.

HUMAN RIGHTS EDUCATION FOR THE PUBLIC SECTOR

Human rights instruments are intended to be a trigger for cultural change – something that promotes and embeds a culture of human rights. The characteristics that define a culture of human rights can be described at different levels of abstraction. In very broad terms, the following features are regarded as essential:

1. the human rights set down in international instruments are respected, promoted, protected and fulfilled;
2. human rights are integrated as norms, standards and principles within the processes for developing government policies and legislation and delivering services;
3. there is a community understanding of rights – in terms of both entitlements and obligations; and
4. the notion of fairness resonates as a right not an act of charity.[113]

At an individual or "grassroots" level, commentators have suggested that in the context of governmental and bureaucratic culture, human rights instruments:

> *...set standards which the public knows it can expect as an entitlement. In simple human terms* [they] *require the agencies of government to treat every individual with the respect that is his/her due. In those terms* [they] *require what I asked of my bureaucratic letter writers as Minister for Social Security, that they write as they would to a parent, brother, sister or friend. They should write as they would like to be written to themselves. The same principle applies in every other aspect of agency activity. This is what a culture of human rights in the bureaucracy would look like. It would restore the meaning of the term public servant.* [114]

Human rights cultural change within the public sector involves both an internal and an external dimension (all of which we have examined in detail in preceding parts of this submission):

- Internally, public authorities need to integrate the consideration of human rights issues and the pursuit of human rights

112 The Hon Rob Hulls, Attorney-General for Victoria, *Commission lauds rights progress, funding announced*, Media release, 15 April 2008.

113 Dr Helen Watchir's, *Assessing the first year of the ACT* Human Rights Act 2004, available at http://cigj.anu.edu.au/events/ACTBill05.php.

114 Presentation by The Hon Fred Chaney AO as part of a panel discussion *The state of human rights: What difference will a Charter make?*, held on 11 December as part of Human Rights Week 2007.

compliance into their planning and operational processes. This is about ensuring human rights share equal prominence with the other considerations that already apply within the public policy process, such as financial evaluations. Human rights principles also need to inform internal relationships, recognising that staff will be most able to embrace and act in accordance with such principles if they are reflected in their own experience.

- Externally, public authorities need to approach their interaction with members of the community cognisant of their considerable and often unique capacity to influence a person's enjoyment of human rights. This requires the exercise of authority or performance of a function to occur in a manner that does not diminish the dignity of the individual or the community – in doing so, it actually serves to legitimise the exercise of power.

A "cultural change lens" provides an opportunity to enhance our understanding of the operation of a national human rights instrument in at least two ways: Firstly, it emphasises that human rights compliance is not a discrete 'point-in-time' exercise, but is ongoing and evolutionary. Secondly, it encourages the identification of the broader drivers that will contribute to the emergence of a culture of human rights. When a national human rights instrument is understood in these terms, the need to resource educative strategies that must accompany the enactment of a national human rights instrument becomes readily apparent, as does the need for human rights education to be approached as a continuous rather than discreet undertaking.

The Content and Focus of Human Rights Education for the Public Sector

In our first report on the operation of the Charter, we observed that:

> *Human rights education needs to be integrated into a range of training tools and strategies in order to ensure an understanding of the implications of the Charter exists across organisations, with the depth of that understanding developed according to the nature of particular roles. In addition, the content of human rights education needs to reflect changes in the understanding of human rights over time. Internal strategies also need to be complemented by developing and delivering Charter messages to external audiences.* [115]

In 2008, with two years of the Charter's operation to analyse, we were able to make far more specific findings regarding which education strategies had worked effectively, and the future educational challenges that would need to be met in order to further embed a culture of human rights:

> *Two years into the life of the Charter and education and training initiatives appear to be at a crossroads. The Commission views this as understandable. A vital and logical first step in improving awareness and understanding of the Charter was the development and delivery of educative strategies that fostered an understanding of the rights enshrined in the Charter, how the Charter operates and its broad application to the work of government.*
>
> *Overall, the Commission believes that agencies have responded positively to this initial challenge: firstly, through their continued engagement with whole-of-government programs facilitated by the Department of Justice and secondly, through the development of localised initiatives (although there are clearly differing levels of progress in this regard).*
>
> *With positive achievements over the last two years in training and information about the Charter, the next stage of human rights education and training strategies needs to focus on enhancing the capacity of agencies to adhere to the human rights based approach to government* (described in Part One of this submission). *The Commission believes that the foundation for such an approach is in place, in terms of establishing an understanding of the Charter within many public authorities in Victoria (including the rights protected by the Charter, as well as the checks and balances it puts in place). However, this foundation of itself can only foster a technical or strict compliance culture. Realising the objectives of the Charter will require education and training that goes much further and integrates a human rights orientation into the skills, strategies and approaches that agencies expect their staff to apply in their day-to-day work.*
>
> *Chapter 1 of this report described a human rights based approach to government as being founded on the principles of participation, accountability, non-discrimination, empowerment and linkages to human rights standards (PANEL). In the Commission's view, the next phase of human rights training and education should focus upon developing an appreciation of what these principles mean in the context of human rights. Each of these principles is familiar – some much more than others – but the current, accepted understanding of these principles needs to be tested and enhanced in accordance with a human rights orientation (for example, developing an understanding that accountability is about more than reporting). Once understood correctly, these principles readily translate into practical skills and strategies that can be integrated into the array of courses and programs that government agencies use to develop, maintain and enhance the competencies of their staff. Whether this is most effectively done via a devolved or whole of government training initiative is a question best answered by departments: whichever option is considered to be*

115 Victorian Equal Opportunity & Human Rights Commission, *The 2007 report on the operation of the Charter of Human Rights and Responsibilities: First Steps Forward*, March 2008, p 64.

the most appropriate, adequate resources will need to be allocated. [116]

In our view, the Victorian experience highlights that:

- human rights education for the public sector is essential to the success of a human rights instrument and must be adequately resourced;
- the Victorian approach of this being a self-directed program involving both a whole-of-government core complemented by localised strategies has worked well;
- education regarding rights and the mechanisms that form part of a national human rights instrument are a logical first step;
- human rights education must evolve beyond the "do and don't" conceptualisation of human rights to encompass human rights competencies, strategies and skills; and
- public sector human rights education is an ongoing and evolving process.

SUMMARY

Community perspectives on human rights are a critical element of the human rights dialogue that is envisaged by a national human rights instrument. Developing the capacity of the community to engage as a party to the human rights dialogue requires ongoing and sophisticated community education strategies, which in many instances will first need to build an accurate understanding of the workings of government so that the role, operation and potential of a national human rights instrument is correctly understood. With additional and adequate resourcing, the Australian Human Rights Commission is well positioned to lead these educational strategies.

A national human rights instrument also affords an unprecedented opportunity to reinvigorate and expand our approach to civics and citizenship education in schools. When human rights principles form the basis of this teaching, research has proved young people develop the skills to reflect critically on events in their community, form views and determine actions with an appreciation of social connectedness and the duality of rights and responsibilities.

Government also needs to educate itself. A national human rights instrument is intended to foster cultural change across government by providing an ethical framework for the exercise of power and the development of relationships with individuals and groups in the community. Public sector human rights education needs to be ongoing and iterative, developing skills and competencies that ensure respect for the dignity and rights of all people.

116 Victorian Equal Opportunity & Human Rights Commission 2008, op cit, pp 20-21.

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