



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
Australia

alhr@alhr.asn.au
www.alhr.asn.au

15 August 2005

Professor George Williams
Chair
Human Rights Consultation Committee
Department of Justice
55 St Andrews Place
EAST MELBOURNE VIC 3002

By e-mail: Michelle.Burrell@justice.vic.gov.au

Dear Professor Williams

Submission on a proposed Charter of Rights in Victoria

Thank you for the opportunity to make submissions on the human rights consultation community discussion paper 'Have your say about human rights in Victoria'.

Our members are excited about the prospect of a human rights charter in Victoria and support the Victorian Government's quest for a suitable instrument to better protect the human rights of all Victorians.

We provide the following submission for consideration by the Human Rights Consultation Committee.

The submission was prepared by the Victorian Committee of ALHR in consultation with the National Committee. The Victorian Committee members are set out in the introduction to the submission.

For further information please contact Simeon Beckett at president@alhr.asn.au or the Victorian Committee at vic@alhr.asn.au.

Yours sincerely

(by e-mail)

Simeon Beckett
President



**Submission on a Victorian Charter of Rights
Prepared by the Victorian Committee of
Australian Lawyers for Human Rights**

INTRODUCTION

1. Australian Lawyers for Human Rights (ALHR) is a national network of Australian lawyers active in practising, and promoting awareness of human rights in Australia. ALHR's membership of over 1,000 is national, with active National and State committees particularly in Victoria.
2. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia, and works with Australian and international human rights organisations to increase awareness of human rights in Australia. ALHR has extensive experience and expertise in the principles and practice of international law and human rights in Australia.
3. ALHR strongly supports the Victoria Government's initiative of establishing the Human Rights Consultation Committee to consult with the community over whether Victoria should have a Charter of Human Rights. ALHR welcomes the opportunity to make a submission.
4. ALHR notes that this process has arisen out of the Attorney-General's *Justice Statement*, which promised to establish a process of discussion and consultation with the Victorian community on how human rights and obligations can best be promoted and protected in Victoria.
5. ALHR notes that the Victorian Government has made a firm commitment to addressing disadvantage and ensuring human rights are valued and protected in Victoria in its *Growing Victoria Together* policy and its Action Plan *A Fairer Victoria*.
6. The Victorian Committee is Thomas Roszkowski, Carola Schmidt, Nicholas Testro, Siobhan McCann and Catherine Dixon.

SUBMISSION & RECOMMENDATIONS - EXECUTIVE SUMMARY

Existing human rights protections in Victoria are partial and incomplete. There are instances where no mechanism exists for challenge or remedy when individual rights are violated. **A Charter would provide an accessible statement of rights** that the community values and assist in creating a culture in Victoria that promotes and respects human rights.

A Charter of Rights should protect the civil and political rights enshrined in the ICCPR as well as the economic, social and cultural rights contained in the ICESCR.

A Charter of Rights should include a “**reasonable limits clause**” to facilitate the balancing of individual rights against competing public interests.

A Charter of Rights should *ideally* be **constitutionally entrenched**, preferably protected by a “double entrenchment” provision so that it cannot be changed without at least a two thirds majority of the Victorian Parliament sitting in joint session. Under this model, the Court would have the power to declare inconsistent legislation to be unconstitutional and therefore invalid. ALHR accepts that this may need to occur over time, like in Canada, where an ordinary Act of Parliament was later followed by a constitutionally entrenched Charter.

A Charter of Rights should **apply to the legislature, executive and judiciary** and to any person or body performing any public function, power or duty.

There should be pre-enactment scrutiny of legislation, including requiring the Victorian Attorney-General to issue **compatibility statements for every Bill** presented by the Government to the Legislative Assembly and requiring the **Scrutiny of Acts and Regulations Committee to examine proposed primary and delegated legislation** and report to the Assembly on compatibility with the Charter.

A **dedicated office within Government** should be established to oversee a whole-of-Government approach to implementing the Government’s commitments in relation to human rights and Government agencies should be required to report on measures taken to protect and promote human rights.

There should be a combination of approaches to enforcing a Charter of Rights in Victoria:. The interpretive model (whereby courts are able to interpret legislation to be compatible with the Charter so far as possible and to otherwise issue a declaration of incompatibility) alone is not a satisfactory method by which to enforce a Victorian Charter of Human Rights. **The most effective enforcement approach is one that also combines a watchdog and complaints-based approaches.**

Accordingly, **ALHR supports the establishment of a Human Rights Commission in Victoria.** The Commission should promote compliance with the Charter, undertake research, educate the public, audit legislation and policy, report annually to Parliament and be empowered to intervene in human rights cases.

In addition, there should be an **individual cause of action against public authorities** that breach the Charter. ALHR recommends that the Committee consider extending the jurisdiction of VCAT to deal with such human rights complaints.

The Charter should allow for the protection of rights under the ICCPR in a different way to those found under ICESCR. While individual complaints are appropriate for ICCPR rights, **ICESCR rights may be enforced through internal review or by external review carried out by the Human Rights Commission** on complaint or periodically.

ALHR submits that the Charter of Rights should **come into force twelve to eighteen months after its passage** through Parliament to enable Government to prepare for implementing the Charter and to allow for community engagement to continue.

THE TEN KEY QUESTIONS

1. Is change needed in Victoria to better protect human rights?

Currently, the rights of individuals living in Victoria are protected only through an incomplete patchwork of limited Commonwealth Constitutional guarantees, Commonwealth and Victorian legislative enactments and common law principles and presumptions. Some short remarks about each are made below.

1.1 Commonwealth Constitutional Protections

The Commonwealth Constitution provides only a few limited guarantees of individual rights. Many of these guarantees are not expressed in terms of rights, but rather, as prohibitions on federal or State legislative power.¹

The High Court has interpreted Chapter III as giving rise to what might be described as some limited due process guarantees in relation to the exercise of judicial power. The separation of powers doctrine restrains both Commonwealth and State Parliaments from legislating to impair the proper exercise of judicial power. While the implications derived from Chapter III of the Constitution do not create direct rights for individuals, they do provide some limited due process rights.

The Commonwealth Constitution's failure to more comprehensively to guarantee rights has been explained as a consequence of the institution of responsible government, where denial of fundamental human freedoms can promptly be brought to account in Parliament. If that leads to a new General Election, the people will express their judgment at the polling booths.

1.2 Statutory Protections

There is no one enactment which protects human rights in Australia on a national basis. Certain human rights are protected by Commonwealth and Victorian anti-discrimination legislation. At the Commonwealth level, anti-discrimination legislation is comprised of the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Human Rights and*

¹ For example: Section 51(xxxi) provides that the Commonwealth may only compulsorily acquire property if it does so on just terms. Thus, the Constitution is said to confer a right to compensation on just terms where the Commonwealth compulsorily acquires property; Section 80 provides that trials for federal indictable offences must be before a jury, thus conferring what some describe as a limited right to trial by jury; Section 116 prohibits the Commonwealth from making laws with respect to the establishment of, or prohibition on the exercise of, religion, thereby conferring a limited right of freedom of religion at the federal level; Section 117 protects residents of one State from special disability or discrimination, based upon residence, in other States. Based on the text and structure of the Constitution, the High Court has also found that the Constitution contains an implied right to freedom of political communication.

Equal Opportunity Commission Act 1986, the Disability Discrimination Act 1992, and the Age Discrimination Act 2004.

At a Commonwealth level, there are enactments which protect specific human rights relating to privacy, but in a limited way, for example: the *Human Rights (Sexual Conduct) Act 1984* which was enacted in response to the United Nations Human Rights Committee's findings in *Toonen v Australia* in relation to sexual privacy; and the *Privacy Act 1988* (Cth), which guarantees the rights in Article 17 of the ICCPR with respect to personal information handled by Commonwealth government agencies.

The legislative landscape in Victoria is similar. The major human rights enactment is the *Equal Opportunity Act 1995*. In addition to anti-discrimination laws, in Victoria the *Racial and Religious Tolerance Act 2001* prohibits religious and racial vilification. The *Information Privacy Act 2000* (Vic) provides privacy protections at the State level.

Furthermore, a number of pieces of legislation that are not expressly designed to protect human rights nevertheless have the effect of protecting particular human rights in some limited circumstances, including for example Federal and State freedom of information legislation.

The limits of legislative protection

The legislation described above, while effective in some cases, is inadequate as a system of human rights protection when measured against the rights found in the numerous international human rights instruments to which Australia is a party. The legislation protects only a very limited range of individual rights, leaving fundamental rights such as freedom of speech, peaceful assembly, the right to vote, and economic, social and cultural rights, unprotected. Neither Federal nor Victorian anti-discrimination legislation is adequate in dealing with problems of systemic discrimination and in promoting substantive equality. The case study below provides an example.

Case Study

The current legislative and practical criteria for access to adoption and assisted reproductive technology in Victoria exclude and treat differently same-sex couples without any reasonable or objective basis. This is contrary to Article 26 of the ICCPR which states that all persons are equal before the law and Article 2 of the *Convention on the Rights of the Child* (also ratified by Australia) which requires parties to protect children from discrimination on the basis

of the status, activities, expressed opinions, or beliefs of the children's parents. This situation reveals gaps in the existing statutory protections.

Whilst the *Equal Opportunity Act 1995* includes 'sexual orientation' as a ground of discrimination, including in the provision of services, there is a general exemption in the Act if discrimination is necessary to comply with, or is authorized by, a provision of another Act (such as the *Infertility Treatment Act 1995* or the *Adoption Act 1984* in Victoria). Whilst the *Sex Discrimination Act 1984* was useful in protecting the rights of single women (including lesbians) who were excluded from infertility treatment in Victoria because they were not married or in a de facto relationship (see the decision of Sundberg J in *McBain v State of Victoria*²), it would not remedy the exclusion of gay couples seeking to adopt children or gay people wanting to adopt his or her partner's children.

We note that the Victorian Law Reform Commission has recently made interim recommendations to amend the law to eliminate discrimination against children and parents based on their family type and relationship status, stating that "[l]egal recognition of diverse family types is an important way of countering discrimination'.

Another key weakness of all legislative human rights protections in Australia is that they are contained in ordinary Acts of Parliament, and are therefore subject to amendment or repeal at any time. Although it may at times be politically difficult for governments to amend or repeal these provisions, day-to-day political constraints alone are not sufficient to ensure individual rights in Australia.

1.3 Common Law

Generally the common law does not directly guarantee rights and freedoms, notwithstanding that the common law looks to the limited catalogue of rights enumerated in *Magna Carta* and the *Bill of Rights Act 1689* (England and Wales) as a source of common law protection. Rather, in limited respects the common law operates indirectly to protect certain of an individual's rights. For example, overarching institutional principles like the 'rule of law' and 'judicial independence' are said to play an indirect role in the protection of rights, as are the development of procedural principles found in administrative law and statutory interpretation.

In the early 1990s, the High Court was increasingly receptive to the idea that international law, and more specifically, international human rights law, could influence the development of the common law (see for example, *Mabo & Others v Queensland (No. 2)*³). International law has been used to develop new rights in the common law. For example, in *Dietrich v The*

² (2000) 99 FCR 116

³ (1992) 175 CLR 1

*Queen*⁴, the High Court invoked principles of international human rights law to identify a common law right to a fair trial. However, Australia has rejected the fundamental rights doctrine (see *Kable v Director of Public Prosecutions*⁵). This doctrine is based on the notion that some common law rights may go so deep that even Parliament cannot legislate to destroy them. So while there may be rights that are deeply rooted in the common law of Australia, they are not immune from legislative intervention.

Ultimately, the common law contains very few direct rights guarantees, and to the extent that it does protect rights, largely does so only indirectly. Moreover, the protective value of the common law is significantly compromised by its vulnerability to legislative change, and its traditional reliance on negative remedies.

1.4 International Remedies

Where no Australian legal remedies are available or an Australian remedy is ineffective to protect human rights, there are, in certain circumstances, procedures by which an international human rights remedy may be obtained. A complaint may be lodged with one of the specialist international human rights committees. There are three main international committees that receive individual complaints:

- the Human Rights Committee, established under the First Optional Protocol to the ICCPR;
- the CERD Committee established under the Convention on the Elimination of All Forms of Racial Discrimination (CERD); and
- the Torture Committee established under the Convention Against Torture (CAT).

When Australia ratified the First Optional Protocol to the ICCPR, it recognised the competence of the Human Rights Committee to receive and consider communications from individuals subject to Australia's jurisdiction.

While international remedies are available, it takes time to pursue the remedies and any findings that human rights are violated or recommendations as to appropriate redress are not binding on the Commonwealth.

1.5 ALHR Submission

The above survey of existing human rights protections reveals a **partial and incomplete patchwork of human rights protections** for individuals living in Victoria. There are

⁴ (1992) 177 CLR 292

⁵ (1996) 189 CLR 51

instances where there is **no mechanism for challenge or remedy when individual rights are violated**. In the absence of a Charter of Rights, Victoria lacks an accessible statement of the rights that the community values. Such a statement would be an important step in creating a culture in Victoria that promotes and respects human rights.

2. If change is needed, how should the law be changed to achieve this?

There are two mechanisms by which a Charter of Human Rights could be introduced by the Victorian Parliament: by an ordinary Act of Parliament; or by constitutional amendment.

2.1 Ordinary Act of Parliament

Pursuant to section 16 of the *Constitution Act* 1975 (the Victorian Constitution), the Victorian Parliament has the legislative power to introduce a statutory Charter of Human Rights which would operate as an ordinary Act of Parliament.

The chief advantage of a statutory Charter of Human Rights lies in the ease with which it could be implemented. The Victorian Parliament would simply follow its usual legislative procedures. But the disadvantage of a statutory Charter of Human Rights is that the Victorian Parliament could amend or repeal Charter of Human Rights at any time without recourse to any special procedures. This could lead to a lack of stability, and undermine the enduring nature of the rights protections it conferred.

2.2 Constitutional Amendment

It can be made more difficult to amend or repeal a Charter of Human Rights by “entrenching” it in a constitution. It would have the protection of ‘single entrenchment’ if it were accompanied by a procedural protection stating that “the Charter of Human Rights cannot be amended or repealed unless procedure [X] is followed”. However, single entrenchment provides only a superficial appearance of rigidity since the procedural provision can itself be amended or repealed by a subsequent Act of Parliament.

A more secure form of procedural protection can be introduced by “double entrenchment”. In such cases, the procedural protection is applied not only to the substantive provisions of the Charter of Human Rights, but also to the procedural protection itself. That is, neither the substantive provisions, nor the procedural protection, can be amended or repealed unless the specified procedure is followed. There are, however limits, on the procedural requirements that may be introduced. An important example of this is the doctrine that a legislature cannot abrogate or delegate its power to make laws.

A very strict procedural requirement, such as the approval of 90% of electors at a referendum, would likely be declared void since it effectively amounts to a prohibition on repeal, and compromises the Victorian Parliament's power to legislate. However, a protection of a two-thirds majority of joint sitting, for example, poses little risk of infringing this limitation.

2.3 ALHR Submission

A Charter of Human Rights is designed to guarantee and protect fundamental human rights. It must therefore be an enduring instrument and one that is not liable to day-to-day alteration or repeal. ALHR submits that the Charter of Human Rights should be constitutionally entrenched, preferably protected by a "double entrenchment" provision. The constitutional status of an entrenched Charter of Human Rights would indicate the Government's commitment to enduring human rights protection, and would empower the citizens of Victoria to take concrete steps to protect and vindicate their rights.

2.4 Government's Statement of Intent

The Victorian Government has stated that if a new law was introduced, it should focus on prevention rather than cure, as this approach should help to build a human rights culture and ensure Government policy reflects good human rights practice. The Statement of Intent indicates that, if the Government were to introduce a Charter of Human Rights, it would likely be an ordinary piece of legislation, to allow some flexibility for future amendments.

ALHR notes the Government's preference for the introduction of a Charter of Rights through an ordinary piece of legislation and recognises that this would be preferable to not having a legislated Victorian Charter of Rights at all. In these circumstances, ALHR recommends that such an Act be reviewed after an appropriate period of time to identify its benefits and problems. That review or subsequent reviews should include consideration of constitutional entrenchment. We note for example that a transitional process for the protection of human rights took place in Canada, where a statutory *Bill of Rights* was later followed by a constitutionally entrenched *Charter of Rights and Freedoms*.

3. If Victoria had a Charter of Human Rights, what rights should it protect?

In answering this question, ALHR addresses the rights the Charter should protect; whether those rights should be subject to any reasonable limits; and to whom the Charter should apply.

3.1 *What specific identifiable rights should the Charter protect?*

Effective protection of human rights in Victoria requires a Charter of Rights that is a comprehensive but not necessarily exhaustive statement of human rights. A starting point for an examination of human rights is the relevant international instruments. In this respect, ALHR submits that the Committee should focus on the two major human rights treaties to which Australia has committed itself at international law: ICCPR and ICESCR. There is a variety of valuable international jurisprudence for interpreting these rights. Given the overlap between human rights treaties, assistance can also be found in the terms of more specific human rights instruments, such as the Convention on the Rights of the Child (CROC), CERD and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). We note that section 31 of the ACT *Human Rights Act 2004* enables the rights set out in that Act to be interpreted by having regard to international law and the judgments of foreign and international courts and tribunals. This would be a useful inclusion in a Victoria Charter of Rights.

The importance of economic, social and cultural rights

ALHR submits that economic social and cultural rights are indivisible from civil and political rights. For example the ICESCR right to be free from hunger is an aspect of the ICCPR right to life; or the ICCPR rights not to be held in slavery or servitude is closely related to the ICESCR right to work. ALHR submits that the simplistic distinction drawn between economic, social and cultural rights on the one hand and civil and political rights on the other has no substance. It is worth noting that the Universal Declaration of Human Rights contains both civil and political rights and social, economic and cultural rights in the one document.

ALHR recognises that there is a perception that economic, social and cultural rights are more difficult to realise than civil and political rights because of limited available resources to meet all of the rights set out in the ICESCR. Nevertheless ALHR submits that this concern, to some extent misunderstands the fact that ICESCR is couched in terms of the gradual realisation of such rights. ICESCR requires that States parties take steps, to the maximum of its available resources, to achieve progressively the full realisation of economic social and cultural rights.

The progressive nature of the ICESCR rights calls for a different approach to the enforcement of such rights than that preferred for civil and political rights. ICESCR rights may be met through the inculcation of a language of rights within those government departments which directly impact upon those rights. Whereas a system of individual complaints for the breach of a civil or political right makes sense a more collective approach appeals for economic, social and cultural rights. That is, those government departments and other public authorities whose work impacts upon ICESCR rights should be the subject of appropriate benchmarking and public review against those benchmarks. Periodic review of the meeting of such rights could be conducted internally by the department/public authority or externally by a Victorian Human Rights Commission (considered further below). The Commission could receive *ad hoc* representative complaints about the ability of a particular department or public authority to meet its obligations to safeguard economic, social and cultural rights.

ALHR notes that the inclusion of these rights would reflect the budgetary commitments the Government has recently made to families, children, older Victorians and people with disabilities in addressing disadvantage (see *A Fairer Victoria*).

Indigenous Victorians

ALHR notes that ICESCR and ICCPR do not specifically refer to Indigenous rights. International law has been slow to develop the category of Indigenous rights. Accordingly ALHR submits that the Committee should carefully consider the inclusion of the right to self-determination in any Charter of Rights. The right to self-determination is set out in Article 1 of both the ICCPR and ICESCR. It includes the right to freely determine political status and freely pursue economic, social and cultural development. The UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights have identified self-determination as a right held by Indigenous peoples, including in Australia.⁶ The Aboriginal & Torres Strait Islander Social Justice Commissioner previously identified a number of factors about the content of Indigenous peoples' right to self-determination to which we refer the Committee. The then Commissioner stated that self-determination is an ongoing process of choice for the achievement of human security and fulfillment of human needs. Respect for distinct cultural values and diversity and for Indigenous peoples' relationship to land and resources is integral as well as recognition of a collective political identity for Indigenous peoples (see pages 28-30).

The right to self determination and economic, social and cultural rights will be particularly important to Indigenous Victorians. It is relevant to consider these rights in the context of the disadvantage suffered by Indigenous Australians. The life expectancy of Indigenous people

⁶ For a list of Concluding Observations and jurisprudence, see the Aboriginal & Torres Strait Islander Social Justice Commissioner *Social Justice Report 2002*, pages 13-14

is estimated to be around 17 years lower than that of the total Australian population. The most recent estimates on a comparable basis indicate that life expectancy at birth is 59 years for Indigenous males compared with 77 years for males in the total population, and 65 years for Indigenous females compared with 82 years for females in the total population.⁷

ALHR also recommends that any preamble to a Charter of Rights recognize the special significance of rights for Indigenous Victorians – see the ACT Preamble to the *Human Rights Act 2004*.

3.2 Reasonable limits clauses

One popular criticism of a Bill of Rights is that it has potential to lead to “far-fetched” results in some circumstances. Some Bills of Rights have responded to this criticism by including a general limitation on the judicial application of the substantive rights contained in it. The most common provision is that the rights contained in the document are subject to ‘such reasonable limits as may be justified in a democratic society’.⁸

In Canada, there is case law concerning the proper interpretation and application of the reasonable limitation clause. The Canadian Supreme Court has held that the objective of the law purporting to override the Charter must be identified, and must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. It must relate to concerns which are “pressing and substantial”. Further, the means chosen to pursue that objective must be reasonable and demonstrably justified. They must be rationally connected to the objective; impair “as little as possible” the right or freedom in question; and represent a proportionality between the effects of the measures and the objective (*R v Oakes*). Such a clause has longstanding support in the jurisprudence of the European Court of Human Rights with regard to the European Convention of Human Rights and the jurisprudence of the Human Rights Committee in adjudicating complaints under the ICCPR.

The Australian legal system is already familiar with the balancing exercise that a reasonable limits clause would require. For example, some constitutional questions are resolved through the invocation of a proportionality test.

3.3 To whom should the Charter apply?

The NZ *Bill of Rights 1990* (see section 3) applies to all three branches of Government and to “any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law”. The UK *Human Rights Act 1998* also

⁷ See “Overcoming Indigenous Disadvantage – key Indicators 2005” Report, page 3.4

⁸ See for example, section 1 of the *Canadian Charter of Rights and Freedoms*; section 28 of the *ACT Human Rights Act 2004*; section 5 of the *New Zealand Bill of Rights Act 1990*.

applies to the acts of “public authorities”, although this does not include either House of Parliament. “Public authority” is defined in that Act to include “a court or tribunal and any person certain of whose functions are functions of a public nature...”.

ALHR submits that the Charter of Rights ought to apply to all three branches of Government (unless the legislature retains the power to act inconsistently with human rights - see below). In addition, the Charter should impose obligations on any person or body performing any public function, power or duty.

ALHR believes it is important to make any definition of “public authority” comprehensive to ensure that contractors and other persons performing public functions are captured by the obligations in the Charter.

3.4 ALHR submission

ALHR submits that the Victorian Charter of Rights should protect both the civil and political rights enshrined in the ICCPR and the economic, social and cultural rights contained in the ICESCR. ALHR supports a mixed approach of individual complaints for civil and political rights and the protection of economic, social and cultural rights based on periodic review and representative complaints.

ALHR submits that a “reasonable limits clause” should be included because it facilitates the balancing of competing public interests.

ALHR submits that the Victorian Charter of Human Rights should apply to the legislature, executive and judiciary and to any person or body performing any public function, power or duty.

3.5 Government’s Statement of Intent

The Government asked the Committee to focus on civil and political rights. The Committee has also been asked to examine whether any of these civil and political rights should be altered or limited to remove ambiguity and to add certainty. The Statement of Intent indicates that legislating for the protection of economic, social and cultural rights is complicated because it raises difficult issues of resource allocation. The Statement of Intent indicates that rights in some international treaties, like the International Convention on the Elimination of all forms of Racial Discrimination are already protected in equal opportunity legislation, therefore, the Committee has not been asked to examine those rights.

ALHR believes that the division between rights under the ICCPR and those under the ICESCR is artificial. It has suggested, above, a way for ICESCR rights to be the subject of review and complaints. Should the Government still wish to defer consideration of ICESCR rights then such rights should be included in a statutorily enforced review in 5 and again in 10 years after enactment.

4. What should be the role of our institutions of government in protecting human rights?

All of the three branches of Government have an important role in protecting the human rights set out in a Charter of Rights.

In this section, ALHR focuses on the role of the Executive and Parliament. In the next section, ALHR focuses on the role of the Courts (and Tribunals).

4.1 ALHR submission

A Victorian Charter of Rights should include mechanisms for ensuring that legislative proposals are consistent with human rights before they are debated in Parliament.

ALHR recommends requiring the Attorney-General to issue compatibility statements for every Bill presented by the Government to the Legislative Assembly (see for example, section 37 of the ACT *Human Rights Act 2004* and section 7 of the NZ *Bill of Rights Act 1990*). This centralised model is preferable to the UK model, where the specific Minister introducing the Bill performs the scrutiny role, with the result that very few Bills have been characterised as non-compliant.

ALHR recommends requiring the Scrutiny of Acts and Regulations Committee to examine proposed primary and delegated legislation, including Private Member's bills, and report to the Assembly on its compatibility with the rights recognized in a Charter of Rights. ALHR notes the important role played in the UK by the Joint Committee on Human Rights, which is appointed to consider matters related to human rights and proposals for remedial orders made under the *Human Rights Act 1998*. It has the power to require the submission of written evidence and documents, to examine witnesses, appoint specialist advisers and make reports to both Houses.

ALHR recommends establishing a dedicated office within Government to oversee a whole-of-Government approach to implementing the Government's commitments in relation to human rights. The main success of the ACT *Human Rights Act 2004* so far has been its impact on cultural change within Government, particularly by introducing a more rigorous and human rights focused framework to the policy making process. This should be a key aim of a Charter of Rights in Victoria.

ALHR recommends requiring Government agencies to report on measures taken to protect and promote human rights (see for example Schedule 2 of the *Annual Reports (Government) Agencies Act 1995* for ACT agencies).

5. What should happen if a person's rights are breached?

The enforcement of a Charter of Human Rights and the effectiveness of any remedies are critical issues. It is antithetical to the very idea of rights protection to confer a right without conferring a remedy by which that right may be enforced. The Victorian Charter of Human Rights should extend beyond a mere declaration of principle and contain appropriate enforcement mechanisms in order to properly guarantee and protect the rights it proclaims.

Legislation provides a well articulated normative regime to which all Victorians may refer. The fact that litigation may result from a breach is not the aim of the legislation but really a necessary by-product. For each piece of litigation where a court or tribunal determines a breach there are countless occasions where a person's behaviour has been changed by legal advice to the effect that certain conduct is illegal. That is how a (human) rights culture is instilled. Those who are aware of Australia's obligations at international law to protect human rights have continually been frustrated by the lack of a positive domestic remedy for a breach of such a right. If a human rights regime is little more than a slap on the wrist it will be treated accordingly by those who would infringe human rights.

5.1 Models of Enforcement

There are three main approaches to the enforcement of Bills of Rights:

- An interpretive approach
- A "watchdog" approach
- A complaints-based approach

These approaches are not mutually exclusive and some jurisdictions employ more than one approach to enforce their human rights guarantees.

An interpretive approach

This is a minimalist approach, where no new enforcement mechanisms are created. No legal sanctions are created, and no legal redress is available, when an individual's rights are violated. An interpretive approach could take a number of forms:

- The Charter of Human Rights could include an express provision which largely mirrors the common law position: the arms of government, and other entities (if the Charter of Human Rights applies to them), are required to make decisions and to act in a manner which is consistent with the rights in the Charter of Human Rights. This, however, would merely be a directive provision, and would lack any true enforcement power: there would be no legal consequence if an entity ignored this provision.
- The Charter of Human Rights could create a rule of statutory interpretation beneficial to human rights. If more than one interpretation is available with respect to a piece of legislation, that which results in the legislation conforming with the rights in the Charter of Human Rights must be preferred (see for example section 6 of the New Zealand *Bill of Rights Act 1990*).
- The Charter of Human Rights could give the courts power to declare that action or decisions, including legislation, are “inconsistent” with the Charter. For instance, the UK *Human Rights Act 1998* and the ACT *Human Rights Act 2004* operate in this manner with respect to legislation. However the courts stop at the point of making this declaration, and do not have the power to order that the legislation is invalid.

ALHR supports an interpretive clause modeled on the UK *Human Rights Act 1998* that all Victorian laws (including the common law) are interpreted as far as possible in a way that is compatible with the Charter.

In addition, if the Charter is an ordinary Act rather than entrenched in the Constitution, ALHR supports empowering the Court to make a declaration of incompatibility where legislation is inconsistent with the Charter. Ideally, if the Charter was constitutionalised, the Court could be given the power to declare inconsistent legislation to be unconstitutional and therefore invalid.

ALHR notes that under the ACT *Human Rights Act 2004*, the Attorney-General is obliged to respond to any declaration of incompatibility in the Legislative Assembly not later than 6 months (see section 33). ALHR supports a similar provision in a Charter of Rights. Lastly, ALHR submits that declarations of incompatibility should invalidate subordinate legislation (unless the subordinate legislation is mandated by its parent legislation, in a similar way to the UK *Human Rights Act 1998*).

ALHR believes that the interpretive approach alone is not a satisfactory method by which to enforce a Victorian Charter of Human Rights. ALHR submits that the most effective enforcement approach is one that also combines a watchdog and complaints-based approaches (see below).

A “watchdog” approach

This is an active approach, where a body has responsibility to administer and supervise the Charter of Human Rights. It could be a body akin to the Human Rights and Equal Opportunity Commission (HREOC) at the federal level or the Human Rights Office in the ACT.

In the ACT, the Human Rights Commissioner has the following function (section 41):

- Review the effect of Territory laws (including the common law) and report in writing to the Attorney-General on the results of the review;
- Provide education about human rights and the Act;
- Advise the Attorney-General on anything relevant to the operation of the Act.

The Commissioner may intervene in proceedings before a court that involves the application of the Act, subject to obtaining leave of the Court (section 36). The Human Rights Office assists people with human rights inquiries, but does not have a complaint-handling role. ALHR submits that the Human Rights Office has had an important role in monitoring and championing the Human Rights Act in the ACT and notes that the delay in setting up an equivalent independent body in the UK has been regarded as a weakness of that system.

ALHR supports the establishment of a Human Rights Commission in Victoria with the following functions:

- To promote compliance with the Charter of Rights
- To undertake research and educate the public about the Charter of Rights
- To audit legislation and policy in order to identify any inconsistency with the Charter and to report to Parliament on the results of the audit
- To inquire into representative complaints (for the breach of economic, social and cultural rights), make findings and recommendations to Parliament
- To report annually to Parliament on matters relevant to the operation of the Charter
- To intervene in matters before the Victorian courts, tribunals and commissions of inquiry which touch upon Charter rights.

ALHR sees merit in an expanded, renamed and reconstituted Equal Opportunity Commission taking on the role of a Human Rights Commission. After all the right to equality enshrined in

the *Equal Opportunity Act 1995* is but one of a number of rights appropriate to be included in the Charter.

A complaints-based approach

ALHR supports a complaints-based approach which involves enabling individuals or groups of individuals to initiate complaints. As mentioned, different approaches may be made for the breach of ICCPR as opposed to ICESCR rights. The complaints based approach supported by ALHR for ICCPR rights involves the ability of a person or representatives of persons of a particular class to make complaints to a court or tribunal for adjudication. ICESCR rights may be dealt with in the way suggested in the previous section.

ALHR notes that where public authorities are found to be in breach of the UK *Human Rights Act 1998*, there is a cause of action against the public authority and a court may grant relief or remedy or make such orders as are within its powers and which it considers just and appropriate (section 8). Whilst no equivalent cause of action is expressly provided in the NZ *Bill of Rights Act 1990*, the New Zealand Court of Appeal implied a remedy into the Bill of Rights, recognizing a cause of action directly against the State for damages for breach of the Act: see *Simpson v Attorney-General [Baigent's Case]*. The ACT *Human Rights Act 2004* does not contain an express remedies section, despite the ACT Bill of Rights Consultative Committee recommending one (see page 80 of *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee*).

ALHR recommends that the UK model be followed and express provision be made for an individual cause of action against public authorities that breach the human rights set out in the Charter.

The forum for resolving human rights complaints should be accessible, inexpensive, and include appropriate dispute resolution services. ALHR recommends that the Committee consider the appropriateness of extending the jurisdiction of the Victorian Civil & Administrative Tribunal to deal with human rights complaints (with appeals to the Supreme Court on points of law). Available remedies should include powers equivalent to declaration, injunction, compensation, and public apology.

5.2 ALHR Submission

ALHR supports a combination of approaches to enforcing a Charter of Rights in Victoria.

ALHR supports a clause that enables court and tribunals to interpret legislation to be compatible with the Charter so far as possible.

ALHR prefers a Charter that is constitutionally entrenched, where the Court has the power to declare inconsistent legislation invalid. However, if the Charter is to be an ordinary Act, ALHR supports a declaration of incompatibility clause modeled on the UK *Human Rights Act 1998*, which is tabled in Parliament and formally responded to by the Government.

ALHR supports the establishment of a Human Rights Commission in Victoria with a role to promote compliance, undertake research, educate the public, audit legislation and policy, receive representative complaints, report annually to Parliament and intervene in human rights cases.

ALHR supports an individual cause of action against public authorities that breach the Charter. ALHR recommends that the Committee consider extending the jurisdiction of VCAT to deal with such human rights complaints.

5.2 Statement of Intent

The Government has stated that its preferred approach to addressing human rights is through dialogue, education, discussion and good practice rather than litigation. The Government does not wish to create new individual causes of action based on human rights breaches. The Statement of Intent indicates that Government prefers the ACT model where the ACT Human Rights Commissioner does not have the power to arbitrate individual complaints and the role is more about community education, human rights training for government, examining government practice through auditing and promoting a culture of rights generally. Victoria has an existing statutory body, the Equal Opportunity Commission that takes responsibility for anti-discrimination policy, education and awareness.

ALHR submits that the combination of approaches to enforcement suggested above will encourage dialogue, education, discussion and good practice rather than litigation.

ALHR submits that a cause of action against a public authority is appropriate and that it is preferable for the Government to design such a remedy than for the court to imply one.

Consideration could be given to expanding and resourcing the Victorian Equal Opportunity Commission to fulfill the broader role of a Human Rights Commission.

6. What wider changes would be needed if Victoria brought about a Charter of Human Rights?

In order to inculcate a human rights culture into government departments and other public authorities it is necessary to ensure that rights contained in a Charter are integrated into a benchmarking and review culture. It should not be left for a Human Rights Commission alone to enforce individual rights from outside such bodies. Within those organizations there must be a reporting process known to senior management and disseminated within the organization. If individual managers are responsible for reporting and breaches then this will do more for the protection of human rights than individuals being able to complain about breaches.

As part of that integration of rights all relevant audit and review bodies should include charter rights as one of the benchmarks they are able to report against. That is not to say that every such review or monitoring organization such as the Auditor-General or the Ombudsman then becomes a watch-dog for human rights but rather they include Charter rights as one part of the way in which they can measure good governance, service provision or efficiency.

7. What role could the wider community play in protecting and promoting human rights?

No response.

8. What other strategies are needed to better protect human rights?

A Victorian Human Rights Commission should enter into formal consultation arrangements with the Human Rights and Equal Opportunity Commission and other State and Territory based relevant bodies to ensure co-operation and consultation on the protection of human rights nationally.

9. If Victoria introduced a Charter of Human Rights, what should happen next?

ALHR submits that the Charter of Rights should come into force twelve to eighteen months after its passage through Parliament to enable Government to prepare for implementing the Charter and to allow for community engagement to continue.

ALHR recommends that a centralised human rights office be established within Government to coordinate human rights training and develop publications to guide public servants and relevant public authorities such as the Office of Premier and Cabinet. Departments and agencies should review existing legislation, policies and procedures against the Charter and could develop action plans to ensure compliance.

The Government should move to establish the Victorian Human Rights Commission as soon as possible.

10. Is there anything else you would like to tell us about how human rights should be protected in Victoria?

ALHR recommends that the Charter be reviewed by an independent committee after each 5 years to assess the following:

- The operation of the legislation;
- Whether the legislation is meeting its objective of better protecting the human rights of Victorians;
- Whether additional rights should be added to the Charter taken from available international instruments or otherwise;
- Whether the Charter should be further entrenched;
- Whether there are preferable mechanisms and processes available to better protect the human rights of Victorians;
- The operation of the Human Rights Commission.

Such reviews should be legislatively mandated.

15 August 2005