

Inquiry into the Charter of Human Rights and Responsibilities

Terms of Reference

The Governor in Council requires the Scrutiny of Acts and Regulations Committee to inquire into, consider and report to the Parliament on the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') by considering the following issues:

- The matters referred to in section 44(2) of the Charter:
 - whether additional rights should be included in the Charter, including economic, social, cultural, children's, women's and self-determination rights
 - whether further provisions should be made regarding public authorities' compliance with the Charter, including regular auditing and further provision for remedies
- The effects of the Charter on:
 - the development and drafting of statutory provisions
 - the consideration of statutory provisions by Parliament
 - the provision of services, and the performance of other functions by, public authorities
 - litigation and the roles and functioning of courts and tribunals
 - the availability to Victorians of accessible, just and timely remedies for infringements of rights
- The overall benefits and costs of the Charter
- Options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria

This Guide is intended to assist organisations and individuals who wish to make a written submission and/or who would like to present evidence before the Committee at a public hearing.

Rights and responsibilities in the Charter

The Charter does not protect all human rights. Rather, it only protects the rights specifically listed in Part 2 of the Charter. These rights are mostly based on those in the *International Covenant on Civil and Political Rights*, but with some alterations, additions or omissions. The Charter does not contain a list of responsibilities, but some of its rights allow specific limits to be placed on them and section 7(2) provides for all rights to be subject to reasonable limits under law.

Section 44(2) of the Charter (one of the Terms of Reference of the Inquiry) requires consideration of whether additional rights should be included in the Charter. Potential rights that might be included are rights:

- in the *International Covenant on Economic, Social and Cultural Rights*:
<http://www.austlii.edu.au/au/other/dfat/treaties/1976/5.html>
- in the *Convention on the Rights of the Child*: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/1991/4.html>
- in the *Convention on the Elimination of All Forms of Discrimination Against Women*:
<http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/1983/9.html>
- to self-determination in Article 1 of the *International Covenant on Civil and Political Rights*:
<http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>

The Committee welcomes submissions on whether or not any of these rights, or any other rights, should be included in the Charter and, if so, how they should be protected.

The Committee notes that the Terms of Reference do not include consideration of whether or not:

- any current or proposed laws, policies or government acts are compatible with human rights
- any existing rights should be removed from the Charter.

Such matters should only be addressed in submissions to the extent that they fall within one of the Terms of Reference of the Inquiry.

Operation and effect of the Charter

The rights set out in Part 2 of the Charter have no legal operation on their own. Rather, they are given effect by other parts of the Charter and in other Victorian statutes. Part 3 sets out rules:

- requiring statements of human rights compatibility for all bills, human rights certificates for most regulations and reports on human rights compatibility by this Committee
- for interpreting Victorian laws in a way that is compatible with human rights and for court declarations where Victorian laws cannot be interpreted consistently with human rights
- obliging all Victorian public authorities to act and make decisions compatibly with human rights

A number of sections of the Charter provide for additional functions for some bodies (such as the Victorian Equal Opportunity and Human Rights Commission) and for a variety of rules setting out procedures for or placing restrictions on some aspects of the Charter's operation.

The Committee welcomes submissions on the effects of these rules, or of any other provisions of the Charter, on the development and consideration of legislation, the performance of public authorities, the roles of courts and tribunals and the availability of accessible, just and timely remedies for rights infringements.

The Committee also welcomes submissions on the overall costs and benefits of the Charter. These may include both economic and non-economic factors.

The Committee notes that the Terms of Reference do not include consideration of:

- the constitutionality of the Charter or any of its provisions
- the accuracy of any parliamentary statements or reports on compatibility or incompatibility
- the correctness or otherwise of any specific decision of a court or tribunal concerning the Charter

Such matters should only be addressed in submissions to the extent that they fall within one of the Terms of Reference of the Inquiry.

Reform or improvement of the Charter

The Charter is an ordinary statute and can be amended or repealed by an ordinary vote of Parliament.

Section 44(2) (one of the Terms of Reference of the Inquiry) requires consideration of particular reforms to the Charter's regime for public authorities. There are three main parts to this regime:

- Section 4 of the Charter defines public authorities to include most Victorian state employees, Victorian statutory agencies that perform public functions and other entities that perform public functions on behalf of Victoria. Some bodies (e.g. police, local governments and

Ministers) are specifically included, while others (e.g. Parliament and, except in their administrative capacities, courts and tribunals) are specifically excluded.

- Section 38 of the Charter requires public authorities to act compatibly with and give proper consideration to all human rights. It is subject to exceptions for where a law leaves the public authority with no reasonable choice, for private acts and for some acts by religious bodies.
- Section 39 of the Charter permits a person to seek a relief or remedy (other than an award of damages) if a public authority breaches section 38 if that person could seek that same relief or remedy on a ground of unlawfulness arising under non-Charter law.

The Committee welcomes submissions on whether or not there should be regular mandatory auditing for public authorities to assess compliance with human rights and also whether further provision should be made for proceedings to seek reliefs or remedies for breaches of the Charter by a public authority.

The Committee also welcomes submissions on all options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria. The Committee notes that possible reform options include:

- the proposals in any of the other inquiries or reports listed below
- rights protection models adopted or proposed to be adopted in Australia, such as those in the *Human Rights Act 1994* (ACT):
http://www.austlii.edu.au/au/legis/act/consol_act/hra2004148/
and the Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth):
<http://www.austlii.edu.au/au/legis/cth/bill/hrsb2010419/>

The Committee notes that the Inquiry is concerned with the operation of the Charter. Reform proposals should therefore focus on amendments to the Charter or other statutes, rather than:

- constitutional reforms in Victoria or Australia
- funding and resources for bodies or programmes.

Such matters should only be addressed in submissions to the extent that they fall within one of the Terms of Reference of the Inquiry.

Previous inquiries and reports

The Terms of Reference ask the Committee to take note of, and make use of as it sees fit, the evidence and findings of, and government responses to, previous inquiries and reports concerning rights and responsibilities in Australia.

Previous inquiries and reports concerning human rights in Australia include:

- Human rights consultations in the ACT: <http://acthra.anu.edu.au/articles/BORreport.pdf>,
Victoria: http://acthra.anu.edu.au/victoria/HumanRightsFinal_FULL.pdf,
Tasmania: http://www.law.utas.edu.au/reform/docs/Human_Rights_A4_Final_10_Oct_2007_revised.pdf,
Western Australia: http://acthra.anu.edu.au/articles/WAHuman_Rights_Final_Report.pdf
and nationally:
http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-TableofContents.

(The ACT and Victorian consultations led to the enactment of the *Human Rights Act 2004* (ACT) and the Charter. The Tasmanian government is presently engaged in a second community consultation. The national consultation led to the introduction of the Human Rights (Parliamentary Scrutiny) Bill into the federal parliament.)

- ACT Government-commissioned reviews of the operation of the *Human Rights Act 2004* (ACT) in 2005 and 2009.

http://acthra.anu.edu.au/Primary%20documents/twelve_month_review.pdf

http://www.justice.act.gov.au/resources/attachments/report_HumanRightsAct_5YearReview_ANU_2009.pdf

- Other ACT and Victorian reviews.

http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=itemlist&layout=generic&tag=Charter&task=tag&Itemid=659

http://acthra.anu.edu.au/PESCR/Final%20report/Final%20Report%20of%20the%20ACT%20ESCR%20Research%20Project_9%20December%202010.pdf

The Committee notes that the Terms of Reference of the current Inquiry differ from the terms of reference of these previous inquiries. The current Inquiry is into the operation of Victoria's Charter since its enactment, rather than broader questions concerning the adequacy or need for human rights protection across Australia. The latter matters should only be addressed in submissions to the extent that they fall within one of the Terms of Reference of the Inquiry.

Submissions

The Committee welcomes written submissions addressing one, multiple or all Terms of Reference of the Inquiry. Submissions close on Friday 10 June 2011. Guidance regarding submissions can be found at: <http://www.parliament.vic.gov.au/committees/get-involved/making-a-submission>

Submissions can be provided in either hard copy or by email to Mr Edward O'Donohue, Chairperson.

Email: charter.review@parliament.vic.gov.au

Hard copy submissions should be sent to:

Mr Edward O'Donohue, MLC
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

The Committee draws your attention **that all submissions are public documents unless confidentiality is requested**. Please contact the Committee if confidentiality is sought, as this has bearing on how evidence can be used in the report to Parliament.