

Submission to
Human Rights Consultation Committee,
Victoria
on a proposed
Charter of Rights

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Jane Stratton
Policy Officer

Robin Banks
Chief Executive Officer

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1. Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (**PIAC**) is an independent, non-profit legal and policy centre. PIAC provides legal advice and representation, public policy programs and advocacy training to promote the rights of disadvantaged and marginalised people and enhance accountability, fairness and transparency in government decision-making.

PIAC's key goal is to undertake strategic legal and policy interventions in public interest matters in order to foster a fair, just and democratic society and empower citizens, consumers and communities.

PIAC's work extends beyond the interests and rights of individuals; it specialises in working on issues that have systemic impact at both a NSW and National level. PIAC's clients and constituencies are primarily those with least access to economic, social and legal resources and opportunities. PIAC provides its services for free or at minimal cost.

Wherever possible, PIAC works co-operatively with other public interest groups, community and consumer organisations, Community Legal Centres, private law firms, professional associations, academics, experts, industry and unions to achieve its goals.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly-based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC consultations and acknowledgments

PIAC gratefully acknowledges the following people for their participation in consultations and for contributing to PIAC's thinking in relation to this submission:

- Dianne Otto, Associate Professor, Faculty of Law, University of Melbourne;
- Peter Bailey, Associate Professor, Faculty of Law, Australian National University;
- Rowena Daw, Human Rights Legal Adviser, Human Rights Office (ACT) ;
- Gordon Renouf, General Manager, Policy & Campaigns, Australian Consumers' Association;
- Simeon Beckett, Barrister, Maurice Byers Chambers and President, Australian Lawyers for Human Rights;
- Indira Rosenthal, Parliamentary Review Committee, NSW Parliament and National Committee Member, Australian Lawyers for Human Rights; and
- Kate Eastman, Barrister, St James Chambers.

The views in this document remain PIAC's and should not be attributed to any of those we have consulted in preparing this submission.

Victorian Human Rights Consultation Committee

PIAC congratulates the Victorian Government (**the Government**) for initiating the Human Rights Consultation Project, consistent with the policy commitments contained in *Growing Victoria Together*¹ and the *Justice Statement*.²

PIAC welcomes the creation of the Human Rights Consultation Committee (**the Committee**) and thanks the Committee for the opportunity to make this submission.

PIAC notes the significant time constraints within which the Committee is working and records its concern at the short consultation period allowed by the Government. A longer period for consultation would have been more conducive to greater community awareness and participation. PIAC therefore places great value in its submissions on ways by which to engage the community following this consultation process and the eventual passage of any Charter of Rights.

¹ Victorian Department of Premier and Cabinet, *Growing Victoria Together: A Vision for Victoria to 2010 and Beyond* (2001) (**Growing Victoria Together**) <<http://www.growingvictoria.vic.gov.au>>.

² The Hon Rob Hulls, *Attorney-General's Justice Statement: New Directions for the Victorian Justice System, 2004-2014* (May 2004) (**Justice Statement**), Part 4.0, especially Part 4.2.

2. The Government's Commitments

In *Growing Victoria Together*, the Government committed itself to building a fairer society that reduces disadvantage and respects diversity by protecting rights, building cohesive communities and reducing inequalities.³ In the *Justice Statement*, the Government committed itself to 'ensuring that all Victorians have the opportunity to realise their human rights, and through this, their full potential'.⁴

The *Justice Statement* sets out the Government's understanding of human rights as being:

... essential to human dignity, freedom and tolerance, and are a vital prerequisite for a free and democratic society. They represent the fundamental protections afforded to all members of a society regardless of their particular attributes, and are a statement of the value that is attached to our common humanity.⁵

The *Justice Statement* usefully acknowledges the need to deliver substantive equality. It recognises the need to address disadvantage to create equality of opportunity and equality under the law.⁶ It recognises the need for systemic interventions.⁷ Finally, it endorses a whole-of-government approach.⁸

In PIAC's view, the *Justice Statement* and *Growing Victoria Together*, both of which were approved by Cabinet, are difficult to reconcile with the subsequent *Statement of Intent*, which was released by Cabinet.

In particular, PIAC notes the following concerns:

- The *Statement of Intent* frames the purpose of the consultation as a task of identifying 'those mechanisms that will strengthen Victorians' enjoyment of their democratic rights and the institutions that protect those rights'. It marks a shift away from 'human rights' to 'democratic rights', a much more limited concept.
- The *Statement of Intent* forecloses areas for discussion that are highlighted for consultation in the *Justice Statement* by clearly signaling that a constitutionally entrenched model and that any model with an individual right of action would not be supported;
- Further, the *Statement of Intent* supports a focus on the rights articulated by the *International Covenant on Civil and Political Rights (ICCPR)* at the expense of economic, social and cultural rights articulated in the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. Foreclosing debate in this way is not consistent with the

³ *Growing Victoria Together*, Part 8, 18-19.

⁴ *Justice Statement*, Part 4.1, 52.

⁵ *Justice Statement*, Part 4.2, 53.

⁶ *Justice Statement*, Part 4.1, 52. PIAC further acknowledges the Government's social action plan, *A Fairer Victoria: Creating opportunity and addressing disadvantage*, with its fourteen strategies for addressing disadvantage in Victoria.

⁷ *Justice Statement*, Part 4.2.2, 56-57.

⁸ *Justice Statement*, Part 4.1, 52.

Government's own commitment in the *Justice Statement* to consult Victorians about how human rights principles can be more clearly supported in Victoria.⁹

PIAC is aware of broad community disappointment in the distance between the *Justice Statement* and the more recent *Statement of Intent* and the expedited nature of the community consultation. In PIAC's submission, such disappointment is warranted. PIAC regrets the premature foreclosure of the issues under consideration. Nonetheless, PIAC is committed to engaging with the Government to achieve outcomes that will foster a robust human rights culture in Victoria.

PIAC understands the current consultation process about a Charter of Rights as a first step on a longer path. In PIAC's submission, it is critical that the Government be clear about its long-term vision and how it intends to achieve it. PIAC makes this submission to assist Government in that task.

⁹ *Justice Statement*, Part 4.2.3, 57. The Government states:

The Government believes the community should be consulted about how human rights principles could be more clearly supported in Victoria. A consultation process will be established to canvas the sorts of rights that need protection, and the remedies and processes available to promote compliance with human rights obligations.

3. Ten key questions

The Committee, in its discussion paper, posed ten key questions. PIAC provides brief responses here and refers the Committee to its more detailed comments in other parts of the submission.

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

Yes.

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

General position

Such change should be achieved by introducing a legislatively entrenched Charter of Rights and establishing a set of institutions and processes to support the full implementation of the principles recognised in the Charter of Rights.

The Charter of Rights should apply to the acts and omissions of a ‘public authority’. By ‘public authority’, PIAC means to capture obvious government officers and entities such as Ministers, the Parliament, government departments and agencies, courts and tribunals, the police, and public servants. PIAC is also concerned to ensure coverage of actions and omissions of contractors and other persons or entities when performing functions for government, or that government would ordinarily perform. The term ‘public authority’ captures all these classes of people or entities when performing a public function, and also permits some interpretive leeway.

In order to achieve that objective, PIAC supports a Charter of Rights that:

- binds public officials, authorities, agents and those performing public functions; and
- gives individuals a direct right of action and enforceable remedies in Victorian courts, with respect to certain rights, including but not limited to the rights recognised and protected in the ICCPR; and
- requires that all new legislation, including delegated legislation, respects, protects and promotes the rights recognised in the Charter of Rights; and
- vests courts with the authority to interpret existing legislation and delegated legislation consistent with the rights recognised in the Charter of Rights,
- vests the Supreme Court of Victoria with authority to read down or strike down inconsistent laws as invalid; and
- recognises the interconnectedness and indivisibility of classes of human rights by recognising the full spectrum of human rights rather than a limited sub-set of rights, such as political and civil rights alone; and
- is legislatively entrenched such that it cannot be changed without at least a two thirds majority of the Victorian Parliament sitting in a joint session; and
- include a ‘reasonable limits’ clause; and
- does not include ‘notwithstanding’ clause.

PIAC supports a Charter of Rights in this form because:

- it is emblematic of the Government’s commitment to protect, respect and promote human rights in Victoria;
- it provides a clear normative framework against which public functions and actions can be assessed and within which individual rights, freedoms and responsibilities can be balanced;

- it engages the three branches of Government—the Parliament, Executive and Judiciary—in dialogue about how to protect, respect and promote human rights;
- it generates a shared community understanding of what the content of the human rights recognised in the Charter of Rights mean for Victorians;
- it sparks engagement with the broader community;
- it signals real commitment from Government by aligning rights with remedies;
- it is a cost-effective means of protecting, promoting and fulfilling human rights in Victoria.

PIAC now addresses some of the key characteristics in detail.

Detailing PIAC’s preferred model

(a) Binding public authorities

The Charter of Rights should impose an explicit obligation on public authorities, officials and agencies to protect, promote, respect and fulfill the rights it recognises.

In comparable jurisdictions such as the United Kingdom and New Zealand, the obligations in the respective legislation applies to those exercising any public function, power or duty. Section 6 of the *Human Rights Act 1998* (United Kingdom) provides:

Section 6

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

Notably, Parliament or a person exercising functions in connection with Parliamentary proceedings, are *not* included in the application of the *Human Rights Act 1998* (UK).¹⁰

A breach of section 6(1) gives a person a right to a bring proceedings¹¹ and to obtain a remedy.¹²

In New Zealand, section 3 of the *Bill of Rights Act 1990* (NZ) provides that:

This Bill of rights applies only to acts done:

- (a) by the legislative, executive, or judicial branches of the government of New Zealand;
- (b) by 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.

PIAC submits that the Charter of Rights should borrow from both the United Kingdom and New Zealand by ensuring that all three branches of Government are subject to the Charter of Rights, including in a legislative capacity, and that the Charter employ the concept of ‘public authority’ as a neater means of achieving the same end as sub-section 3(b) of the New Zealand *Bill of Rights Act 1990* (NZ).

In the United Kingdom, the guidance documentation produced to assist public servants to implement the *Human Rights Act 1998* (UK) advises public servants that ‘[i]n some cases it will be difficult to know if a body is a public authority. You will need to take legal advice to clarify this.’ It then goes on to provide non-exhaustive key characteristics of a public authority which include:

- whether the body performs or operates in the public domain as an integral part of a statutory system that performs public law duties;

¹⁰ *Human Rights Act 1998* (UK), s 6(3).

¹¹ *Human Rights Act 1998* (UK), s 7(1).

¹² *Human Rights Act 1998* (UK), s 8.

- whether the duty performed is of public significance;
- whether the rights or obligations of individuals may be affected in the performance of the duty;
- whether an individual may be deprived of some legitimate expectation in performance of the duty;
- whether the body is non-statutory but is established under the authority of government or local government;
- whether the body is supported by statutory powers and penalties;
- whether the body performs functions that the government or local government would otherwise perform;
- whether the body is under a duty to act judicially in exercising what amounts to public powers.¹³

PIAC endorses this approach.

(b) Individual cause of action and remedies

A Charter without a mechanism to provide individuals whose rights have been violated with an accessible and effective remedy is relatively meaningless. A Charter of Rights without directly enforceable protections neither encourages respect by public authorities for the rights it recognises, nor inspires general public confidence that the Government will honour its stated intent to respect, fulfill and promote human rights in Victoria.

To provide a right without a remedy would mean that the Government was claiming to be a champion of human rights protection without being subject to an important measure to keep it true to its human rights commitments, namely, an individual right of action for an effective remedy. The provision of an accessible and effective remedy is itself a basic principle of human rights law.

The United Nations' Human Rights Committee, the committee that oversees States parties' compliance with their obligations under the ICCPR, has said in a General Comment that the Covenant requires:

... that in addition to effective protection of Covenant rights States parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children.¹⁴

The Committee goes on to note that the ICCPR requires that:

States parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy ... is not discharged.¹⁵

...

¹³ Human Rights Task Force Secretariat, Human Rights Unit, Home Office, *Human Rights Task Force Guidance for Public Authorities: A New Era of Rights and Responsibilities. Core Guidance for Public Authorities* (2000) 12.

¹⁴ United Nations' Human Rights Committee, General Comment No 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant'. UN Doc HRO/Gen/1/Rev 7, ¶15.

¹⁵ United Nations' Human Rights Committee, General Comment No 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant'. UN Doc HRO/Gen/1/Rev 7, ¶16.

The Committee further takes the view that the right to an effective remedy may in certain circumstances require States parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.¹⁶

The common law has long recognised the necessary correlation between a right and a remedy in the maxim *ubi jus ibi remedium* (for the violation of every right, there must be a remedy). Chief Justice Holt in a judgment in 1703 said:

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy ... want of right and want of remedy are reciprocal.¹⁷

As PIAC has set out above, the UN Human Rights Committee has provided definitive guidance on the meaning of Article 2(3) of the ICCPR.¹⁸ Provisions exist in certain other human rights instruments for measures to ensure that a person who suffers a breach of the relevant standard has an effective remedy.¹⁹

One objection to including economic, social and cultural rights in any Charter of Rights is that they are not justiciable in the same way as civil and political rights. There is no equivalent provision to Article 2(3) of the ICCPR in ICESCR. Rather, Article 2(1) of the ICESCR requires that States Parties take steps, to the maximum of its available resources, to achieve progressively the full realisation of the rights recognised in the ICESCR, particularly through legislative measures.

Yet, the practice of the South African Constitutional Court in adjudicating claims based on violations of economic, social and cultural rights teaches us that the task of protecting economic, social and cultural rights is not qualitatively different from protecting civil and political rights.²⁰

¹⁶ United Nations' Human Rights Committee, General Comment No 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant'. UN Doc. HRO/Gen/1/Rev 7, ¶19.

¹⁷ *Ashby v White* (1703) 2 Ld Remy 938 at 953; 92 ER 126. PIAC gratefully acknowledges Australian Lawyers for Human Rights for this reference.

¹⁸ Article 2(3) of the ICCPR provides that:

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

¹⁹ For example: *Convention on the Elimination of all Forms of Discrimination against Women*, Article 2(b) by which a State party undertakes to adopt legislative and other measures, including sanctions, to prohibit discrimination against women; *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Articles 4 and 14, by which a State party undertakes to make torture a criminal offence punishable by appropriate penalties, and further, to provide to a victim of torture (or their descendants if they do not survive), an enforceable right to 'fair and adequate compensation' including the means for rehabilitation.

²⁰ See ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (May 2003) 95-100 especially 96, ¶5.34.

The *Constitution of the Republic of South Africa* requires the public authorities to ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of ... this right’.²¹ The South African Constitutional Court has adjudicated the right to health²², the right to housing²³, and children’s right to shelter.²⁴

The notion of ‘progressive realisation’ is sometimes used by Governments to excuse the lack of explicit protection of economic, social and cultural rights. However, the United Nations Committee on Economic, Social and Cultural Rights provides useful guidance on the meaning of the obligation in Article 2(3). It is not an open-ended obligation. The Committee has said that:

Thus while the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force... Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.²⁵

The Committee notes that whilst legislative measures are explicitly encouraged in the wording of Article 2(1) of the ICESCR, introducing legislative measures does not exhaust the obligations under the Covenant.²⁶ The Committee notes that other appropriate measures include judicial remedies.²⁷

While PIAC advocates an individually enforceable right as set out below at **Question 5** for both ICCPR and ICESCR rights, it also offers an alternative suggestion here. In relation to ICESCR rights, the Committee might think about a range of remedies that are tailored to the nature of the rights in question.

More often than not, claims involving a breach of economic, social and cultural rights will be brought by on behalf of a group of similarly affected people seeking a common outcome. It may be that the Committee considers appropriate enforcement mechanisms for economic, social and cultural rights to be systemic remedies, available through Courts or through the supercomplaints mechanism outlined by PIAC below at **Question 5**. PIAC reminds the Committee of the importance of ensuring a broad standing provision in the Charter for this purpose, which is addressed below under **Question 5**.

²¹ *Constitution of the Republic of South Africa*, Act 108 of 1996, ss 26(2) and 27(2).

²² *Soobramoney v Minister of Health, Kwa-Zulu Natal* 1997 (12) BCLP 1696 (CC) (whether restricting access to certain treatments violated the right to health); and *Minister of Health v Treatment Action Campaign* [2002] 5 SA 271 (access to health care services, in particular an anti-retroviral drug used to treat patients with HIV-AIDS).

²³ *Government of South Africa v Grootboom* [2001] 1 SA 46 (group of people squatting on public land); see *Constitution of the Republic of South Africa*, Act 108 of 1996, s 26.

²⁴ *Government of South Africa v Grootboom* [2001] 1 SA 46 (group of people squatting on public land); see *Constitution of the Republic of South Africa*, Act 108 of 1996, s 28(1)(c).

²⁵ United Nations Committee on Economic, Social and Cultural Rights, General Comment No 3, ‘The nature of States parties’ obligations (Art 2, para 1, of the Covenant) (1990), UN Doc HRI/GEN/1/Rev 7, ¶2.

²⁶ United Nations Committee on Economic, Social and Cultural Rights, General Comment No 3, ‘The nature of States parties’ obligations (Art 2, para 1, of the Covenant) (1990), UN Doc HRI/GEN/1/Rev 7, ¶4.

²⁷ United Nations Committee on Economic, Social and Cultural Rights, General Comment No 3, ‘The nature of States parties’ obligations (Art 2, para 1, of the Covenant) (1990), UN Doc HRI/GEN/1/Rev 7, ¶¶4-5.

(c) Legislative consistency with human rights

PIAC notes in its response to **Question 8** below that legislative measures include a requirement that all legislative proposals should be accompanied by a detailed Human Rights Impact Statement and that the responsible Minister should, upon introducing any proposed legislation, make a statement about the human rights implications of the proposed legislation.

That alone will not ensure legislative consistency with human rights however. The role of the Judiciary, to act as a counterbalance to the Executive and the Parliament, is required to balance the democratic equation. PIAC submits that an interpretive provision be included in any Charter of Rights by which all legislation (whether primary or delegated legislation) and the common law should be read and given effect, as far as possible, in a way that is compatible with human rights by all Victorian Courts and tribunals.

The strength of the ACT *Human Rights Act 2004 (HRA)* is in its interpretive provisions. Subsection 30(1) provides that ‘in working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred’. Importantly, subsection 31(1) goes on to provide that ‘international law, and the judgments of foreign and international courts and tribunals, relevant to a human rights may be considered in interpreting the human right’. PIAC submits that an interpretive clause be included in a Charter of Rights in Victoria, and further, that the Charter explicitly allow the consideration of international and comparative jurisprudence on human rights by Victorian courts and tribunals. The value in explicitly allowing courts to consider international and comparative human rights jurisprudence is that Victoria will gain the benefit of sixty years of thinking about the meaning of human rights standards, and be able to interpret that thinking in a locally relevant way.

In the ACT, reflections on the first year of the operation of the HRA often raise the issue of the continuing lack of judicial and legal practitioner capacity in the area of human rights jurisprudence. PIAC submits that this is an area in which government resources should be allocated to increase capacity and awareness.

(d) Judicial declarations of inconsistency

PIAC submits that the Supreme Court of Victoria should be empowered to strike down as invalid legislation and delegated legislation that is inconsistent with recognised rights in the Charter of Rights, and which cannot be interpreted in a way that is compatible with those rights.

Lower courts, faced with an application to strike down legislation as invalid, should be empowered to refer this to the Supreme Court.

PIAC does not support the ACT HRA’s Declaration of Inconsistency. In PIAC’s submission, the ACT model—by which the Supreme Court may make a Declaration of Inconsistency to be tabled in Parliament and formally responded to in Parliament by the Government of the day—is a weak one. It is often justified by reference to ‘parliamentary sovereignty’. This is a specious justification. PIAC encourages a robust dialogue between the Judiciary, the Parliament and the Executive and one which carries with it effective consequences.

Parliamentary sovereignty means that parliament is not bound by the legislative actions of any previous parliament, and retains the power to legislate on any subject matter lawfully within its jurisdiction. Parliament is properly subject to judicial oversight, and where a court strikes down or reads down a legislative provision, that is a meaningful form of dialogue between the arms of government. Parliament remains free to re-legislate in a lawful manner on the same subject. This is a fundamental principle of Australian democratic institutions, and PIAC sees no compelling reason to make an exceptional or less robust arrangement in relation to human rights protection.

(e) Interconnectedness of rights

The inclusion in the Charter of economic, social and cultural rights would not spell either fiscal disaster nor loss of Parliamentary sovereignty.

PIAC has already noted the Government's preference for civil and political rights articulated in the *Statement of Intent*. The Government's justification for its preference is awkward. The Government claims that:

Those who are living in poverty and people from marginalised communities have often had the most need of the protections offered by the basic rights found in the ICCPR... The Government's primary purpose in this initiative is to adequately recognise, protect and promote *those rights that have a strong measure of acceptance in the community*. (Emphasis added)²⁸

Further, in defence of its position against the inclusion of economic, social and cultural rights, the Government claims:

Legislating for the protection of the ICESCR rights ... is complicated by the fact that such rights can raise difficult issues of resource allocation and that many deal with responsibilities that are shared between the State and Commonwealth Governments. The Government also believes that Parliament rather than the courts should continue to be the forum where issues of social and fiscal policy are scrutinised and debated.

In PIAC's submission, a focus on people living in poverty and from marginalised communities teaches the importance of insisting on the interconnectedness and indivisibility of rights. People need to eat, to have access to appropriate shelter and to a secure income source, just as they ought to enjoy the right to vote and other civil and political rights. To create a division between these classes of rights is arbitrary, artificial and out of touch with the reality of people in Victoria who are doing it tough.

The Government should not balk at considering the protection of economic, social and cultural rights together with civil and political rights. In significant ways, the Government has already committed itself to delivering on economic, social and cultural rights in its plan for social sustainability, *A Fairer Victoria*.²⁹ The budgetary commitments connected to the policy statements in *A Fairer Victoria* span the range of civil and political rights, economic, social and cultural rights and other human rights treaties such as the *Convention on the Rights of the Child (CROC)*, the *Convention on Elimination of all forms of Racial Discrimination (CERD)* and the *Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)*.

The Government has provided financial commitments for revitalised disability services, measures to ensure family integrity, general rights to access government services (including the justice system), children's services, housing, public transport, aged care, schools and communities, health (including mental health and aged care), education, and community safety and participation in government.³⁰

²⁸ *Statement of Intent*.

²⁹ The Government has already committed \$788.2 million over the next four years to 'tackle disadvantage and give all Victorians the best possible chance to achieve their potential and share in the many benefits our State has to offer': *A Fairer Victoria*, 6.

³⁰ *A Fairer Victoria*.

(f) Entrenchment

Protection of human rights is a fundamental obligation incumbent upon the Government. A Charter of Rights is an important expression of this obligation and the commitment a Government gives to all people within its jurisdiction that the Government will work to better people's lives and to be accountable to them where it acts or fail to act, in violation of an individual's human rights.

Consistent with this undertaking—once it is formally given by a Government—it ought to be difficult to retract, water down or otherwise alter the rights protected in a Charter of Human Rights. PIAC therefore recommends that a Charter of Rights be legislatively entrenched such that to amend it would require the agreement of two thirds of the parliament in a joint sitting.

Finally, PIAC submits that the Charter should include a ratchet clause, such that once rights are recognized they could not easily be taken away. The process of consultation should be a cumulative building of rights protection rather than a process by which existing rights protection is incrementally weakened.

(g) Community engagement

The Charter of Rights should signify a process as well as a documented commitment made by the Government to the people of Victoria.

PIAC supports the consultation process currently underway, albeit expedited and limited in scope.

PIAC's position is that the full range of human rights protections should be included in the Charter of Rights from the beginning. While PIAC advocates strongly for the enforceability of the full range of human rights once the Charter comes into effect (eighteen months after its date of commencement), PIAC's alternative position is one of phased implementation and enforceability, rather than phased recognition. This means that all of the rights recognised in the ICCPR and ICESCR should be recognised in the Charter at its inception, but the Charter legislation would include within it a phased implementation of mechanisms for the enforcement of those rights. As such, PIAC does not support a process of community review as is found in the HRA. However, PIAC strongly urges the Government to prioritise and adequately fund community engagement, awareness, and capacity-building initiatives.

In PIAC's view, support for building capacity to engage in human rights protection and promotion should focus on the community sector, on professions and sectors that represent people in using the Charter, such as unions, local government and legal profession, and on the business sector.

(h) Reasonable limits clause and notwithstanding clause

PIAC refers to its comments below at **Question 8**.

(i) Cost effectiveness

PIAC submits that through enacting a broad-based Charter of Rights that gives to people in Victoria the ability to vindicate their rights directly, the Government will succeed in achieving a human rights culture far more quickly than any mass education or awareness-raising campaign could hope to do.

In the absence of a Charter of Rights the task of creating a human rights culture becomes a costly exercise and challenging for individuals to understand and implement. A Charter of Rights gives Victorians a direct and tangible link with human rights. Education, awareness raising and capacity building activities become more powerful, direct and therefore cost-effective strategies.

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

A Charter of Rights in Victoria should, at a minimum, protect the rights to which Australia has committed itself at international law, namely, the rights set out in the following international treaties:

- the *International Covenant on Civil and Political Rights*; and
- the *International Covenant on Economic, Social and Cultural Rights*.

These rights are interconnected, indivisible and pertain to each person by virtue of their humanity.³¹

Furthermore, PIAC submits that the Charter of Rights should explicitly provide for:

- recognition of Victoria's Indigenous peoples, their continuing cultures and connection to land, and their right to self-determination;
- the right to a safe and sustainable environment;
- the right of people with disabilities to be enjoy substantive equality and to be free from discrimination;
- the right of people of all genders, sexualities and identities to enjoy substantive equality and to be free from discrimination;
- any further rights identified through community consultation in 2005, or during subsequent consultations.

PIAC understands human rights to accrue to natural persons from the time of birth. The drafting of the Charter of Rights should reflect this and not extend beyond it.

PIAC understands the right to life, protected in the ICCPR, to be a right that begins at the time of birth, and to operate to restrain the Government from taking the life of any person in its jurisdiction. PIAC does not understand that right to prevent a woman from exercising her right to exercise control over her own body, or to prevent an informed and voluntary decision to take one's own life. The debate about a Charter of Rights should not become a debate about women's access to abortion or about euthanasia. Human rights principles do not dictate an outcome, and PIAC advocates that the current status quo in relation to the regulation of abortion remain undisturbed.

Further, PIAC notes that both *The Age* and the *Sydney Morning Herald* reported on a poll conducted by Fairfax media in which it was reported that up to 66% of those polled 'are willing to sacrifice privacy and civil liberties' for protection from terrorist attack.³² PIAC anticipates that the Committee will have received submissions that support this position and that make the point that the Prime Minister, John Howard, and the Federal Attorney-General, Philip Ruddock, have made recently, namely, that the most important right of all is the right to life and that by passing legislation to protect the lives of the many, against the 'fanatical' few, the Government is acting consistently with its human rights obligations. PIAC resisted this logic when it was first articulated

³¹ The Vienna World Conference on Human Rights in 1993 declared that the correct approach was to regard all categories of rights as indivisible, universal, interrelated, and interdependent: see *Vienna Declaration*, UN Doc A/CONF 157/24, ¶¶ 5 and 8.

³² *Sydney Morning Herald*, 3 August 2005, 1 -2; *The Age*, 3 August 2005, <<http://www.theage.com.au/news/war-on-terror/war-in-iraq-raised-terror-risk-say-66/2005/08/02/1122748639595.html>>.

by the Secretary of the Commonwealth Attorney-General's Department, Mr Robert Cornall, in the guise of 'community rights'.³³ This attempt to undermine internationally accepted interpretation of human rights of great concern to PIAC and should be rejected.

The main point PIAC wishes to emphasise to the Committee and through it, to the Government, is that measures to counter terrorism should be, and can be, consistent with human rights and the Rule of Law.

In PIAC's view, it is fundamental that any measures to combat terrorism should themselves uphold, rather than circumvent, international human rights standards.³⁴ In discussing measures to combat terrorism, it is not a question of 'striking an appropriate balance' between human rights and the national security interest. Australia's human rights obligations are not negotiable. They are part of the democratic relationship between the Government and people within Australia and any compromise is to the detriment of Australian democracy.

The United Nations human rights system was born from the experience of World War II in which countless individuals suffered at the hands of States and State-based terrorism and human abuse. The framework of human rights with which this submission has been concerned was created as a bulwark against oppressive State regimes. The rights that PIAC advocates should be protected in a Charter of Rights in Victoria accrue to individuals, not to governments or States. They exist to protect individuals and to give individuals a means of asserting a right against the more powerful State. They reflect a clear vision of the basic and inherent rights that belong to each of us, before any other tag is attached to us, as human beings.

PIAC rejects the *Statement of Intent*'s exclusive focus on so-called 'democratic rights' connected to the ICCPR and its instruction to the Committee that it ignore 'issues associated with specific international covenants' because 'many of these rights are already protected in domestic equal opportunity legislation'.

The *Justice Statement* addresses the question of protecting human rights at Part 4.2. The Government states that the question of whether Victorians' enjoyment of their human rights can be improved and by what means should be determined through consultation about:

- a Charter of Rights;
- new approaches to reducing systemic discrimination;
- how to promote attitudinal change.³⁵

Both the *Justice Statement* and the *Statement of Intent* tend to conflate human rights with equal opportunity or anti-discrimination measures.

Human rights and non-discrimination are not co-extensive terms. This is why PIAC advocates the creation of a stand-alone human rights body (see below under **Question 4**, rather than expanding the capacity of the Equal Opportunity Commission of Victoria (**EOCV**), which is occupied with

³³ Jane Stratton and Robin Banks, 'Human rights should not be the casualties of the war on terrorism', *Sydney Morning Herald*, p 11 (13 May 2005).

³⁴ See for example, the commitment by the United Nations General Assembly which stated in a Resolution following the events of 11 September 2001, 'that all measures to counter terrorism must be in strict conformity with the relevant provisions of international law, *including human rights standards*'. [*emphasis added*] Resolution 56/160 (19 December 2001), Preamble. See also operative paragraphs 5 and 6, which (*inter alia*) call on States 'to take all necessary and effective measures, in accordance with relevant provisions of international law, including international human rights standards, to prevent, combat and eliminate terrorism in all its forms and manifestations...' (para 6).

³⁵ *Justice Statement*, Part 4.2, p 53.

promoting equal opportunity and reducing the incidence of discrimination. It is PIAC's strong view that a new body that is clearly dedicated to the broader question of human rights should be established.

PIAC supports the continuation of the EOCV as a specialist anti-discrimination and equality rights body, to ensure that historically disadvantaged groups enjoy not only equal protection of the rights provided in the Charter, but also of access to all other aspects of day-to-day life in Victoria that are specifically protected under anti-discrimination law. This can be a complex area and requires specialised expertise to deliver meaningful, substantive equality outcomes under those existing laws.

It is critical to understand that anti-discrimination protections do not exhaust human rights protections. For instance, there is nothing in anti-discrimination legislation or discourse about a right to vote, a right to housing, a right to education, or a right to be free from arbitrary detention. Rather, anti-discrimination protections afford everyone the same access to existing entitlements and services. If, for example, the parliament were to limit the right to vote across the board, anti-discrimination legislation would not assist someone who wished to exercise an enhanced right to vote.

Finally, PIAC submits that it is important that rights be described in clear and plain language to ensure maximum community engagement with the ideas informing the Charter of Rights.

<p>4. <i>What should be the role of our institutions of government in protecting human rights?</i></p>

The institutions of government have the chief responsibility for protecting, promoting, respecting and fulfilling the human rights of each person in Victoria, without discrimination. To achieve a fully functioning human rights culture however, everyone in Victorian society should know about human rights, know how to protect their own human rights, and be encouraged to respect the human rights of others.

PIAC makes a range of suggestions in relation to the institutions of government that involve the expansion of existing offices, and in limited instances, the creation of new mechanisms:

- ***Establishment of a Victorian Human Rights Commission (VHRC)***: this would act as a human rights watchdog and a source of expertise and capacity. PIAC proposes that the VHRC be empowered to initiate law reform and research on human rights in Victoria, to educate and build capacity in human rights principles in Victoria, to investigate and report on human rights issues in Victoria, to act as *an amicus curiae* in human rights matters, to bring representative proceedings in relation to systemic violations of recognised rights, and to provide technical assistance to litigants in relation to human rights principles.
- ***Establishment of an Office of Human Rights, in the Office of Premier and Cabinet (OHR)***: this would provide a focal point for whole-of-government implementation, capacity building and policy development.
- ***Changes to the Scrutiny of Acts and Regulations Committee***: the existing Committee's role should be extended to mandate it to provide technical expertise to parliament on the human rights implications of proposed primary and delegated legislation, including the provision of proportionality analysis to guide the parliament where it is necessary to balance competing rights, or where the parliament proposes to legislate to compromise or override a right recognised in the Charter of Rights.

PIAC adopts the definition of and approach to ‘proportionality’ provided by the United Kingdom Joint Committee on Human Rights:

The principle of proportionality requires decision-makers, contemplating an interference with a right, to balance the severity of the interference with the intensity of the social need for action. Proportionality has a number of elements. The following factors are relevant:

- An interference must not take away the very essence of a right.
 - There must be a sufficient factual basis for believing that there was a real danger to the interest which the State claims there was a pressing social need to protect.
 - The State's measure or act must interfere with the right in question no more than is reasonably necessary in order to achieve the legitimate aim.
 - Measures are likely to be regarded as disproportionate if they impose heavy burdens on one individual or group, apparently arbitrarily, in order to achieve a social benefit, or if they impose penalties which appear to be excessive in relation to the circumstances of the offence to which they relate.
 - The effectiveness of any legal controls over the measures in question, and the adequacy of compensation or legal remedies for those affected by the measures, will be relevant to the proportionality of any interference.³⁶
- ***Establishment of a Joint Parliamentary Committee on Respecting, Protecting and Promoting Rights (Joint Parliamentary Committee)***: this would undertake parliamentary oversight and to signify parliamentary commitment to the protection of human rights in Victoria. PIAC proposes that the Joint Parliamentary Committee’s Terms of Reference would be to inquire into the practices of public authorities on its own information, or on a reference that discloses a significant and systemic human rights issue from the Attorney-General, VHRC, the Ombudsman, or the Auditor-General.
 - ***Changes to the role of the Ombudsman***: the role would be expanded to develop an explicit human rights capacity to deal with complaints of serious human rights violations consistent with existing powers.
 - ***Changes to the role of the Auditor-General***: this role would be expanded to develop explicit human rights compliance audit capacity. PIAC proposes that public authorities begin to report more explicitly against social outcomes.

Currently, the Auditor-General monitors fiscal outcomes, however, PIAC proposes that consistent with a broadened reporting base, the Auditor-General should develop a new capacity to monitor social outcomes reporting, including outcomes consistent with human rights standards.

Human rights capacity building within Government will be a key challenge to the addressed in ensuring the effective implementation of a Charter of Rights. PIAC makes more detailed submissions about building capacity around human rights under **Questions 8 and 9** below.

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

PIAC’s submits that there should be a mutually supporting range of individual, systemic and compliance outcomes.

³⁶ Joint Committee on Human Rights, Annex 2 of the Committee's First Report, Session 2000-01, Criminal Justice and Police Bill (26 April 2001).

PIAC recommends a range of enforcement mechanisms and remedies for breaches of rights of individuals. Where a complaint identifies a systemic barrier to the protection and promotion of recognised rights, there should be mechanisms to address the systemic aspects of the individual's complaint as well as compensating or providing other remedies to the individual. There should also be processes to enable systemic human rights issues to be identified by community organisations and government institutions.

Individual remedies

Where a person's rights are breached, they should be entitled to an accessible and effective remedy for that breach.

This is consistent with international approaches to human rights protection, and is necessary to give meaning to the Government's stated commitments noted above in **Section 2**.

PIAC acknowledges the first experiment in human rights protection in Australia, the *Human Rights Act 2004* (ACT), and commends the ACT Government for its commitment to human rights. However, the HRA represents the first, tentative steps for formal rights protection in Australia, and is limited to an interpretive and limited watchdog model. It does not represent, in PIAC's submission, the benchmark against which Victoria should measure itself.

Accordingly, PIAC advocates a model that draws on the United Kingdom and New Zealand experiences more directly. (Unlike South Africa, Canada and the United States, the relevant legislation in New Zealand and the United Kingdom does not have constitutional or quasi-constitutional status.)

In both New Zealand and the United Kingdom, the relevant legislation (and subsequent judicial interpretation in New Zealand)³⁷, means that individuals can take an action for a breach of a recognised right by a public authority for a remedy. Similarly, in Victoria, individuals should be empowered to make such claims.

PIAC recommends that individual claims be adjudicated in Victorian courts of all levels, against public authorities that fail to respect, protect or promote the individual's rights recognised in the Charter as enforceable. Where claims in administrative tribunals raise human rights issues, those tribunals should be empowered to consider the matter, providing they arise from a cause of action within the tribunal's jurisdiction.

Care should be taken to ensure that mechanisms for seeking remedies through the courts are user friendly, inexpensive, and are supported through appropriate registry services and access to legal aid and affordable legal services.³⁸

Available remedies should include declaratory relief, compensation, injunctive relief, orders designed to remedy the effects of the violation upon the individual, and orders designed to address the systemic roots of the violating conduct by the public authority (**systemic orders**).

³⁷ The *Bill of Rights Act 1990* (NZ) has no express enforcement provision. Nonetheless, the New Zealand Court of Appeal has implied a remedy in its interpretation of the provisions of the Act by recognising a cause of action directly against the New Zealand State for damages for a breach of the Act. In *Simpson v Attorney General (Baigent's Case)* [1994] 3 NZLR 667, it was found that the police violated section 21 of the Act (right to be free from unreasonable search and seizure) by entering the plaintiff's house with an invalid search warrant.

³⁸ On this issue, PIAC notes the recent decision of the European Court of Human Rights in *Case of Steel & Morris v United Kingdom* (2005) Eur Court HR, in which it was found that the absence of legal aid gave rise to a breach of the right to a fair trial.

The Supreme Court of Victoria should be empowered to make an order that a legislative provision is invalid or that a legislative provision that is inconsistent with recognised rights be read down. Lower courts should be empowered to refer to the Supreme Court any application to strike or read down a legislative provision as inconsistent with recognised rights.

Systemic outcomes

Systemic orders might include, for example, an order that managers of the public authority and key staff undergo VHRC-approved human rights capacity-building and awareness training, that the public authority work in partnership with the VHRC and the HRO to design and implement a human rights strategy, or that the public authority report to the VHRC at appointed times on measures it has taken to address the systemic problem identified by the VHRC as a result of the individual's complaint. In this way, individuals are provided with an effective and sustainable remedy that ensures respect for their rights, and further, creates an opportunity for a co-operative and capacity building approach to ameliorating any systemic cause of the complaint.

PIAC notes Article 38 of the *Constitution of the Republic of South Africa*, which provides for broad standing for any of the following to bring a matter before 'a competent court, alleging that a right in the Bill of Rights has been infringed or threatened':

- anyone acting in their own interests;
- anyone acting on behalf of another person who cannot act in their own name;
- anyone acting as a member of, or in the interest of, a group or a class of persons;
- anyone acting in the public interest;
- an association acting in the interest of its members.³⁹

PIAC supports inclusion of this approach in a Charter of Rights as it provides a mechanism to recognise both the individual and systemic nature of rights abuse.

Further, PIAC proposes that community-based organisations that are representative bodies, such as the Victorian Council of Social Service, Trades Hall, the Ethnic Community Council of Victoria, and the Federation of Community Legal Centres (Victoria), be recognised as competent bodies to make a complaint alleging systemic breaches of the Charter. Such a complaint would compel a response from the respondent and an investigation by the VHRC. The VHRC would have the ability to make recommendations that should be:

- tabled in Parliament;
- monitored for compliance and implementation by the VHRC; and
- enforceable upon application to the Supreme Court.

This proposed representative complaints scheme is based on the 'supercomplaints' scheme that operates in the United Kingdom in the field of consumer protection.

Under the *Enterprise Act 2002* (UK), designated consumer bodies, including the National Consumer Council, are empowered to submit a supercomplaint. Such a complaint must present a 'reasoned case' and should be supported with background materials, including documented facts and evidence. A supercomplaint is defined in section 11 of the *Enterprise Act 2002* as a complaint that 'any feature, or combination of features, of a market in the UK for goods or service is or appears to be significantly harming the interests of consumers'.

Under that system, particular conduct or structural issues can be the subject of a complaint and the matters complained of can be regional, national or supranational. Where the complaint exceeds the

³⁹ *Constitution of the Republic of South Africa*, Act 108 of 1996, s 38.

jurisdiction of the United Kingdom, only the United Kingdom aspects of the issue can be addressed. A broad range of bodies can receive supercomplaints, including the Office of Fair Trading, the Office of Communications, the Office of Gas and Electricity Markets, the Office of Water Services, the Rail Regulator, and the Civil Aviation Authority. They are required to publicly publish a reasoned response within 90 days. Remedies include:

- enforcement action by the Office of Fair Trading's regulation divisions;
- launching of a market study into the issue;
- making a market investigation reference to the Competition Commission.

PIAC recommends this type of complaint mechanism as a means of keeping integrated systems of human rights protection accountable.

PIAC envisages that designated community organisations would be empowered to make a 'supercomplaint' in relation to a gross abuse of human rights, particular patterns of human rights violations, and/or structural impediments to human rights protection and promotion. Provided the complaint discloses credible facts, or a reasoned case, investigation and compliance measures should be triggered as a mandatory outcome.

In PIAC's submission, the VHRC would be ideally placed to investigate complaints and to oversee the implementation of its recommendations. Such recommendations should be tabled in Parliament, and formally shared with the Auditor-General, the OHR and the Joint Parliamentary Committee each of whom should be empowered to take compliance and monitoring measures.

Compliance mechanisms

Finally, PIAC turns to compliance more generally. PIAC submits that the Auditor-General and Ombudsman, with a new human rights capacity, together with a newly established Joint Parliamentary Committee, and the OHR, provides an effective mixture of administrative and Parliamentary mechanisms to monitor the performance of public authorities, to collaborate to identify poor performance and its causes, and to develop strategies to improve human rights compliance with poorly performing public authorities. Consistent with PIAC's submissions below under **Questions 6 and 8**, public authorities would be required to do the following:

- Develop a Statement of Commitments as a compact between the public authority and its stakeholders, including members of the community. A Statement of Commitments should reflect how the public authority plans to respect, protect, promote and fulfill relevant human rights standards.
- Report annually to parliament, via the Joint Parliamentary Committee, on steps taken to respect, protect, promote and fulfill the rights recognised in the Charter of Rights, including on its performance against its Statement of Commitments.

Such reports would be part of social outcomes reporting, which the Auditor-General will be mandated to review (see **Part 6** below).

The OHR would be charged with ensuring a co-ordinated, whole-of-government approach to rights protection and to foster human rights capacity within the Government. The Ombudsman will retain an investigative and reporting function in relation to the conduct of public authorities, which will be explicitly expanded to include human rights standards. Together, the OHR, the Auditor-General, the Ombudsman and the Joint Parliamentary Committee, if they develop systems to work together effectively, will be uniquely placed to promote human rights compliance in Government.

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

PIAC's submission has touched on some of these changes already.

Firstly, the Government needs to make a policy and fiscal commitment to institutional capacity building within Government and in the Victorian community about the substance of human rights principles, and more specifically what the Charter of Rights means in practice. An important aspect to PIAC's submission in this regard is the institutional capacity building that PIAC set out above under **Question 4**.

Second, PIAC supports the creation of, and strengthening of existing, written undertakings of human rights commitments in delivering services and developing policy by public authorities. PIAC notes the development of compacts, charters, plans and strategies by some public authorities.⁴⁰ PIAC supports this practice and sees this development as a positive means of implementing a rights culture. PIAC submits that all public authorities should be required, as part of the implementation strategy of any Charter of Rights, to develop a Statement of Commitments to their stakeholders, clients and the community more broadly. Such Statements engender human rights awareness amongst public servants, and those in the community whom they affect in their work.

Third, and connected in part to the development of Statements of Commitments between government departments and agencies and the community, PIAC proposes stronger reporting and accountability measures by public authorities. PIAC notes that the ACT Government has introduced a human rights reporting mechanism in its annual reporting system. PIAC proposes that public authorities be required to report to parliament on an annual basis on indicators that include their implementation of the Charter of Rights and their Statement of Commitments. Such reporting should explicitly include social outcomes. Further, PIAC proposes that administrative remedies and inquiries should follow serious breaches of Statements of Commitments by public authorities. PIAC sets out a more detailed submission on reporting and accountability for breaches of Statements of Commitments by public authorities above under **Question 5** and below in **Part 0** of this submission.

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

The community has an important role to play in making the Charter of Rights a living document, as individuals and as a collective body. If members of the community are not aware of the Charter of Rights, and not empowered to use it and the mechanisms that are created in Victorian society to support it, the potential benefit of the Charter of Rights and associated mechanisms will be diminished. In addition to the remedies available to individual members of the community outlined above under **Question 5**, PIAC submits that the Government should dedicate financial and material resources to increasing community capacity to understand human rights principles. Key measures that the Government could undertake to secure this outcome include:

- the provision of human rights education as part of core curriculum throughout the Victorian education syllabus;
- funding of community groups and initiatives with the aim of protecting and promoting human rights, particularly those that include an awareness raising aspect.

⁴⁰ For example, the *Aboriginal Justice Agreement* (Indigenous Issues Unit, Department of Justice); the *Women's Safety Strategy* (Office of Women's Policy, Department for Victorian Communities); the *State Disability Plan* (Disability Services, Department of Human Services); the *Cultural Diversity Project* (Department of Justice); and the *Public Hospital Patient Charter* (Clinical Governance Unit, Department of Human Services).

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

PIAC suggests the following strategies in the parliamentary and administrative spheres. Further comments in relation to the judicial and community spheres are set out under **Questions 2 at 0(b), (d) and (g)**, under **Question 5 on the judiciary**, and under **Question 7**. It is important that these strategies be thought of as interrelated and integrated strategies rather than as stand-alone measures.

Parliamentary strategies

All legislative proposals should be accompanied by a detailed Human Rights Impact Statement. The responsible Minister should, upon introducing the Bill or delegated legislation, make a statement about the human rights implications of the proposed legislation. This should include, as a minimum, whether or not the proposed legislation will promote compliance with the rights recognised in the Charter of Rights. If the Minister believes the legislation will breach, fail to promote compliance with particular rights, or impair a right recognised in the Charter of Rights, the Minister should be required to provide a justification for the legislation. Such a justification should be based on the wording of the ‘reasonable limits’ clause of the Charter of Rights.

PIAC recognises that the parliament will need the ability to balance competing rights by passing legislation to limit qualifiable rights where such laws are:

- necessary in a democratic society;
- pursue an important objective;
- are rationally connected to that objective;
- impair a right no more than necessary to achieve the objective; and
- do not have a disproportionately severe impact or impermissibly discriminatory effect on the people to whom the law will apply.⁴¹

As noted above, PIAC does not support the inclusion of a ‘notwithstanding’ clause in the Charter.

The *Canadian Charter of Rights and Freedoms* contains a ‘notwithstanding’ clause that effectively gives the Canadian Parliament the power to pass legislation, notwithstanding the fact that it is inconsistent with or fails to respect, protect, and promote the human rights protections contained in the Charter, provided the Parliament makes an explicit declaration of the inconsistency.⁴² Such legislation has a limited operation of five years, but may be renewed by the Parliament.

In the event that such a clause is included in any Charter of Rights in Victoria, PIAC submits that any such clause should closely limit the life of legislation that is inconsistent with the Charter to a maximum of three years and, further, should ensure that such legislation is referred to a comprehensive review that includes community consultation, prior to its passage through parliament, and finally, to ongoing parliamentary oversight by the Joint Parliamentary Committee. This is necessary to guard against legislation creep, whereby extraordinary legislation begins to be seen as ‘normal’⁴³, and to prevent the incremental weakening of a human rights culture.

⁴¹ PIAC does not mean to exclude special measures by this caveat, that is, measures that are *prima facie* discriminatory but which operate to the benefit of particular equality seeking groups. This approach is broadly consistent with international human rights jurisprudence on ‘proportionality’ and has been adopted by both the Canadian Supreme Court and the United Kingdom Joint Committee on Human Rights.

⁴² *Canadian Charter of Rights and Freedoms*, s 33.

⁴³ A good and topical example of ‘legislation creep’ is the introduction of compulsory questioning and detention powers for the Australian Security and Intelligence Organisation, which are currently under review by the Joint Parliamentary Committee on ASIO, ASIS and DSD and which have the serious potential, in PIAC’s submission, to breach human rights standards. These laws were said by

Consistent with international law, the Charter should distinguish between absolute and qualifiable rights. Absolute rights cannot be derogated from and include the right to protection from torture and cruel, inhuman or degrading treatment or punishment, freedom from discrimination, the right to life from the time of birth, the prohibition against slavery and enforced labour, the right to be recognised as a person before the law, the right to freedom of thought, conscience and religion; and protection from retrospective criminal penalties.⁴⁴

Qualifiable rights include, for example, the right to respect for privacy and family life, freedom of speech, and freedom of association. Any qualification of the rights should be consistent with the ICCPR and ICESCR.

Further, PIAC has advocated the expansion of the mandate of the Scrutiny of Acts and Regulations Committee to include an active human rights mandate. PIAC also recommends that a Joint Parliamentary Committee be created with a standing terms of reference to inquire into the practices of public authorities on its own information, or on a reference that discloses a significant and systemic human rights issue from the Attorney-General, VHRC, the Ombudsman, or the Auditor-General.

Administrative measures

Administrative measures for human rights compliance include, as already highlighted:

- The creation of the OHR.
- The creation of guidance documents in relation to human rights protection, not merely equality rights. Examples in other jurisdictions include the United Kingdom Home Office's Human Rights Task Force Secretariat's publication, *Human Rights Task Force Guidance for Public Authorities: A New Era of Rights and Responsibilities. Core Guidance for Public Authorities* (2000), and the ACT Department of Justice and Community Safety's Human Rights Unit's publication, *The Plain English Guide to the Human Rights Act 2004*. PIAC is concerned to ensure that any such manuals are comprehensive human rights documents, and do not remain in a particular subset of human rights protection, such as equality rights.
- The development of practical human rights implementation training and workshops that become part of the fabric of public service professional development⁴⁵.
- The requirement that public authorities articulate their commitment to human rights in the form of a policy framework and undertakings to stakeholders, including the community in the form of a Statement of Commitments.
- The introduction of a requirement that public authorities report annually to parliament on their work to respect, protect and promote recognised human rights standards in the Charter of Rights, including the Statement of Commitments.

the Commonwealth Government to be an extraordinary response to extraordinary events when they were introduced. Yet when the laws came up for review in 2005, the Commonwealth Attorney-General and the Director-General of ASIO submitted that the laws should be made a permanent feature of ASIO's powers.

⁴⁴ Non-derogation of rights is expressly dealt with in Article 4 of the ICCPR.

⁴⁵ See for example, the New Zealand Human Rights Commission's *Making Rights Work*, a training package on the *Bill of Rights Act 1990* (NZ) for the public service.

- The referral of poor performance against policy commitments/compacts/ community agreements to the OHR and the VHRC to build better awareness and capacity to meet the expectations of the community.

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

PIAC submits that the Charter of Rights should come into effect eighteen months after its passage through the Victorian Parliament.

In the United Kingdom, there was a period of two years from passage through the United Kingdom Parliament before the *Human Rights Act* came into force. This time was used productively to prepare for full implementation of the Act.

In Victoria, the eighteen months should be used to create capacity throughout the public service and to continue community engagement. The following parallel processes should occur within the first six to twelve months:

- ***Creation of a Task Force with the role mirroring that established in the United Kingdom.***

In the United Kingdom, a Task Force was created with the following functions:

- 1.(i) help Departments and other public authorities prepare for implementation of the Human Rights Act 1998; and
- (ii) increase general awareness, especially amongst young people, of the rights and responsibilities flowing from the incorporation of the European Convention on Human Rights and thus to help build a human rights culture in the United Kingdom.
2. The Task Force will maintain a dialogue between Government and non-governmental organisations on the readiness of public authorities for implementation. It will help identify, promote and support, as appropriate, a range of initiatives and opportunities to assist training and development, including the production and dissemination of appropriate guidance, good practice and publicity material.⁴⁶

The Task Force in the United Kingdom consisted of Ministers, non-government organisations, public servants from the Home Office, the Cabinet Office, and the Lord Chancellor's Department, and other interested public sector agencies.

PIAC submits that in Victoria, a similar Task Force should be created as a mechanism to ensure that the preparation for and implementation of the Charter of Rights is well integrated both within Government and through the community.

- ***An Inter-Departmental and Inter-Agency Council (Council) should be formed.***

Each Chief Executive Officer, or senior representative with delegated authority, should be responsible, in consultation with staff and stakeholders, and with reference to a group of human rights experts, to review existing legislation and procedures within their respective Departments or agencies for human rights compliance. Following the review, the Chief Executive Officers should each be responsible for developing a human rights implementation plan. The task of the Council, together with the Task Force, will then be to

⁴⁶ United Kingdom Department for Constitutional Affairs, *Taskforce Terms of Reference*, <<http://www.dca.gov.uk/hract/taskref.htm>> accessed 1 August 2005.

integrate the implementation plans to form a coherent whole-of-government implementation strategy.

- ***The mandate of the Task Force should be carried out on an ongoing basis by the newly created Office of Human Rights within the Office of Premier and Cabinet.***

The OHR will be responsible for the whole-of-government implementation of the implementation strategy and for continuing to ensure the public service in Victoria is adequately resourced to deliver human rights consistent outcomes, and to ensure that mechanisms to ensure community engagement are maintained. It should continue and expand the work of the Task Force and should itself, be required to report to Parliament on human rights implementation and strategies from a whole-of-government perspective.

- ***Legislate to create the Victorian Human Rights Commission.***

The VHRC should have a mandate that includes the capacity to initiate law reform and research, the function to educate and build capacity in human rights principles in Victoria, an investigative and reporting function, an *amicus curiae* and intervention power in human rights matters, the power to bring representative proceedings in relation to systemic violations of Charter rights, and the power to provide technical assistance to litigants in relation to human rights principles.

The Government should resist an understanding of this Commission as co-extensive with existing anti-discrimination mechanisms such as the Equal Opportunity Commission of Victoria, given that human rights principles include, but go beyond, non-discrimination.

- ***Human rights capacity building workshops should begin immediately.***

These should be based upon the rights recognised in the Charter of Rights, and touching upon any rights that are the subject of the next phase, if any, of the Charter. These human rights should form a core part of the Victorian public service training program, integrated throughout the existing training programs.

- ***Government to develop partnerships and commit resources to capacity building.***

Such partnerships would be with the community sector and relevant professions and would include the provision of financial and material resources to build capacity within those sectors.

- ***Expand the mandate of the Scrutiny of Acts and Regulations Committee.***

This would be expanded to explicitly require it to report on the compatibility of bills and proposed regulations with the rights recognised in the Charter of Rights.

Once its new powers come into effect, where the Committee reports a potential violation of a right, or a conflict of rights, it should be required to provide technical assistance to Parliament as to how it might prevent the violation and/or resolve the conflict of rights, consistent with human rights jurisprudence of proportionality.

- ***The Government to prioritise the reporting of social outcomes as well as fiscal outcomes.***

This would include creating institutional capacity to ensure that the capacity to develop and report against social outcomes is created; and further, that the outcomes inform policy development.

PIAC suggests that the Auditor-General play a role in this process, through the development of a specialised unit within that Office. The *Audit Act 1994* (Vic) to be amended to mandate the reporting and auditing of social outcomes.

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

Yes. PIAC refers the Committee to this submission, read as a whole, for a comprehensive proposal about human rights protection in Victoria.

See also the suggestions set out in **Part 6** below.

4. Responses to Government concerns

A range of arguments have been raised in the *Statement of Intent* to support the limited scope proposed; these are summarised below:

- ***A concern to retain Parliamentary sovereignty***: It is said that Parliament rather than the Courts is the appropriate place for decisions about fiscal allocations and policy direction to be set.
- ***Delineation of Commonwealth and State responsibility***: It is suggested that the Government does not have control over certain matters because they are controlled by the Commonwealth, particularly in relation to economic, social and cultural rights.
- ***A concern to avoid direct access to courts by individuals to claim a remedy***: Presumably this results from a wariness about creating a litigation culture, which is commonly perceived to exist in the United States of America.
- ***A concern that rights will be static***: That is, that, once fixed in a Charter of Rights, the document will fail to respond meaningfully to the needs of generations to come.

PIAC addresses each of these briefly here, and touches on some of these issues in its broader submissions.

Parliamentary sovereignty

Parliamentary sovereignty denotes the principle that no Parliament is bound by way of precedent by the actions of previous parliaments and similarly, it cannot bind its successors.

It is sometimes used to denote the idea that Parliament should not be told what to do by other branches of Government, that in AV Dicey's famous statement that '... no person or body is recognised ... as having a right to override or set aside the legislation of Parliament'.⁴⁷

This view is not consistent with the contemporary practice of democracy and separation of powers in Australia. The attitude of courts to attempts by the legislature to exclude judicial review through the use of privative clauses teaches us that there is a contemporary acceptance that legislation and executive action should be subject to judicial oversight.⁴⁸ The common law imports a number of protections against the erosion of 'fundamental freedoms' by parliament by creating judicial assumptions that parliament does not intend to trespass on individuals' freedoms absent clear legislative provisions to the contrary.⁴⁹

The idea that parliament may do whatsoever it pleases is an anachromism. Democracy as it is practiced in contemporary Australia is founded on a three-way dialogue between the Judiciary, the Parliament and the Executive. Government then is not limited to the Executive, delivering its policy agenda through Parliament. The Judiciary plays an important limiting role on what the Executive and the Parliament can lawfully do. By permitting the courts to adjudicate rights claims against the public authorities, Parliament and the Executive are submitting to an important democratic check.

PIAC is not advocating that parliament loses sovereignty, if that term is properly understood to mean that parliament can legislate on any matter it chooses to do, subject to constitutional limits. By permitting courts the adjudicate rights claims, to interpret legislation consistent with rights standards, and to strike down legislation that cannot be so read as invalid, the parliament does not

⁴⁷ AV Dicey, *Introduction to the Study of the Law of the Constitution* (1885).

⁴⁸ For example, *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2, per Gleeson CJ.

⁴⁹ *Coco v R* (1994) 179 CLR 427.

lose sovereignty. It merely loses the ability to make decisions that adversely affect human rights unless it can provide strong justification and accountability. Parliament does not lose the ability to override a court's decision with counter-veiling legislation. However, it does need to be able to justify its position to the public in doing so.

Delineation of Commonwealth and State responsibility

The *Statement of Intent* claims that, particularly in the field of economic, social and cultural rights, the Government cannot be expected to properly deliver human rights outcomes because it does not retain control over those areas, for example, welfare rights.

PIAC does not expect that the Victorian Government should bear sole responsibility for programs it does not administer. However, consistent with the Victorian Government's commitment in its social sustainability plan, *A Fairer Victoria*, PIAC submits that the Victorian Government should, at a minimum, accept that it should work to protect and promote relevant rights standards to the extent it can, and should advocate that the Commonwealth deliver its services and programs in a way that is consistent with the Victorian rights-based paradigm. PIAC reminds the Government that in *A Fairer Victoria*, it stated:

The framework acknowledges that the Commonwealth Government has responsibility for many policy areas such as social security and that the Victorian Government's responsibilities do not extend to all policy areas where action could be taken to improve the well being of individuals, families and communities. Despite these constraints, the framework aims to address those areas where the State Government can have an impact on the causes and consequences of disadvantage.⁵⁰

PIAC expects the Victorian Government to adopt a similar posture in relation to rights protection, as a minimum.

Litigation culture

PIAC's submits the existence of a costs jurisdiction creates a very different litigation context than in the United States, where costs do not follow the event. PIAC submits that this renders a general anxiety about the creation of a direct right to enforce rights violations and the potential for the provision of enforceable rights to result in a flood of litigation overstated.

Fixed concepts of rights

The involvement of the judiciary in the interpretation and operation of a Charter of Rights is the best means of ensuring that the rights recognised in the Charter of Rights remain relevant to Victorians through time. This is the means by which the common law has continued to remain a relevant body of law.

⁵⁰ *A Fairer Victoria*, 4.

5. Charter of Rights - an alternative model

As PIAC has already set out, it regards the *Statement of Intent* as a premature foreclosure of the options available to Government.

If the Government is unwilling to consider the model PIAC prefers, PIAC offers the following as an alternative model.

PIAC offers a two-stage implementation plan (Phase 1 and Phase 2).

In Phase 1, PIAC proposes that the Charter of Rights recognise and enforce the civil and political rights articulated in the ICCPR, and further, recognise the economic, social and cultural rights articulated in the ICESCR with a timeframe for progressive implementation and full enforceability.

In Phase 2, all rights listed above should be recognised and enforced.

In suggesting two phases of rights, PIAC does not indicate a preference for phased introduction of rights but rather a phased introduction of the *enforceability* of those rights. PIAC believes there are significant difficulties in expanding the spectrum of rights protected at a later time. There is now an impetus and a commitment in Victoria, within Government and the community, to bring human rights standards to life in a locally relevant way. Victorians should be wary of the experience in the ACT where, in order to begin a ‘rights conversation’ in the community, advocates for a Charter of Rights agreed to allow economic, environmental, and Indigenous rights to be considered in a review after a year of the operation of the *Human Rights Act 2004* (ACT). The ACT now faces a very difficult task to achieve protection of those rights.

In light of the ACT experience, the Victorian Government will be understood to be reluctant to step up to the plate of rights protection and promotion should it seek to limit the scope of a Charter of Rights at this early stage. It would be preferable, in PIAC’s submission, to recognise the full cast of human rights now as reflective of the Government’s rights vision, but to stagger implementation or enforceability until a later time. If this course is followed, Victorians will be reassured of their Government’s commitment to human rights.

Regardless of whether the Government chooses to take up either of the two models put forward by PIAC, the following section outlines measures that the Government should take in the context of a Charter of Rights, or no Charter of Rights, to improve rights protection in Victoria.

6. Charter Plus

PIAC now turns to how to create an effective platform for the inculcation of human rights principles in Government.

PIAC submits that human rights and social outcomes-focused policy platforms should be implemented by the Government irrespective of whether a Charter of Rights is enacted.

Further, PIAC submits, a greater emphasis on reporting against social measures and outcomes, connected to action plans, should be instilled in the Victorian public service.

Use of policy platforms

The Government has used policy platforms imaginatively so far in its term in office to give life to policy commitments. Good examples of the Government's willingness to use policy statements to catalyse action and change include *Growing Victoria Together*, an integrated economic, social and environmental direction for Victoria; *Victoria: Leading the Way*, a policy statement about economic sustainability; *Securing Our Water Future Together*, a white paper about water and environmental sustainability; and *A Fairer Victoria*, a policy statement about addressing disadvantage and creating social sustainability. PIAC submits that a Charter of Rights would entrench this vision of sustainability in Victoria, but recognises the value of policy initiatives in this vein, regardless of whether a Charter is introduced.

PIAC submits that policy platforms and action plans should be framed to promote human rights outcomes. A strong example of a policy package that is rights based comes from Western Australia where a coalition of government actors including the Department of Premier and Cabinet, the Equal Opportunity Commission, the Office of Equal Employment Opportunity, the Department of Indigenous Affairs, and the Office of Multicultural Interests has developed a Policy Framework for Substantive Equality.⁵¹ This Policy Framework builds upon the WA Charter of Multiculturalism and includes implementation guides and resources for the public service.⁵²

PIAC endorses this approach because human rights are not treated as an 'add-on' but rather infuse the policy package. Further, the Policy Framework is a call to action, and supports implementation with 'how to' guides, capacity building initiatives such as a dedicated office in the Equal Opportunity Commission to support other public authorities' efforts, and accountability and monitoring strategies.

Social Performance Reporting

PIAC acknowledges that the Government has begun to use concepts such as 'sustainability' in its policy and action platforms. This indicates a concern with holistic outcomes, including social outcomes. PIAC commends the Government for its understanding and implementation of the importance of working explicitly to achieve social, as well as fiscal and environmental, outcomes.

⁵¹ *The Policy Framework for Substantive Equality: Responding to the Different Needs and Priorities of Individuals and Communities* (February 2005).

⁵² The supporting resources for implementation include a specialised unit within the Equal Opportunity Commission, the Substantive Equality Unit; a Summary Guide for Chief Executive Officers; and the following documents: *Implementing the Policy Framework for Substantive Equality*; *Understanding the Policy Framework for Substantive Equality*; *Reporting Framework on the Policy Framework for Substantive Equality*.

Nonetheless, fiscal outcomes remain privileged in existing public authority reporting mechanisms and particularly in the accountability mechanisms, such as the Auditor-General's office and the Parliamentary Public Accounts and Estimates Committee. PIAC submits that the OHR, with the VHRC, could work to improve understandings within Government and the community sector of social sustainability, and to widen the measures against which the performance of public authorities in the exercise of their powers and duties are reported and monitored.

In particular, PIAC urges concepts of social outcomes to include measures and indicators of human rights compliance. For instance, in measuring the performance of a business unit within the Department of Health, the markers of the right to health should be built into reporting frameworks.⁵³ A watching brief should be kept on the reporting framework that is currently under development by the Substantive Equality Unit of the Western Australia Equal Opportunity Commission connected to the Policy Framework for Substantive Equality.

PIAC notes the Government's existing commitment to the Global Reporting Initiative (**GRI**) model of sustainability reporting. The GRI model consists of a core document and a sector supplement for public agencies. PIAC is aware that GRI is, through a partnership involving the City of Melbourne, the State of Victoria and ICLEI-ANZ, to open the Centre for Public Agency Sustainability Reporting, located in Melbourne. In PIAC's understanding, this Centre will advance sustainability reporting in public agencies globally by running capacity building programs and delivering other educational products and services to help agencies report.

Further, PIAC understands that GRI will collaborate with the Centre in early 2006 in order to pilot test the Sector Supplement for Public Agencies. PIAC commends the Government for its commitment to this process and urges the Government to explicitly include human rights outcomes in its definition of sustainable social outcomes.

⁵³ The United Nations Committee on Economic, Social and Cultural Rights has issued a General Comment on the right to health: see General Comment No 14, 'The right to the highest attainable standard of health (art. 12)', UN Doc HRI/GEN/1/Rev 7, 86.