



public interest
ADVOCACY CENTRE LTD

Human Rights Charter Review – respecting Victorians

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) 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 Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

Background to this submission

PIAC welcomes the opportunity to take part in the Victorian Parliament's Scrutiny of Acts and Regulations Committee (SARC) review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter'). Much of PIAC's current and previous substantive work involves human rights issues. This includes work on privacy, discrimination, freedom of information, detention, government and democracy, and access to justice. As such, PIAC has extensive experience in the impacts of laws, policies, programs and conduct on human rights. A significant number of PIAC's casework clients have direct experience of what it means to have their human rights infringed or not respected.

PIAC has responded to the various inquiries conducted across Australia in the last five years into human rights protection, including the public consultation about the introduction of the Victorian Charter in 2005.¹ For example, PIAC conducted a range of community consultations for the

¹ Jane Stratton and Robin Banks, *Submission to Human Rights Consultation Committee, Victoria on a proposed Charter of Rights* (2005) Public Interest Advocacy Centre <http://www.piac.asn.au/publication/sub-re-proposed-vic-charter-rights> at 23 May 2011.

National Human Rights Consultation and worked closely with its diverse networks to encourage those least likely to respond to the consultation to take part. This included working with people experiencing homelessness, people with mental illness, Indigenous people, older Australians, people with disability, and migrant women. PIAC has also focused specifically on human rights training and policy development for a number of years.

PIAC's approach to this submission

PIAC supports a 'human rights approach' as a means of fostering a fair, just and democratic society. However, this submission does not approach the Victorian Charter with preconceived ideas. Instead, it dispassionately assesses the operation and impact of the Charter. While PIAC is based in NSW, it has a national focus with significant experience in Victoria. PIAC receives no funding associated with the Charter, and PIAC's sole objective in participating in this review is to promote the principles of dignity and respect - principles that, of course, are almost universally shared among the representatives of Victoria's major political parties, the business community and civil society groups.

PIAC has approached this review with the aim of providing an independent critique of the Charter's operation. PIAC recognises that human rights statutes, and more specifically the Victorian Charter, can ignite robust ideological debate. However, this submission is restricted to a rational analysis of the available evidence regarding the Charter's operation. PIAC believes that in adopting an evidence-based approach, the clear conclusion is that the Charter is having a significant, positive impact in protecting human rights and, more importantly, the principles of dignity and respect that underlie human rights.

Moreover, the evidence strongly suggests that the Charter achieves these goals in a way that is efficient and cost-effective, avoiding unnecessary litigation. PIAC has reached this conclusion partly with reference to data regarding the Charter's operation, and partly by comparing how human rights issues would be dealt with under the Charter in Victoria, and without a Charter in NSW.

This is not to say that the Charter is perfect. This submission identifies a number of ways in which the Charter could be improved. These are elaborated upon below.

Response to the Terms of Reference

Whether additional rights should be included in the Charter, including economic, social, cultural, children's, women's and self-determination rights

PIAC recommends that the Victorian Government give legislative force to all of the rights set out in various international agreements to which Australia is a party through ratification or accession, which include the:

- Convention on the Prevention and Punishment of the Crime of Genocide;²

² Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ratified by Australia on 8 July 1949 (entered into force for Australia on 12 January 1951).

- International Convention on the Elimination of all Forms of Racial Discrimination (CERD);³
- International Covenant on Economic, Social and Cultural Rights (ICESCR);⁴
- International Covenant on Civil and Political Rights (ICCPR);⁵
- Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW);⁶
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);⁷
- Convention on the Rights of the Child (CROC);⁸ and
- Convention on the Rights of Persons with Disabilities (CRPD).⁹

Human rights attach to each person by virtue of their humanity and they are interdependent, which renders them indivisible. This indivisibility is recognised at international law. The reliance of one right on the existence of another can be demonstrated by the fact that freedom of association can become meaningless if there is no right to personal security, or that the right to education is meaningless if there is no freedom of thought. All rights adopted in the Charter should receive equal protection and promotion.¹⁰

Economic, social and cultural rights, in many ways, are necessary precursors to the exercise of many of the civil and political rights contained in the Charter. These rights cover issues that have profound impacts on the daily lives of Victorians. The ability to access work, services to assist with food, clothing, housing and health services, impact on a person's dignity and ability to fully participate in society on an equal basis with others. In PIAC's experience working with disadvantaged and marginalised communities, including people experiencing homelessness, problems in service delivery in areas such as housing can be significant.

³ International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ratified by Australia on 30 September 1975.

⁴ International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ratified by Australia on 10 December 1975 (entered into force for Australia on 10 March 1976).

⁵ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993).

⁶ Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ratified by Australia 28 July 1983 (entered into force for Australia on 27 August 1983).

⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ratified by Australia on 8 August 1989 (entered into force for Australia on 7 September 1989, except articles 21 and 22, which entered into force for Australia on 28 January 1993).

⁸ Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ratified by Australia 17 December 1990 (entered into force for Australia on 16 January 1991).

⁹ Convention on the Rights of Persons with Disabilities, opened for signature 31 March 2007, Doc.A/61/611 (entered into force 3 May 2008), ratified by Australia on 17 July 2008 (entered into force for Australia on 16 August 2008).

¹⁰ 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 Con A/CONF 157/24.

The Victorian Government has direct responsibility in relation to many of these matters because direct service delivery has always been the particular domain of the States, something reflected in the division of powers in the Commonwealth Constitution.

Inquiries in Australia and subsequent reports about the type of rights to be included in human rights legislation have recommended the inclusion of economic, social and cultural rights. This included the most recent consultation in the Australian community led by Father Frank Brennan about how human rights could be better protected in Australia. In coming to its conclusion, the national committee took into account discussions at a series of community round tables across Australia, written submissions and a population survey, in forming the view that the majority of Australians placed a priority on the promotion of an adequate standard of living, education, and the highest attainable standard of health.¹¹ In the 2005 Victorian consultation, 41 percent of submissions wanted the Charter to include economic, social and cultural rights, even though this was not part of the original terms of reference.¹²

In 2010, Victorians were still calling for the inclusion of economic, social and cultural rights. Victorian Equal Opportunity and Human Rights Commission (VEOHRC) report on consultations with the community to gauge their attitude to the inclusion of these rights found 'the majority support the inclusion of economic, social and cultural rights in the Charter'.¹³ The research found that Victorians believed the development of the Charter was 'half done' and the government should finish the job by closing the 'legislative holes' by including these rights in the Charter. Victorians believed inclusion of these rights would:

- help achieve equality;
- provide clarity and simplicity;
- encourage transparency and accountability in government decision making;
- help move from a welfare based to a rights based culture; and
- create a shared sense of responsibility in the community.¹⁴

The ACT is also considering including such rights: a report, commissioned by the ACT Government, recently tabled in the ACT Legislative Assembly, recommended the inclusion of economic, social and cultural rights in the *Human Rights Act 2004* (ACT); the report included a Model Bill.¹⁵ Moreover, the human rights consultation committees in Tasmania and Western Australia both recommended the inclusion of at least some economic, social and cultural rights in their proposed acts.¹⁶

¹¹ Frank Brennan, Mary Kostakidis, Tammy Williams and Mick Palmer, *National Human Rights Consultation Report*, Attorney General's Department, Australia (2009) 72 and Recommendation 17.

¹² Victoria, Department of Justice, *Rights, Responsibilities and Respect*, The Report of the Human Rights Consultation Committee, (2005), 27.

¹³ VEOHC, *Talking rights: consulting with Victorians about economic, social and cultural rights and the Charter*, (2011), 7.

¹⁴ Ibid.

¹⁵ *Australian Capital Territory Economic, Social and Cultural Rights Research Project*, Report, September 2010, <<http://acthra.anu.edu.au/>> at 13 December 2010.

¹⁶ Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10 (2007), 169-170; ACT Bill of Rights Consultative Committee, 100. Consultation Committee for a Proposed WA Human

Victoria should also recognise the growing emphasis placed on ‘third generation’ rights, that is, rights concerning the environment in which humans live, and the effect the environment has on people’s capacity to enjoy their human rights. Third generation rights introduce the concept of *community* or shared rights, as distinct from solely individual rights. These rights are developing in response to the growing recognition of the effect humans have on the environment, and also the effect the environment has on human rights.

Recommendations – Inclusion of additional rights

- *The Victorian Government should amend the Charter of Human Rights and Responsibilities to include economic, social and cultural rights.*
- *The Charter should cover all rights from international agreements to which Australia is a party.*
- *The Charter should include third generation rights, such as those rights concerning the environment.*

Whether further provisions should be made regarding public authorities’ compliance with the Charter, including regular auditing and further provision for remedies

PIAC supports the current inclusion of public authorities based on the detailed definition of ‘public authority’ in the Victorian Charter.¹⁷ The Victorian Government is in the fortunate position of improving on the Charter using the experience from other jurisdictions.

The Charter could be made more flexible by adopting a provision similar to s 40D in the *Human Rights Act 2004* (ACT), which allows any entity that is not a public authority to choose to be subject to the Charter obligations of public authorities. Such a provision could encourage the private and non-government sector voluntarily to commit to abide by the human rights obligations in the Charter. The provision would also be useful to clarify the Charter’s applicability to entities where this is unclear. In addition, such a provision may be used as a mechanism to assess tenders for government contracts. Non-government entities that choose to be subject to Charter obligations could be considered favourably by government for tendered services. Alternatively, certain government contracts may specifically require contractors to undertake to comply with the Charter.

The five-year review into the *Human Rights Act 2004* (ACT)¹⁸ considered the ‘opt-in’ provision of s 40D. The review supported retaining the provision, as it could be useful for entities for the reasons noted above. Currently, three private organisations in the ACT have opted in to the Human Rights Act regime under s 40D – namely, Companion House, Women’s Legal Service and Centre for Australian Ethical Research. The review concluded that the community was largely unaware of this option and its benefits. The review recommended that the government do more to promote the ‘opt-in’ option to private organisations.¹⁹

Rights Act, *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act* (2007), 76-77.

¹⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(1).

¹⁸ The Human Rights ACT Research Project, ANU, *The Human Rights Act 2004 (ACT), The First Five Years of Operation, A report to the ACT Department of Justice and Community Safety* (2009), 19 <http://acthra.anu.edu.au/ACTHRA%20project_final%20report.pdf> at 6 June 2011.

¹⁹ *Ibid.*

The value of promotion can be seen by the private sector's response to the 'opt-in' provision in s 6EA of the *Privacy Act 1988* (Cth). That provision allows small business operators, who would otherwise not be covered by the Privacy Act, to choose to be treated as an organisation for the purposes of the Act and therefore be subject to the National Privacy Principles.

There are 233 companies currently registered under this voluntary code.²⁰ The Office of the Australian Information Commissioner provides organisations with a simple online process to register, as well as access to an Information Sheet and checklist, and lists the names of registered organisations.²¹ By contrast, the ACT Government does not provide any online information that is easy to access on the function of s40D, nor on the process to apply to opt-in or online registration.²² PIAC recommends that the Victorian Charter be amended to allow private organisations to 'opt-in' to the Charter regime, and also that VEOHRC be resourced to promote this option to the private sector.

VEOHRC could play a greater role in monitoring compliance and public authorities could provide regular and more detailed reports about their progress in complying with the Charter. The reports should be based on mandatory human rights action plans submitted to VEOHRC each year. While PIAC supports further provision for remedies, the aim of the Charter should be to protect rights and avoid costly litigation. A greater role for the VEOHRC would assist in identifying systemic issues at an early stage and provide relief to service users, rather than reliance on costly and time consuming court processes.

In assessing the compliance with the Charter, VEOHRC reports each year on the operation of the Charter, however it is hampered in its work by the arrangement whereby its analysis is based on the reports from government departments, Victoria Police and local government.²³ Further provision should be made for VEOHRC to initiate inquiries and improve reporting by public authorities.

VEOHRC can only investigate and audit a public authority's programs and practices, when requested by the public authority. Granting VEOHRC powers to investigate an agency of its own motion or following an individual complaint, or a group complaint on behalf of a number of individuals, or by referral from the Attorney-General would help alleviate the burden on individuals in bringing complaints themselves. It may be that a number of individual complaints are about a particular agency that reveals a systemic problem. A greater investigative role for VEOHRC, and the Charter more generally, would allow systemic issues to be properly examined.

To carry out this function, VEOHRC needs to be granted adequate powers to request documents, and enter premises and speak with agency staff. The ACT Human Rights Commission and

²⁰ Register of businesses that have opted into Privacy Act coverage listed at http://www.oaic.gov.au/privacy-portal/resources_privacy/optin-register.html#z at 9 June 2011.

²¹ Ibid.

²² *Plain English Guide to the Human Rights Act 2004*, on-line information <http://www.justice.act.gov.au/publication/view/94> at 9 June 2011.

²³ VEOHRC, *Making Progress: the 2009 report on the operation of the Charter of Human Rights* (2009), 7.

Western Australian Equal Opportunity Commission provide a model for powers to investigate an act or service on its own motion and has the power to enter and inspect correctional centres.²⁴ The Western Australian Equal Opportunity Commission also has the power to undertake a review of governmental policies and practices, including the power to obtain information and documents as part of such a review.²⁵ The power to request documents and enter premises is also consistent with the powers and functions of the newly formed Office of the Information Commissioner in New South Wales.²⁶

In addition to these investigative powers, PIAC submits that VEOHRC should have a function to audit or monitor the programs and services of agencies. Such an auditing function, in some cases, would replace the need for individual complaints. For example, in PIAC's experience representing clients in disability discrimination complaints in relation to accessible public transport, if a body had a monitoring or audit function to check compliance with disability discrimination law and standards then an individual complaint would not be necessary, as non-compliance would be identified from an audit.

Also, an audit of an agency's programs and services may help to avoid breaches of the Charter. Detecting possible breaches of human rights before they occur, by proactively monitoring programs and agencies, is an important part of protecting human rights. Human rights protection is not limited to enforcement of human rights and remedies but also includes ensuring that programs and agencies are guided by respect for and protection of human rights. Moreover, in performing such a monitoring function VEOHRC will be able to assist agencies to identify issues and find solutions to human rights problems.

PIAC submits that the findings and recommendations of an investigation or audit by VEOHRC should be publicly available. This will ensure that the performance of agencies and Departments is subject to public scrutiny. It will also contribute to the development of a human rights culture both within agencies and the Victorian community more generally.

In addition, agencies should be required to formally respond to VEOHRC findings and recommendations. This response should also be made publicly available. Following an investigation or audit, VEOHRC should continue to monitor the agency and ensure that any recommendations are implemented. VEOHRC findings and recommendations of an investigation or audit should be provided in a report to the Attorney-General, who is then required to table it in Parliament, similar to the requirement in s 41 of the *Human Rights Act 2004* (ACT). It is important that the investigative and auditing functions of the Human Rights Commission are adequately resourced. Further consideration is needed of how frequent agency audits are conducted having regard to the capacity of VEOHRC.

PIAC notes that that in public consultations about the protection of human rights in Australia, community members have raised concerns that if rights are breached they should be able to seek

²⁴ See *Human Rights Commission Act 2005* (ACT) s 48; *Corrections Management Act 2007* (ACT) s 56; and *Children and Young People Act 2008* (ACT) s 153.

²⁵ See *Equal Opportunity Act 1983* (WA) ss 82, 86. Two reports have been produced by the Equal Opportunity Commission under s 82 both in relation to discrimination in the area of housing *Find a Place* (2004) and *Accommodating Everyone* (2009).

²⁶ *Government Information (Information Commission) Act 2009* (NSW) ss 21, 25, 26.

redress through a mechanism that is accessible and affordable²⁷. For example, the Brennan Report summarised the consultation on this matter:

Barriers to access to justice—including the complexity of the legal system and the high cost of going to court—were another source of concern. ... There were strong calls for governments at all levels to honour their responsibility to respect human rights and for the court system to play a role in the enforcement of those rights.²⁸

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. The Charter should empower courts and administrative tribunals that raise human rights issues 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. Allowing courts and tribunals at different levels to consider human rights breaches will improve and individual's access to legal remedies.

Recommendations - Remedies

- *The Charter should allow Victorian courts at all levels to consider matters within their jurisdiction that raise human rights matters.*
- *The Charter should allow an individual who has only a human rights action caused by incompatible provisions in the Act, to take a complaint to VEOHRC, which can then refer the matter to the Supreme Court.*
- *The Charter should allow individuals to make a complaint about breaches of their rights to VEOHRC.*
- *The Charter should allow individuals to take action for a breach of human rights by a public authority and seek an appropriate remedy, including financial damages.*
- *The Charter should empower VEOHRC to audit and investigate reviews of services and programs of agencies on its own initiative, as a result of an individual complaint, or that of a group. PIAC also recommends that VEOHRC be granted power to conduct reviews of services and programs of agencies on reference from the Attorney-General. VEOHRC should not be limited to conducting any reviews only with the voluntary co-operation of the organisations concerned.*
- *The Charter should provide VEOHRC with investigative powers, including the ability to request documents, enter premises and speak with agency staff.*
- *The Charter should allow findings and recommendations of an investigation or audit by VEOHRC to be made publicly available.*
- *The Charter should require agencies to formally respond to VEOHRC findings and recommendations.*
- *The Government should resource VEOHRC to ensure it can undertake investigative and auditing functions.*
- *Government departments and agencies should provide VEOHRC with a human rights action plan each year and provide a progress report against that plan each year, the documentation should be made public.*

²⁷ See, for example, Victoria, Department of Justice, *Rights, Responsibilities and Respect*, The Report of the Human Rights Consultation Committee, 2005, p115.

²⁸ Frank Brennan et al, above n 11, p20.

The effects of the Charter on the development and drafting of statutory provisions

In preparing its 2010 review, VEOHRC undertook interviews with community members as well as Government Department representatives who prepared policy, legislation and compatibility statements. Government agencies reported that to meet the requirements under the human rights legislation, transparency of the policy and legislative process had improved and parliamentary debate had increased. VEOHRC quotes the Department of Justice comments on the process undertaken leading to the introduction of the *Control of Weapons Amendment Bills*, eventually tabling the Bill with a statement that advised Parliament of the Bill's incompatibility with the Charter. The Department described how the process helped frame discussions within government and 'required the Government to publicly explain its reasons for departing from rights in this context', and as a consequence increased government transparency and accountability.²⁹

PIAC supports the retention of the compatibility statements for legislation introduced into the Victorian Parliament but submits that improvements can be made to improve the standard of reporting.

Dr Helen Szoke, VEOHRC Commissioner made the point in her introduction to the 2009 report on the operation of the Charter that:

Notwithstanding the role of the Victorian Parliament's Scrutiny of Acts and Regulations Committee (SARC), a number of Bills are still being introduced into the Parliament without sufficient scrutiny and consultation.³⁰

VEOHRC referred to similar concerns in the 2010 report on the Charter, noting that for Parliament and its Committees to fully engage in the process, Ministers needed to provide 'substantial statements of compatibility', that were in a style accessible to the general public.³¹

PIAC notes that in 2006, the Victorian Government rejected the recommendation³² in the Victorian human rights charter consultation report, to place the responsibility of compatibility statements with the Attorney General. The report on the consultation noted that the majority of submissions addressed this issue and recommended this approach. Drawing on international experience, it was argued that it built a safeguard in the Charter machinery as Ministers retained decision-making power while the Attorney General provided a review mechanism.³³ The current review is an opportunity for the current Government to correct this matter and improve the standard and quality of the review process.

The report from the National Human Rights Consultation also recommended that statements of compatibility be required for all Bills introduced into the Australian Parliament against the interim, and later the definitive, list of Australia's human rights obligations. In making this

²⁹ Ibid.

³⁰ VEOHRC, above n 15, 6.

³¹ VEOHRC, *Talking rights: 2010 report on the operation of the Charter of Human Rights and Responsibilities* (2011), 45.

³² Professor George Williams, Rhonda Galbally, Andrew Gaze, Professor Haddon Storey QC, *Rights, Responsibilities and Respect: The Report of the human Rights Consultation Committee* (2005), Recommendation 14, 72.

³³ Ibid.

recommendation, the report drew on evidence provided by a number of submissions, including the Victorian Government, that compatibility statements resulted in issues ‘being identified much earlier in the policy and law development process’.³⁴ The committee found evidence that compatibility statements improved debate inside and outside of parliament, increased transparency and accountability and rights were less likely to be infringed. In commenting on how the statements should be produced:

The Committee prefers the ACT approach of having the Attorney-General prepare the statements for government Bills, considering that this would encourage a more rigorous and consistent process. Failing that, it would be preferable that statements of compatibility prepared by other departments are vetted by the Attorney General’s Department.³⁵

Recommendations - Accountability

The Victorian Government should retain the requirement for all Bills to be accompanied by a compatibility statement and improve the standard of reporting by transferring the responsibility of drafting the reports to the Attorney General.

The effects of the Charter on the consideration of statutory provisions by Parliament

VEOHRC in its 2010 report on the Charter found that the Scrutiny of Acts and Regulations Committee (SARC) had a constructive exchange of views about human rights issues. The statistics it has collected each year show that the number of debates about protecting the rights of Victorians has increased. In 2010, 90 Bills were debated in Parliament, half of which resulted in an active debate with SARC; most requests by SARC for ministerial responses to Charter issues were met.³⁶

This active debate is the result of the Victorian Charter providing a set of standards and framework for a human rights analysis. While it could be argued that this debate is possible without a legislative framework, NSW provides an example where the Parliamentary review process fails because the legislative framework does not exist.

In 2001, the NSW Parliament Legislative Council Standing Committee on Law and Justice undertook an inquiry into the need for legislative protection of human rights in NSW. The Committee rejected specific legislation in favour of establishing the Legislation Review Committee (NSW LRC).³⁷ The NSW LRC has been in operation since 2003. The scope of the NSW LRC’s work is to consider personal rights and liberties that it interprets to include common law rights, rights provided for in statutes and rights under international law. The NSW LRC provides a list of ‘Main human rights recognised under international human rights law’ that

³⁴ Frank Brennan et al, above n 11, Recommendation 6, p322.

³⁵ Frank Brennan et al, above n 11, 168.

³⁶ VEOHRC, above n 23, 44.

³⁷ NSW Parliament Legislative Council Standing Committee on Law and Justice, *A NSW Bill of Rights* (2001), para 8.1.

includes social security, adequate standard of living and education.³⁸

A report examined the work of the NSW LRC in 2008 against its mandate and found that the NSW LRC identified an issue of concern in about half of the Government Bills, but missed human rights issues in about a quarter of these Bills. When human rights issues were identified, only the civil and political rights were identified. Social, cultural and economic rights were never raised, despite the inclusion of such rights in its mandate. The report describes the level of analysis as:

...not clearly articulated in those terms (human rights) and seems conclusory or intuitive rather than fully reasoned.³⁹

The review process in NSW also fails compared with Victoria in relation to the NSW LRC improving public or parliamentary debate. The 2008 study found 'only sparse references' in Parliamentary debates to the NSW LRC reports and 'no significant changes to legislation.'⁴⁰ The report concludes that human rights legislation

would provide a clear and possibly comprehensive set of standards and a framework for full human rights analysis and ... would focus the minds of policymakers and legislators as they go about their tasks, and force a second look when things seem to have gone awry.

PIAC submits that it is vital that the legislature be required to consider the human rights impact of legislation as part of the parliamentary debate. It must be required to consider any incompatibility and expressly permit, if necessary that any incompatibility to stand.

It is essential for SARC to have appropriate capacity and access to relevant human rights expertise for it to be able to undertake an appropriately rigorous examination of Bills, legislative instruments and current Acts for compatibility with human rights. In particular, SARC should have sufficient capacity to conduct a thorough examination, which goes beyond consideration of the Minister's Statement of Compatibility. Inherent in such a thorough examination is:

- the availability of sufficient time to conduct an appropriate examination of the Bills/Legislative instruments/Acts in a thorough and comprehensive manner;
- access to appropriate resources, including specialist expertise in human rights law in international and domestic human rights law; and
- the ability to invite submissions from and to conduct public hearings.

In addition, it is vital that provision be made in the Parliamentary Standing Orders to require that further Parliamentary debate on the Bill does not take place until the Committee Report is available for consideration. PIAC acknowledges that there are circumstances in which Standing Orders may need to be suspended to allow urgent debate. However, PIAC submits that such suspensions should only occur in extreme circumstances, with support from a two-thirds majority in the House in which debate is to take place.

³⁸ Information paper: *Rights and Liberties considered by the Legislative Review Committee* (undated), NSW Parliament <http://www.parliament.nsw.gov.au/legislationreview> at 25 May 2011.

³⁹ Andrew Byrnes, 'The protection of human rights in NSW through the Parliamentary process-a review of the recent performance of the NSW Parliament's Legislation Review Committee' (2009), *University of NSW Faculty of Law Research Series*, Paper 44, 7.

⁴⁰ Ibid.

Recommendations – Legislative responsibilities

The Victorian Government should retain the Scrutiny of Acts and Regulations Committee (SARC) and improve its operation by:

- *granting SARC the power to conduct an inquiry into any matter relating to human rights in Victoria, upon reference from either House of Parliament;*
- *ensuring that SARC has appropriate capacity and access to relevant human rights law expertise for it to be able to undertake an appropriately rigorous examination of Bills for Acts, legislative instruments and current Acts for compatibility with human rights; and*
- *providing that further Parliamentary debate on a Bill does not take place the report from SARC is available for consideration, unless there are exceptional circumstances.*

The effects of the Charter on the provision of services, and the performance of other functions by, public authorities

There is evidence that the application of the Charter by direct service delivery agencies (both government and non-government) is starting to deliver consumer-focused outcomes and avoid lengthy complaint processes and court appearances. This is one area that VEOHRC found in its four year report, both to have had the most positive change and also room for improvement. The response to the survey undertaken as part of its report found that around half the respondents thought the Charter had a positive impact on service delivery, a quarter disagreed and the balance were not sure.⁴¹ The VEOHRC report cites examples where the service delivery agencies are starting to incorporate the principles of the Charter into their business planning and decision making-processes so that the values are entrenched into the business framework and not reliant on the training of individual front-line staff.⁴² This should create greater consistency in standards across service delivery agencies; an issue, which VEOHRC noted, created much of the contradictory response to the Charter from clients.⁴³

The VEOHRC report provides examples of the types of improvements by public authorities that have improved client outcomes, for example:

- Resolving outcomes for public housing clients without going to VCAT;
- Providing information in a format that is accessible to marginalised consumers;
- Local councils revising laws so they are compatible with the Charter;
- Building public spaces that are accessible to people with disability; and
- Culturally appropriate decision-making process in the building of a residential diversion program for Aboriginal prisoners.

A useful means of assessing the relative merits of the operation of the Charter to consumers of public authorities is to explore the differences between Victoria with its Charter and NSW that has no Charter, but where public authorities are providing the same service. The following examples⁴⁴ compare how the approach to government decision-making, and especially government service delivery, differs under the Charter as compared with NSW (a non-Charter jurisdiction). In these

⁴¹ VEOHRC, above n 15, 9.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ All case studies are from the Human Rights Law Resource Centre, *How a Human Rights Act Can Promote dignity and Address Disadvantage* <<http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/#victoria>> at 27 May 2011.

examples, the government objective is functionally identical between Victoria and NSW (quality service to targeted client groups). The Victorian examples show the Charter promotes a more respectful approach, and one that more efficiently promotes the achievement of the government's objective.

Case study 1: Promoting flexible decision-making for the elderly and vulnerable

A Victorian woman, who was the sole carer for her elderly parents (one of whom had recently suffered a stroke and the other had dementia), was issued with a notice from the local council. The council stated that the accommodation she had arranged for her parents was contrary to planning approvals. The woman's legal representative wrote to the council asking that it consider the right to privacy and family life. The council responded by granting the woman extra time to make alternative arrangements for her parents.

This Victorian example shows that, where a public authority makes a decision that impacts on a vulnerable person (in this case, elderly people), the Charter provides a useful framework for the public authority and the vulnerable person's representative to negotiate in a way that promotes due consideration of the vulnerable person's needs. Importantly, this example shows how the Charter can encourage an outcome that actually *avoids* a costly official complaint process, with formal conciliation and adjudication involving a court or tribunal. Here, the existence of the Charter led to a sensible review of the decision to issue the notice at the council level. This enabled the dispute to be resolved at an early stage, obviating the need to seek judicial review of the decision.

If this situation had occurred in NSW, in PIAC's experience, it is much more likely that the carer would have needed to escalate their complaint through the formal dispute resolution system. The absence of a Charter in NSW means that, unlike in Victoria, there is no legal obligation on public authorities to consider the fundamental human rights of those affected by decisions. While such considerations might nevertheless fall within a public authority's general discretion, without a clear exhortation to take such matters into account, the human rights of vulnerable people can be too easily forgotten, or left for dispute resolution bodies to deal with. Consequently, PIAC submits that in a situation such as this, the carer would have needed to make a formal application to the NSW Land and Environment court to review the notice from the local council.

Case study 2: Refugee family transferred to safe, secure and adequate housing

An African woman ('Ms K') and her children fled to Kenya following civil war in her home country. After a series of brutal attacks, Ms K was found to have a 'genuine fear of persecution' and was settled in Victoria. She had been applying for a transfer after being re-traumatised by the fear and lack of safety in her allotted public housing. The Victorian Office of Housing was unresponsive despite representations that had been made on the woman's behalf.

The legal service and her counselor used the Charter to assert Ms K's rights to liberty and security (s 21) and a right to protection of children and family (s 17). After detailed negotiation about these issues, the Office of Housing agreed to provide a transfer to more suitable accommodation.

Again, if such a situation arose in NSW, much would depend on the individual decision maker that Ms K dealt with. Faced with an overly rigid decision maker, who did not appreciate the need to provide appropriate accommodation for a vulnerable family, there would be no formal scope to

make human rights arguments. In NSW, the only avenue for a similar complaint would be to complain to the Ombudsman in relation to the decision. The Ombudsman could only make a recommendation of appropriate action, but not a binding decision. By contrast, the Victorian Charter provides an opportunity for the Department to review its decision internally, reducing the need to make a complaint to an external body such as the Ombudsman.

Case study 3: Young woman gains access to disability support services

A 19 year-old Victorian woman ('Ms T') with cerebral palsy was left housebound and alone while the Victorian Government acted particularly slowly in responding to her request for disability support services. Ms T's advocate noticed that her mental state was deteriorating as a result and wrote to the relevant Government department citing the woman's right not to be treated in a cruel, inhuman or degrading way and her right to privacy. Ms T's advocate noted that a person's private life is affected when they are unable to participate in the community or access social, cultural and recreational activities. This prompted the department to determine that the young woman was eligible for support services and placed her on the waiting list for case management.

In NSW, a person with a disability or their advocate must contact relevant agencies and request a service and a place on the waiting list. This does not automatically happen once the person's needs are assessed. As there is no right to a service, resources of the agency and comparative need determine the delivery of service. People considered most in need would receive the services first, if the resources were available. However, if a complaint were made, it would go through several levels:

- first, the complaint would be to the relevant department;
- the next stage would be to use the department's appeal mechanism;
- the next would be lobbying the service – for example, the local newspaper might publish a general interest story about government neglect.

The practical changes to the Victorian government agencies, allows advocates to engage the service provider in a review of individual cases and reach an outcome without exhausting the resources of the consumer, their advocate or the service provider.

Case Study 4: Provision of medical services to elderly persons

A middle-aged woman with an acquired brain injury required urgent therapy to treat severe contractures of her left hand. The contractures caused considerable pain and suffering and resulted in deterioration of her hand. Although the woman had been waiting for therapy for over three years, she was not considered a priority because she was aged over 50. Without appropriate medical services, it was likely that radical surgery would be required, possibly involving amputation of the hand. After raising Charter arguments, advocates were able to receive funding for the urgent medical treatment. The result was a sensible, respectful resolution of the complaint at a much earlier stage in the process than might have occurred otherwise.

In NSW, a claim of indirect discrimination could be made with the Anti-discrimination Board or the Health Complaints Commission, and either body may try to resolve the matter on behalf of the woman. An argument about rights could not override the 'rule' about priority within the health service. A formal process is unlikely to be efficient or timely and, in PIAC's experience, there is a very strong possibility that radical treatment would have occurred before the matter was resolved.

The effects of the Charter on litigation and the roles and functioning of courts and tribunals

One of arguments put by opponents of human rights legislation is that it will increase litigation and create a 'lawyer's picnic'. There is no evidence that the Charter has caused this to occur. VEOHRC in its 2009 report on the Charter, concluded that 'the Charter is not causing any increase in litigation' and expressed concern that courts and tribunals were not being presented with human rights arguments often enough.⁴⁵ In 2010, VEOHRC was starting to find that the Charter was providing 'clearer guidance and protection than common law standards' and helping to clarify the responsibilities of government. Examples of how day-to-day operations are assisted include the *Momcilovic* case,⁴⁶ where the Department of Housing gave evidence about how human rights issues were considered in its decision-making processes to consider and issue an eviction notice.⁴⁷

Each year the Productivity Commission provides comparative time series data on court administration for each jurisdiction. This provides an indicator of whether the Victorian court system, compared with states such as NSW which do not have human rights legislation, has experienced any changes in the number of back log of cases, cost per case, finalisations in the year and so on. A review of the civil court data published for the years 2005-6 to 2009-10 reveals little difference between NSW and Victoria. For example finalisations and lodgements in the civil courts per 100,000 people (except children's, federal and coroners) had decreased for both states. Lodgments in Victoria decreased at a greater rate than NSW and the attendance indicator (average number of attendances per finalisation) for the civil courts remained constant between 2005-06 and 2009-10 for Victoria.⁴⁸ The Victorian Government had the opportunity to explain to the Productivity Commission the reasons for any variations in the performance of the courts. There was no reference to the Charter; the only explanatory statement was that the commercial list had grown because of

the removal of the monetary jurisdictional limit as from 1 January 2007. Finalisations have been constant over the last 3 financial years, with approximately 5,500 cases. This has slightly increased our pending figures over the same period.⁴⁹

The review is an opportunity to assess the role of the courts and consider further powers that aim to protected human rights of Victorians. PIAC submits the following changes should be considered in this review.

Declarations of incompatibility

PIAC strongly supports the principle that where the Supreme Court declares subordinate legislation and Council by-laws to be incompatible with the Charter, that they become invalid, unless Parliament amends the primary legislation to make them valid. This simply reflects the principle of legality.

Under the Charter's interpretative provision, any primary legislation is to be interpreted in a manner consistent with the Charter, so far as it is possible to do so consistently with the

⁴⁵ VEOHRC, above n 15, 108.

⁴⁶ *R v Momcilovic* [2010] VCSA 50.

⁴⁷ VEOHRC, above n 23, 48.

⁴⁸ Productivity Commission, *Report on Government Services 2011* (2011), Table 7A.1-Table 7A.26.

⁴⁹ Productivity Commission, *Report on Government Services 2011*, (2011), 7.54.

legislation's purpose. Therefore it is arguable that any subordinate legislation which is incompatible with the Charter would have to be inconsistent and therefore beyond the ambit of the primary legislation. As such, the provision in the subordinate legislation that could not be interpreted in a manner that is compatible with the Charter would be able to be struck down by a court under the usual rules of interpreting subordinate legislation.

Such a provision is only a modest, incremental extension of the current position at common law, as reflected in the decision of the Federal Court of Australia in *Evans v State of New South Wales*.⁵⁰

Parliament is required to respond to a Declaration of Incompatibility issued by the Supreme Court, and is limited in its capacity to confirm legislation that is incompatible with the Charter. Specifically, there are particular rights (i.e. non-derogable rights) that cannot be overridden, and the override declaration can only be made in exceptional circumstances. PIAC submits that the Charter should include a definition of 'exceptional circumstances' that is consistent with the term 'public emergency' as used in Article 4 of the *International Covenant on Civil and Political Rights*, which states:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

The inclusion of such a requirement in the Charter codifies and reinforces the well-established common law principle that, where there is ambiguity, legislation should be interpreted consistently with human rights and so that it advances Australia's international treaty obligations.⁵¹ A court should not impute to the Parliament an intention to abrogate or curtail fundamental human rights or freedoms unless such an intention is clearly manifested by unambiguous language⁵².

Providing that the interpretative role of courts and tribunals be constrained by legislative intent, it preserves parliamentary supremacy and the separation of powers. It ensures that courts do not inappropriately stray from the legitimate judicial function of interpreting legislation to improper judicial law making. Such a requirement will ensure that courts are not able to redraft legislation in a manner that undermines legislative intent.

⁵⁰ *Evans v State of New South Wales* [2008] FCAFC 130.

⁵¹ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

⁵² *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4 at [47] (French CJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [29] (Gleeson CJ) citing *Coco v The Queen* (1994) 179 CLR 427 at 437 Mason CJ, Brennan, Gaudron and McHugh JJ; *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131; and *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ).

Although it is now well accepted in the common law⁵³ and in legislation⁵⁴ that statutory interpretation should be purposive, inclusion of such a requirement in the Charter would ensure that this principle is maintained.

In considering which courts should be invested with the power to make a declaration of incompatibility, it is important to balance the need for affordability and accessibility with the sometimes competing need to ensure that decisions have appropriate authority and are regarded seriously. Accordingly, PIAC submits that only the superior and most authoritative court should have the ability to make Declarations of Incompatibility. However, in order for this process to be accessible, the Charter should empower any lower court or tribunal to refer a question of law on Charter interpretation to the Supreme Court.

PIAC also recommends that the Charter provide that individuals will not be personally liable for bearing the costs of proceedings before the Supreme Court where a matter has been referred by a lower court or tribunal on a question of law on Charter interpretation. Based on its extensive experience in conducting public interest litigation on behalf of socially and disadvantaged members of the community, PIAC is concerned that the usual costs rule prevents disadvantaged members of the community from pursuing meritorious claims and is thus a significant barrier to access to justice.

PIAC has particular concerns regarding the principles and rules dealing with costs in public interest cases. It is submitted that proceedings referred to the Supreme Court where a matter has been referred by a lower court or tribunal on a question of law on Charter interpretation comes within the definition of public interest litigation. These proceedings will assist in the development of the law and therefore provides significant benefit to the community. Often litigants in such proceedings will not stand to gain financially from the proceedings. However, under the usual costs rule, they risk significant economic consequences if not successful.

In 1995, the Australian Law Reform Commission recommended retaining the principle that costs follow the event, but noted that there should be exceptions to the general application of this rule in public interest cases, given that public interest litigation is of significant benefit to the community and that it should not be impeded by the costs allocation rules.⁵⁵

PIAC submits that proceedings before the Supreme Court where a matter has been referred by a lower court or tribunal on a question of law on Charter interpretation are of a similar nature in that they have a significant public interest. PIAC submits that individuals should not be personally liable for bearing the costs of such proceedings, given the public interest involved.

Recommendation – role of the courts

- *The Charter should include a provision stating that where the Supreme Court declares subordinate legislation and Council by-laws to be incompatible with the Charter, they become invalid, unless Parliament amends the primary legislation to make them valid.*

⁵³ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384.

⁵⁴ *Acts Interpretation Act 1931* (Tas) s 8A.

⁵⁵ Australian Law Reform Commission, *Cost Shifting – Who Pays for Litigation*, Report No. 75 (1995) [13.1], [13.19].

- *The Charter should allow only the Victorian Supreme Court to make Declarations of Incompatibility.*
- *Where an individual makes a complaint to VEOHRC, the Charter should allow the Commission to refer the complaint to the Supreme Court to determine whether a Declaration of Incompatibility should be made.*
- *The Charter should not allow individuals to personally bear the costs of proceedings before the Supreme Court where a matter has been referred by a lower court or tribunal on a question of law on Charter interpretation.*

The effects of the Charter on the availability to Victorians of accessible, just and timely remedies for infringements of rights

The positive effects of the Charter on Victorians seeking remedies are due to:

- Improved judicial remedies where courts have used the Charter as part of the decision-making process;
- public authorities, including government service agencies negotiating outcomes with clients using a human rights based approach to avoid the escalation of complaints; and
- public authorities, including government service agencies reviewing their practices and documenting processes to provide evidence that they have considered the Charter, if a complaint does escalate to a tribunal or court.

VEOHRC in its progress reports about the Charter has provided non-judicial and judicial examples of how these remedies have been delivered to the most disadvantaged people in Victoria.⁵⁶ The case studies used earlier in this submission also show how the Charter is giving Victorians greater respect in the complaint process and achieving better results than residents in NSW, a jurisdiction without human rights protection.

PIAC submits that it is an essential function of VEOHRC to investigate services and programs of agencies. This provides some protection for ensuring that programs and services are delivered in a manner that is consistent with human rights; however, in and of itself it is not sufficient protection. This function needs to co-exist with the recognition by the Charter of an individual right of action and enforceable remedies in Victorian courts. PIAC reasserts its commitment to the principle that individuals should be able to take action for a breach of a recognised right by a public authority for an appropriate remedy, including financial damages.

In Victoria, the *Director of Housing v TK* case provides an example of Victorian government agencies providing services to the most disadvantaged Victorians are using the Charter to improve reduce barriers. The Director of Housing led evidence of its processes and policies in ensuring that tenants' rights are considered in decision-making processes.⁵⁷ The case demonstrated how a government department changed its processes in engaging with its clients. This could be compared to NSW, where public housing applicants face many barriers to access their right to public housing, and human rights arguments cannot be used to appeal decisions.

In 2009, the Homeless Person's Legal Service conducted consultations as part of the National Human rights Consultation. The participants in the consultations described the many ways their rights to access adequate housing is undermined by the practices of Housing NSW. One

⁵⁶ VEOHRC, above n 23 and n 15.

⁵⁷ *Director of Housing v TK* [2010] VCAT 1839 (16 November 2010).

example of this is the requirement that an applicant for public housing must respond to an offer of accommodation within two days of the letter's date of issue. Those experiencing homelessness have obvious difficulties receiving mail. If a letter is received at all, it is highly unlikely that a homeless person will obtain it within two days of the letter's date of issue.⁵⁸ There is no interest or obligation in NSW for agencies to review processes such as these using a human rights framework that takes into account any rights of individuals. In Victoria, the human rights legislation provides a framework in which processes can be assessed and changes in practice can benefit those most in need.

Policies may be instigated that unintentionally or indirectly discriminate against certain people and the day-to-day conduct of people in the community can often inadvertently fail to respect the humanity of or discriminate against others. Without legally protected human rights, discriminated people in NSW have little access to recourse.

As this submission highlights, court proceedings for human rights breaches represent only a very small percentage of human rights disputes. Such proceedings have an important educative effect. PIAC's work in the area of public interest law has repeatedly demonstrated that litigation can be an effective mechanism for bringing the public spotlight onto an issue, for highlighting problems facing particular groups within the community, for putting pressure on governments and others to improve their practices and procedures and so the public can see that the Human Rights Act was making a difference.

Recommendations - Enforcement of Rights

- *The Charter should allow Victorian courts at all levels to consider matters within their jurisdiction that raise human rights matters.*
- *The Charter should allow an individual who has only a human rights action caused by incompatible provisions in the Act, to take a complaint to VEOHRC, which can then refer the matter to the Supreme Court.*
- *The Charter should allow individuals to take action for a breach of human rights by a public authority and seek an appropriate remedy, including financial damages.*
- *The Charter should empower VEOHRC to audit and investigate reviews of services and programs of agencies on its own initiative, as a result of an individual complaint, or that of a group. VEOHRC should not be limited to conducting any reviews only with the voluntary co-operation of the organisations concerned.*
- *The Charter should provide VEOHRC investigative powers, including the ability to request documents, enter premises and speak with agency staff.*
- *The Charter should allow findings and recommendations of an investigation or audit by VEOHRC to be made publicly available.*
- *The Charter should require agencies to formally respond to VEOHRC findings and recommendations.*
- *The Government should resource VEOHRC to ensure it can undertake investigative and auditing functions.*

⁵⁸ Public Interest Advocacy Centre (PIAC) and the Public Interest Law Clearinghouse (PILCH), *Our rights matter! The voices of those who are or have been homeless in Sydney*, (2009), http://www.piac.asn.au/sites/default/files/publications/extras/09.06.15_HPLS_Submission_to_National_Consultation_on_Human_Rights-small.pdf at 29 May 2011.

The ‘Annoying Laws Case’

If the NSW Parliament had a Charter-type review mechanism, it is far more likely that problems associated with the infamous *World Youth Day Regulation* 2008 (NSW) could have been solved at a much earlier stage. Clause 7(b) became commonly known as the ‘anti-annoyance regulation’. It gave police authority to arrest anyone who ‘causes annoyance or inconvenience to participants in a World Youth Day event’.

A Parliamentary review system in NSW, supported by a Charter of Rights, would have provided a human rights framework to examine the Bill. This, in turn, would have prompted the early identification of the Regulation’s unnecessary impact on civil liberties. Instead, the NSW Government found itself defending its legislation. In *Evans v State of New South Wales* [2008] FCAFC 130, the Regulation was challenged on the ground that it went beyond the power conferred by its parent Act. The Full Federal Court (French, Branson, Stone JJ) accepted this argument.

Associate Professor Jeremy Gans of Melbourne Law School published an analysis of how this regulation would have fared in Victoria.⁵⁹ He speculated that such a provision would have been unlikely to get past the scrutiny of SARC as it would have been necessary to submit a Statement of Compatibility. In preparing the Statement, the Government and its advisors would have been required to consider and justify any incursions on human rights.

Gans commented that did not believe that Victoria would get to ‘this silly point’ of passing parliament and legal challenge. However, if the legislation was passed in Victoria, Gans suggests that a Victorian court could have considered whether:

- the regulation was a ‘lawful restriction’ (Charter s.15(3));⁶⁰
- the Governor breached the Charter’s conduct mandate and failed to give ‘consideration to a relevant human right’ (Charter 38(1));⁶¹
- the interpretation of ‘annoying’ was limited to commercial conduct (Charter s.32);⁶²
- the regulation unduly limited free speech (ie, not just political communication) (Charter s.14(2)).⁶³

⁵⁹ Jeremy Gans, Charterblog, Analysis of Victoria’s Charter of Human Rights, *The Charter vs annoying laws*, (July 15 2008), <http://charterblog.wordpress.com/2008/07/15/the-charter-vs-annoying-laws/> at 16 June 2011.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

The overall benefits and costs of the Charter

While we often hear of the importance of ‘Australian values’, and attempts have even been made to articulate these in some detail,⁶⁴ it is PIAC’s view that often these values are espoused rather than fully lived. They are values to which we have a theoretical commitment, but do not always carry through into practice. One of the benefits of the Charter is that it is a clearly articulated set of values that can be referred to, understood, and against which conduct and laws can be tested. In many ways, they are the shared values that are agreed as necessary for just, fair and peaceful societies. They are values based on our shared humanity.

PIAC’s experience in advocating for people whose human rights have been violated has shown that the laws and systems in place to protect human rights are insufficient. Seeking redress among NSW’s existing rights legislation, or the common law, all too often fails to read to an appropriate result that protects the dignity of victims, nor does it have any effect in changing society’s behaviour and attitude towards human rights.

PIAC has consulted with community groups in NSW on human rights issues for the National Human Rights Consultation in 2009. The consultations revealed that there is an absence of a culture in which human rights are respected and promoted. PIAC has encountered human rights breaches and problems with frameworks that protect rights. An example is in the area of access to transport for people with disabilities.

PIAC is currently acting for a wheelchair user who alleges that since 2006 the NSW Department of Transport has been licensing Wheelchair Accessible Taxis that do not comply with the *Disability Standards for Accessible Public Transport 2002* (Cth) (Public Transport Standards). This has resulted in a significant and growing number of Wheelchair Accessible Taxis in NSW that cannot accommodate people who use electric wheelchairs because there is inadequate space in the vehicles. However, as a result of the way the Public Transport Standards are drafted⁶⁵, the NSW Department of Transport can only be named as an ancillary party to the disability discrimination complaint making it more difficult to successfully challenge their licensing practices that are at the crux of the issue.

Evidence from Victoria is that the Charter has changed the behaviour of government and the community in general. The Victorian Equal Opportunity and Human Rights Commission in its annual reports of the Charter’s progress has found each year that:

Victoria is making steady progress towards building a culture where human rights are recognised, respected and protected throughout our community.⁶⁶

⁶⁴ Julie Macken, ‘This is Australia?’, *Australian Financial Review* (Sydney, 17 December 2005, 24).

⁶⁵ *Disability Standards for Accessible Public Transport 2002* (Cth) cl 1.4.

⁶⁶ Victorian Equal Opportunity and Human Rights Commission, *The 2010 Report on the operation of the Charter of Human Rights and Responsibilities* (2010) 3.

PIAC submits that the examples in this submission demonstrate that the Charter has:

- clearly articulated human rights;
- provided a benchmark for legislation to ensure that human rights violations cannot be encouraged or sanctioned by government;
- changed the behaviour of governments, institutions, individuals, and businesses so to recognise and respect human rights.

The Charter has resulted in human rights standards being applied in the relationships between private entities and individuals. In this way, human rights protections have extended from the purely public sphere into the private sphere.

Options for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria

This review provides an opportunity for the current government to finish the job started by the previous Government. The following recommendations the Government to allow to develop the Charter by giving respect to the people in Victoria in areas and ways that have requested by the and evidence has shown to benefit the most disadvantaged. PIAC submits that the following reforms would improve upon the current operation of the Charter.

Recommendations – Inclusion of additional rights

- *The Victorian Government should amend the Charter of Human Rights and Responsibilities to include economic, social and cultural rights.*
- *The Charter should cover all rights from international agreements to which Australia is a party.*
- *The Charter should include third generation rights, such as those rights concerning the environment.*

Recommendations - Remedies

- *The Charter should allow Victorian courts at all levels to consider matters within their jurisdiction that raise human rights matters.*
- *The Charter should allow an individual who has only a human rights action caused by incompatible provisions in the Act, to take a complaint to VEOHRC, which can then refer the matter to the Supreme Court.*
- *The Charter should allow individuals to make a complaint about breaches of their rights to VEOHRC.*
- *The Charter should allow individuals to take action for a breach of human rights by a public authority and seek an appropriate remedy, including financial damages.*
- *The Charter should empower VEOHRC to audit and investigate reviews of services and programs of agencies on its own initiative, as a result of an individual complaint, or that of a group. PIAC also recommends that VEOHRC be granted power to conduct reviews of services and programs of agencies on reference from the Attorney-General. VEOHRC should not be limited to conducting any reviews only with the voluntary co-operation of the organisations concerned.*
- *The Charter should provide VEOHRC investigative powers, including the ability to request documents, enter premises and speak with agency staff.*

- *The Charter should allow findings and recommendations of an investigation or audit by VEOHRC to be made publicly available.*
- *The Charter should require agencies to formally respond to VEOHRC findings and recommendations.*
- *The Government should resource VEOHRC to ensure it can undertake investigative and auditing functions.*
- *Government departments and agencies should provide VEOHRC with a human rights action plan each year and provide a progress report against that plan each year, the documentation should be made public.*

Recommendations - Accountability

The Victorian Government should retain the requirement for all Bills to be accompanied by a compatibility statement and improve the standard of reporting by transferring the responsibility of drafting the reports to the Attorney General.

Recommendations – Legislative responsibilities

The Victorian Government should retain the Scrutiny of Acts and Regulations Committee and improve its operation by:

- *granting SARC the power to conduct an inquiry into any matter relating to human rights in Victoria, upon reference from either House of Parliament;*
- *ensuring that SARC has appropriate capacity and access to relevant human rights law expertise for it to be able to undertake an appropriately rigorous examination of Bills for Acts, legislative instruments and current Acts for compatibility with human rights; and*
- *providing that further Parliamentary debate on a Bill does not take place the report from SARC is available for consideration, unless there are exceptional circumstances.*

Recommendation – role of the courts

- *The Charter should include a provision stating that where the Supreme Court declares subordinate legislation and Council by-laws to be incompatible with the Charter, they become invalid, unless Parliament amends the primary legislation to make them valid.*
- *The Charter should allow only the Victorian Supreme Court to make Declarations of Incompatibility.*
- *Where an individual makes a complaint to VEOHRC, the Charter should allow the Commission to refer the complaint to the Supreme Court to determine whether a Declaration of Incompatibility should be made.*
- *The Charter should not allow individuals to personally bear the costs of proceedings before the Supreme Court where a matter has been referred by a lower court or tribunal on a question of law on Charter interpretation.*

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- *The Charter should empower VEOHRC to audit and investigate reviews of services and programs of agencies on its own initiative, as a result of an individual complaint, or that of a group. VEOHRC should not be limited to conducting any reviews only with the voluntary co-operation of the organisations concerned.*
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