



THE VICTORIAN CHARTER OF HUMAN RIGHTS

IMPORTANT TOOL FOR ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN IN VICTORIA

TIME TO GET OUT AND USE IT!

This is a brief overview of the *Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter)* and its relevance to Aboriginal and Torres Strait Islander peoples and children. The paper explores how the Charter has been used to date to advance Aboriginal and Torres Strait Islander interests and describes the review process currently underway.

It also importantly identifies how you can use the Charter to advance the rights of Aboriginal and Torres Strait Islander peoples and children in Victoria. To achieve our human rights, for our children and ourselves, it is up to us to claim and assert them. The Charter can only be effective to the extent that we as citizens use it – so let's get out there, let people know about it and use it!

Finally the paper highlights the importance of taking action now to oppose any weakening of the Charter and a consequent weakening of human rights protection in Victoria.

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What is the Charter?

The *Charter of Human Rights and Responsibilities Act 2006 (Vic)* is an important law that outlines the rights, freedoms and responsibilities that belong to all people in Victoria. The Charter protects 20 basic human rights, which must be considered across all areas of government activity. This includes:

- when new legislation is introduced to the Victorian Parliament;
- when public authorities, such as local councils, Victoria Police and Victorian Government Departments, are undertaking their activities and making decisions; and
- when courts and tribunals are interpreting and applying Victorian laws.

An individual cannot bring a court proceeding based solely on a breach of one of the human rights contained in the Charter. However, the Charter allows for human rights arguments to be joined to existing court actions.

Human rights protected in the Charter include the right to life, freedom of expression, protection of families and children, protection of cultural and religious rights and the right to liberty and security of person.

Relevance of the Charter for Aboriginal and Torres Strait Islander peoples and children

The human rights protected in the Charter apply equally to all persons. For example, all Victorians are entitled to rights such as freedom from discrimination, the right to privacy and freedom of expression. However, the Charter also contains a number of provisions that provide specific recognition of the rights of Aboriginal and Torres Strait Islander peoples in Victoria.

The Charter's preamble states that it is founded on the principle that:

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

The Charter also specifically protects cultural rights. Section 19 provides that:

'All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community or with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.'

Section 19 goes on to specifically mention the particular relevance of cultural rights to Aboriginal and Torres Strait Islander persons, stating that they 'hold distinct cultural rights and must not be denied the right, with other members of their community -

- (a) to enjoy their identity and culture; and
- (b) to maintain and use their language; and
- (c) to maintain their kinship ties; and
- (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.'

The Charter also contains specific protections relating to the rights of families and children. Section 17 of the Charter states that families are the fundamental group unit of society and as such are entitled to protection by society and the state. Section 17 further establishes the right of the child, without discrimination, to protection in his or her best interests.

The protection of cultural rights then enables you to, for example, ask the Department of Education and Early Childhood Development to properly consider your human rights under the Charter where you believe that a decision has been made that denies the rights of Aboriginal and Torres Strait Islander children or families to enjoy their identity and culture, or to maintain and use their language in their preschool or school. A decision to deny a child

in out of home care the opportunity to maintain their kinship ties may also be challenged as may a failure to properly apply the Aboriginal Child Placement Principle when placing a child in out of home care.

Similarly where you feel a decision by your local Council or the police discriminates against you as an Aboriginal and Torres Strait Islander, or your family or childhood service or agency as the case may be, this may be contrary to the provisions of the Charter. Raising attention to the specific rights contained in the Charter may be a way then for you to strengthen the position you are advocating for in discussions with local Council and Government Departments about upcoming decisions and activities to better represent the interests and rights of Aboriginal and Torres Strait Islander children and families.

Use of the Charter to advocate for the rights of Aboriginal and Torres Strait Islander peoples

In the first four years of operation of the Charter, there have been very few developments relating specifically to the rights of Aboriginal and Torres Strait Islander peoples. The only court decision that considers rights specific to Aboriginal peoples was handed down by the Victorian Supreme Court in the case of *Secretary to the Department of Human Services v Sanding* on 22 February 2011.

The case concerned four Aboriginal children who were under the sole custody of the Department of Human Services (the **department**) by court order. The department decided to place the children in out-of-home care. As no relatives were available to take care of the children, the department separated the children and placed them in different homes. Their mother applied to the Children's Court of Victoria to have the order granting custody to the department cancelled and for the children to be placed in the care of their maternal grandmother. At a preliminary hearing, the Magistrate made a temporary accommodation order returning the children to their grandmother's care. The department then applied for judicial review of this decision arguing that the Magistrate had erred in law while making the order without hearing formal evidence regarding the circumstances of the case.

The Supreme Court held that the Magistrate had the discretion to order the return of the four children to their grandmother, despite no formal evidence having been provided. It held that in determining the best interests of the child, a court had to consider the children's rights under the Charter, which included the right to protection of the family as the fundamental group unit of society (section 17(1)), the right to such protection as was in their best interests and was needed by them as children (section 17(2)) and their cultural rights as Aboriginal children (section 19(1) and (2)). The court held that the Magistrate had taken all of these considerations into account when ordering for the children to return to the custody of their grandmother.

The Charter may have been used extensively out of the Courtroom however to advocate for various rights informally with Government Departments, police and local councils.

Victorian Charter currently under review

The Charter is currently being reviewed after its first four years of operation. The Victorian Government asked a parliamentary committee, the Scrutiny of Acts and Regulations

Committee (**SARC**), to undertake a review of the impact and operation of the Charter to date. SARC is composed of seven members of Parliament (four from the coalition government and three from the opposition).

In undertaking its review, SARC considered the following questions:

- whether additional human rights should be included in the Charter, including relevantly for Aboriginal and Torres Strait Islander children: the right of self-determination; and the UN Convention on the Rights of the Child;
- the impact of the Charter on new laws, the provision of services by public authorities, and the operation of courts and tribunals;
- the overall benefits and costs of the Charter; and
- options for reform or improvement of the regime for protecting and upholding the rights and responsibilities in Victoria.

Community support for the Charter, shown through submissions to SARC, was overwhelmingly high. The Human Rights Law Centre (**HRLC**) analysed all submissions provided to SARC and found that of the total 3834 submissions, 95% support retaining or strengthening the Charter while just 5% support weakening or repealing the Charter. Copies of the submissions provided to SARC are available at:

<http://www.parliament.vic.gov.au/sarc/article/1447>

Summary of SARC's Report as it relates specifically to Aboriginal and Torres Strait Islander peoples

General recommendations

A majority of SARC members recommended that the Charter be amended to remove:

- 1 the legal obligation on public authorities to act consistently with human rights; and
- 2 the ability of courts and tribunals to review the actions of public authorities and to interpret Victorian laws in a way that is compatible with human rights.

If accepted by the Victorian Government, these amendments would greatly diminish the human rights protections for all Victorians.

Right to self-determination

The SARC Report recommended that the Charter not be expanded to include a right of self-determination. It noted that submissions supporting inclusion of the right to self-determination revolved around two principle reasons, namely:

- 1 Aboriginal and Torres Strait Islander peoples in Victoria have been subjected to historical discrimination by government policies and there remains a culture of state paternalism towards Aboriginal and Torres Strait Islander peoples, and a present experience of dispossession and marginalisation. Recognising the right to self-determination would be one step towards reconciliation for past wrongs and towards remedying the current marginalisation of many Aboriginal and Torres Strait Islander peoples.

- 2 Aboriginal and Torres Strait Islander peoples in Victoria are disadvantaged in terms of health, education, economic participation, political representation and over-representation in the criminal justice system. The right to self-determination would be one tool when tackling the disadvantage many face in Victoria.

SARC ultimately considered that the right, as currently expressed in various United Nations conventions, is very broad and flexible and would first need to be modified to provide precision as to its intended scope and operation. It stated that different people have different ideas of what the right to self-determination comprises, beyond the idea that it involves participation in decision making.

The Victorian Equal Opportunity and Human Rights Commission in contrast however submitted that any definition of self-determination must necessarily allow flexibility to accommodate a broad range of perspectives. It noted that the needs, goals and aspirations of Victorian Aboriginal and Torres Strait Islander peoples are diverse and include fundamental social and economic needs, such as access to good health care and education, a strong desire for Aboriginal and Torres Strait Islander culture to be recognised and valued, and for Aboriginal and Torres Strait Islander peoples to be acknowledged as First People who have unique, inherent rights.

Other indigenous-specific rights

SARC also received submissions that the Charter should include more indigenous-specific rights, including those contained in the United Nations Declaration on the Rights of Indigenous People, 2007 (**UNDRIP**), which Australia formally endorsed on 3 April 2009.

Native Title Services Victoria stated that it supported the protection and promotion of rights contained in the UNDRIP that support Victorian traditional owners to regain access to their traditional lands and waters, participate in decision making over their traditional lands and waters, develop and participate in cultural practices and have access to economic opportunities deriving from their traditional lands and waters. These rights, it submitted, also help give full expression to the right to self-determination, whether or not that right is separately or expressly articulated.

SARC, however, simply recommended that the Victorian Government, in consultation with Aboriginal and Torres Strait Islander communities in Victoria, continue to develop specific programs that foster improved outcomes for Victoria's Aboriginal and Torres Strait Islander peoples. It noted a series of programs that seek to provide Aboriginal and Torres Strait Islander peoples with greater participation in and control over their affairs:

- the Koori Court, which recognises the authority of elders and respected persons in Aboriginal and Torres Strait Islander culture through advice to judicial officers;
- the Victorian Aboriginal Justice Agreement, which is an agreed direction for delivering a more culturally responsive justice system for Aboriginal and Torres Strait Islander persons;
- the Victorian Aboriginal Heritage Council, which was established under statute to provide a voice for Aboriginal and Torres Strait Islander peoples on the management of cultural heritage;

- the Aboriginal and Torres Strait Islander Child Placement Principle, which is incorporated into statute and which aims to strengthen Aboriginal and Torres Strait Islander children's connections to their families, communities and cultural identity;
- the state-based native title settlement framework under the *Traditional Owner Settlement Act 2010* (Vic), which provides for Victorian Traditional Owner Groups to enter into negotiated settlement agreements with the Government; and
- Local Indigenous Networks, which provides Aboriginal and Torres Strait Islander communities with an opportunity to identify aspirations, local challenges and issues, and represent these to government and decision-making bodies for redress.

Where to from here?

SARC's report has been criticised by various organisations. Liberty Victoria referred to the report as 'bitterly disappointing'. The Castan Centre for Human Rights criticised the recommended removal of obligations on public authorities, saying that 'if the State has no human rights obligations when making decisions... what is the point in having rights?' The Human Rights Law Centre noted that the report was a lost opportunity to enshrine economic and social rights such as the right to adequate housing and healthcare. Premier Ted Baillieu is yet to provide a formal response to the report, other than saying that the 'views expressed in the SARC report are those of the cross-party committee members and not necessarily those of the Coalition government'.

For more information see:

- <http://libertyvictoria.org/sites/default/files/Vic%20Charter%20Media%20Release.%20website%20version.%2014.09.11.pdf>
- <http://castancentre.wordpress.com/2011/09/15/the-sarc-review-of-the-victorian-charter-of-rights-and-responsibilities-profoundly-disappointing/>
- <http://www.hrlc.org.au/content/victoria-set-to-wind-back-protection-of-human-rights/>

The failure to recommend the incorporation of any additional rights into the Charter, in general and in particular concerning the right to self-determination, is extremely disappointing. However, many existing rights, such as those used to protect Aboriginal and Torres Strait Islander children in the case of *Sanding*, continue to provide important protections. It is these important protections which would be substantially weakened by the acceptance of SARC's recommendations to drastically reduce the role of courts and the obligations on public authorities.

The Victorian Government has six months - until March 2012 - to respond to the recommendations contained in the SARC report. It is therefore important that Aboriginal and Torres Strait Islander organisations and communities take action now to encourage the Victorian Government to retain the current important protections in the Charter. This is fundamental to ensure that the Charter can be used as an effective tool to protect and promote the human rights of Aboriginal and Torres Strait Islander peoples in Victoria.

For more information on what you can do to encourage the Victorian Government to retain and strengthen the Charter, visit <http://www.hrlc.org.au/content/strengthen-the-victorian-charter/>.

Assuming the Charter remains intact, the impetus then is on community services, organisations and individuals to use it to advance Aboriginal and Torres Strait Islander interests and rights. It is a powerful resource for us in Victoria which currently remains significantly untapped. The Charter can only be effective if we use it!

The Charter can be used as an advocacy tool in a variety of ways to ensure that public authorities act consistently with human rights. This could involve raising the Charter and relevant human rights during discussions with government departments and agencies. The Charter is also a useful educational tool to empower communities and individuals to learn more about their human rights and how they are protected in Victoria.

For further information about the Charter, please see the following links:

- http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&layout=item&id=764&Itemid=515
- <http://www.hrlc.org.au/our-work/focus/victorian-charter-human-rights/>

If you are interested in using the Charter or feel that it could be relevant to an issue that has arisen in your service or organisation, we would be happy to discuss it further with you.