



# Submission to the National Human Rights Consultation Committee 15 June 2009

## About VCOSS

### Overview

The Victorian Council of Social Service (VCOSS) has served Victorians as the peak independent coordinating body of the social and community services sector for over 60 years. VCOSS raises awareness of the existence, causes and effects of poverty and inequality and advocates for the development of a sustainable, fair and equitable society. As well as promoting the wellbeing of those experiencing disadvantage and contributing to initiatives seeking to create a more just society, VCOSS also provides a strong, non-partisan voice for the community sector.

VCOSS works together with its members on issues of poverty and inequality and seeks to ensure that community resources and services are accessible and affordable. VCOSS promotes community participation and strengthening the value of citizenship in our community. VCOSS advocates on behalf of disadvantaged Victorians through:

- policy development and analysis;
- direct advocacy to government;
- evidence based research;
- reports, media releases and submissions;
- an annual State budget submission;
- strengthening the community sector with collaborative initiatives; and by
- providing a range of services to member organisations.

### VCOSS and human rights

VCOSS is committed to promoting the understanding, engagement, and protection of human rights in Victoria, with a focus on community sector organisations and the broader community – particularly those who experience disadvantage.

VCOSS has incorporated a human rights framework explicitly into its policy advocacy work since 2001. In doing so, VCOSS has sought to link domestic policy advocacy discussions to the various international human rights conventions. VCOSS has continued to build on the range of significant work undertaken over this period to



strengthen the awareness and understanding of human rights within the Victorian community sector.

### **VCOSS and the *Victorian Charter of Human Rights and Responsibilities Act***

In 2005, the Victorian Government appointed a Consultation Committee to inquire into Victorians' views on the protection and promotion of human rights. The Committee's mandate included adopting strategies to engage with marginalised and disadvantaged communities, which they did partly through devolved consultations. VCOSS and the Federation of Community Legal Centres ('the Federation') together were funded to conduct 15 community consultations with the most marginalised and disadvantaged Victorians as part of this process, and to prepare a final report to the Consultation Committee expressing these views. The final report is appended to this submission for your consideration.

VCOSS and the Federation spoke with people living with an intellectual disability; mental health service users and advocates; people on low incomes in rural Victoria; drug and alcohol users, ex-users, and their families; Muslim women; young people from culturally and linguistically diverse backgrounds; newly arrived African women (both Arabic- and Somali-speaking); women in prison; rooming house residents; Indigenous people in regional Victoria; single mothers; and community workers. The project also generated over 140 individual submissions.

All the participants supported the introduction of stronger human rights protection. Every consultation drew out stories of everyday violations of peoples' rights – situations where people felt their rights were not adequately protected, where they felt they had not been treated with respect, and where they felt they had no recourse.

Since the introduction of the *Victorian Charter of Human Rights and Responsibilities* (the Victorian Charter) in January 2007, VCOSS has been working intensively with community sector organisations on the implementation of the Charter, including conducting a preliminary needs analysis and audit of human rights education, providing training on the Victorian Charter, and producing a report on the ways in which community sector organisations are using the Victorian Charter in policy and practice.<sup>1</sup> VCOSS has also been actively engaged in human rights discussions, including providing input into a range of Victorian Government processes, and providing a community sector perspective on human rights implementation to academia, statutory bodies and the legal profession.

This submission has been informed by the experiences of VCOSS with the development of the *Victorian Charter of Human Rights and Responsibilities* through the Human Rights Community Engagement Project, and the subsequent implementation of the Victorian Charter within the community sector. VCOSS believes that the experience in Victoria over the last two years of operation of the Victorian Charter offers a valuable perspective to the national debate.

## **Q.1 – Which human rights (including corresponding responsibilities) should be protected and promoted?**

VCOSS strongly supports the protection of *all* human rights, including social, cultural, economic, civil, political and specific rights, such as Indigenous' rights, women's rights and children's rights.

All human rights enshrined in international instruments which Australia has ratified should be protected.<sup>2</sup> These are obligations which Australia has voluntarily undertaken and which we are obliged to give full effect. They represent an agreed national and international minimum safeguard of human dignity and humanity.

Human rights are indivisible, both in international law and in practice. The current trend in statutory bills of rights appears largely to protect only civil and political rights.<sup>3</sup> VCOSS believes that this model is limited, and even potentially dangerous.

Using a 'dialogue' model Charter involves a process of balancing competing rights. The way this has been done in Victoria is by imposing obligations on 'public authorities' to act in a way that is compatible with human rights and to give proper consideration to human rights when making a decision.<sup>4</sup> In practice this requires the relevant public authority to make an assessment of which human rights enshrined in the Charter are engaged in any given situation, whose rights they are, whether those rights are being limited, and if so, whether that limitation is reasonable, necessary, proportionate and justified. The conclusion as to whether a limitation to a right is justified will be heavily influenced by which other rights (or whose rights) are in conflict.

If some rights are included (such as the right to liberty, or freedom of religion) while excluding others (for example housing, health, education, or an adequate standard of living), then the balancing act becomes skewed. Few legislators would expect a 'happy' or satisfactory result by protecting freedom of expression without also protecting the right to privacy and reputation, for example, and yet a blindness persists towards the potential effect of excluding economic, social and cultural rights. In the Victorian Charter, economic, social and cultural rights do not have to be taken into account.

To illustrate, there is a strong link between women experiencing family violence, and homelessness. If a woman is made homeless through violence, it is likely to have ramifications not only for housing and property rights, but also potentially to her children's education, to her ability to maintain stable employment, to her participation in social and cultural life, and to extended family relations. Under the current Victorian model, if a woman and her children are attempting to stay in the family home which is in her partner's name, then her right to safety and her partner's right to property would be need to be considered, but not her right to housing or employment, her children's rights to education, or their right to an adequate standard of living.<sup>5</sup>

VCOSS argues that excluding economic, social and cultural rights while giving protection to civil and political rights effectively protects liberty over equality, disrupts the subtle balancing act required and can result in unsatisfactory outcomes.

## **Indigenous Rights**

The formal support from the Australian Government for the United Nations *Declaration on the Rights of Indigenous Peoples* in April this year was a significant step. It is critical that this support be reflected through the specific articulation of Indigenous Australian's rights in a National Human Rights Charter.

## **Women's Rights**

A National Human Rights Charter that articulates women's rights, and the right of women to be free from violence, offers a substantially different paradigm to either generic human rights protections or specific legislation dealing with manifestations of gender based human rights violations. VCOSS believes that the right to be free from discrimination, and the obligation that all rights are applied in a non-discriminatory manner, is not sufficient to address the gender-based inequality in Australia.

VCOSS endorses the Womenspeak submission in regards to Women's Rights.

## **Children and young people**

It is vital that the rights of children and young people are considered and that their rights are included and protected in any human rights mechanisms that are developed. Too often, children and young people are simply considered within the context of their family, rather than as individuals.

The United Nations *Convention of the Rights of the Child* (CRC) focuses on the whole child. As a signatory of the CRC, Australia is required to adhere to the principles that are set out in the Convention. The development of national human rights mechanisms, such as a charter or Act, would enshrine these rights in Australian law and put these rights front and centre for all to consider.

The CRC sets out 'best interest' principles. Best interest principles are enshrined in many pieces of legislation in Australia, including the Victorian *Child Wellbeing and Safety Act 2005*, the *Child, Youth and Families Act 2005* and the *Victorian Charter of Human Rights and Responsibilities Act*.<sup>6</sup> These Acts not only enshrine best principles for children, but these principles also inform the design and development of the service system, the role of service providers and practice. VCOSS believes that a national human rights mechanism could ensure that all relevant pieces of legislation and policies, not just selective policies, enshrine best interest principles and that these principles are reflected in implementation and practice.

As with other United Nations convention monitoring procedures, Australia must submit periodic reports regarding the CRC, and the Committee on the Rights of the Child puts

forward concluding observations in response. This Committee has expressed a range of concerns in relation to Australia's adherence to the CRC and many of these recommendations have not been fully implemented. It is vital that this consultation review the concluding observations of the Committee that were presented in 2005. It is also important to note that Australia is over a year late in presenting their periodic report to the UN. This clearly indicates the need for an improved commitment to the rights of children and young people.

This consultation, and the possible development of a national charter or Act, should also lead to the development of the position of a National Commissioner for Children and Young People. This Commissioner should have independent responsibility for the implementation and monitoring of the UNCRC here in Australia, as well as the relevant components of a national human rights mechanism.

Legitimacy also needs to be given to voices of children and young people. There are currently a number of mechanisms that have been developed to not only consult with children and young people, but to also include them in governance and decision making. Organisations such as Early Childhood Australia and the Youth Affairs Council of Victoria have developed resources around effective consultation with children and young people. The UNICEF Child Friendly Cities program also presents a useful framework to guarantee the rights of children and young people and enshrine their participation in meaningful ways.

VCOSS endorses the Youthlaw submission in regards to Children's Rights.

## **Responsibilities**

VCOSS is strongly opposed to the inclusion of 'responsibilities' in any national human rights instrument or other human rights protections.

The concept of 'responsibilities' is antithetical to the fundamental principals of human rights, namely that human rights instruments protect individuals from the abuse of power by governments. Human rights instruments by their very nature regulate the relationship between the state and the individual. They impose obligations on *government* not to abuse power. They do not, and cannot, regulate interpersonal relationships.

Marrying human rights with responsibilities creates the impression that only people who are sufficiently 'responsible' are entitled to rights, creating a hierarchy where individuals whose behaviour is deemed antisocial lose their entitlement to human rights. A person who breaks the law, for instance, is still entitled to a fair trial and to humane treatment, despite the fact that their actions were 'irresponsible'. Human rights are a fundamental birthright, and are not contingent on being a 'good' citizen.

Victoria is alone in the world in introducing a *Charter of Human Rights and Responsibilities Act*. No other human rights instrument in any other country enshrines responsibilities. In the Victorian consultation, the majority of the submissions did not support linking human rights and responsibilities – according to the final Report

produced by the Consultation Committee itself, only around one per cent of submissions called for responsibilities to be included.<sup>7</sup>

In practice also, the Victorian legislation is confusing. When VCOSS has conducted training on the Victorian Charter, participants have expressed confusion about what 'responsibilities' mean in the Act. Despite the title, the only mention of responsibilities is in the Preamble, which states that 'human rights come with responsibilities and must be exercised in a way that respects the human rights of others',<sup>8</sup> and not in the substance. The Victorian Charter states that human rights belong to individuals,<sup>9</sup> while responsibilities, or obligations, are imposed on public authorities'. In short, people have rights and the government (or its agents) have responsibilities.

VCOSS believes the notion of interpersonal responsibilities is played out in the balancing of competing rights enshrined in the Victorian Charter, for instance that freedom of speech is conditional on the responsibility not to infringe another person's right to freedom of religion.

VCOSS believes that this interplay of rights and responsibilities is appropriate in a legislative instrument – that rights belong to individuals while the responsibility to uphold these belongs to the government; and that interpersonal responsibilities are regulated by balancing competing rights. VCOSS reiterates the importance of including the full range of civil, political, economic, social, cultural and group rights in this respect.

## **Q.2 are these human rights currently sufficiently protected and promoted?**

VCOSS believes that human rights are not currently sufficiently protected and promoted in Australia.

VCOSS does not intend to engage with legal arguments regarding the Constitutional, legislative and common law protections of human rights, although VCOSS believes that these are insufficient and piecemeal at the federal level. Rather, this submission draws on the experiences of VCOSS during the consultations around the introduction of the Victorian Charter, and on our subsequent work with community sector organisations on its implementation.

### **Protection**

In the Victorian Charter consultations VCOSS and the Federation conducted, many participants filled out individual submission forms. Of the 141 individual submission forms completed, not one said that change was not necessary. This was reflected in the consultations run by the Victorian Consultation Committee, and in the consultation processes in other states, all of which had a high percentage of people supporting formal human rights protections.

It is often argued that formal protections are unnecessary as Australians already enjoy a high standard of human rights protection. VCOSS regularly works with Victorians who experience discrimination based on race, religion, sexuality, gender, age, disability, appearance or socioeconomic status (to name but a few), or who do not have access to basic services such as education and training, to good health and health services, freedom of religion and belief, freedom from discrimination, and equal access to justice.

To cite just a few examples, socioeconomic status has been cited as the most important indicator of health status among Australians, with people of lower economic status more likely to experience illness and early death than other members of the community;<sup>10</sup> VCOSS has seen increased evidence of families relying on emergency relief services to fund school costs;<sup>11</sup> and approximately half of all people in prison have two or more characteristics of serious disadvantage, including being unemployed, being homeless, having an intellectual disability, having drug or alcohol issues, having previously been admitted to a psychiatric institution, or being of Aboriginal or Torres Strait Islander descent.<sup>12</sup>

In the consultations conducted by VCOSS and the Federation around the Victorian Charter, participants reported daily examples of small and not so small violations of their rights. Furthermore, the people most likely to be denied their rights are often those who are least able to fight for them. One participant stated, 'People like us aren't going to complain about it.'<sup>13</sup>

## **Promotion**

In Victoria, there has been limited promotion of human rights, despite the introduction of the Victorian Charter. The Victorian Department of Justice (DoJ) has had carriage of Charter training for government departments and staff, while the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) is mandated to provide community education on the Charter.<sup>14</sup>

The DoJ put together a comprehensive training program for policy and legislative staff, and another for general staff, in the first year of operation of the Charter. This program was later made available to a limited number of local government staff. There is no ongoing training provided. The VEOHRC is limited by resource constraints, and to date has focussed primarily on the community sector and more recently on local government. There has been no major public information or education campaign either by the Victorian Government or by the VEOHRC, and it would be reasonable to suggest that most ordinary Victorians are not aware of the existence of the Charter. Such limited general awareness of human rights entitlements seriously curtails the effectiveness of the Charter, as people who are unaware of their rights are unable to claim them, or to hold public authorities to account. It takes the general public out of the 'dialogue' that the Charter is intended to create.

VCOSS submits that any changes to human rights protection at the federal level be accompanied by a public information campaign that informs the general public of their rights.

## **Q.3 how could Australia better protect and promote human rights?**

### **A Human Rights Act**

VCOSS strongly supports the introduction of a Human Rights Act or Charter. As discussed earlier, it must be a comprehensive instrument which will give effect to all our international obligations and consolidate existing human rights protections in Australian legislation, common law and our Constitution.

A Human Rights Act also has symbolic value beyond the value of the actual rights enshrined. The mere fact of having a human rights law signals to people that they are valued and creates an expectation that they will be treated with dignity. It can provide us with a framework for understanding our place in society as inherently rights-bearing. This can be an extraordinarily empowering and enabling act, particularly for people who have experienced public life largely as subjects not actors.

VCOSS believes that the value of a law is less in litigation than in its implementation, particularly for people with limited financial and social resources for whom litigation is inaccessible. The 'dialogue model' we have in Victoria, combined with public education, can help create public awareness of, and respect for, human rights. This is often referred to as creating a 'human rights culture', meaning that understanding which rights are protected – and how they apply broadly to everyday life – is a part of society's shared consciousness. It also means that ordinary people see themselves as rights bearing individuals and can articulate that right.

As the peak body of the Victorian community sector, and with a range of community sector organisations, VCOSS uses rights-based language as an advocacy tool to hold the government to account by reframing the dominant welfare-based approach (of the 'deserving poor' receiving assistance as a charitable act for which they are expected to be grateful) within a human rights framework (assistance is provided because fundamental human dignity requires that every person is entitled to an adequate standard of living). A rights based approach can validate people's experiences and provide a framework that is much more respectful of people's dignity.

Some examples of this from Victoria include a person in residential care whose partner was not permitted to enter their accommodation because of concerns by staff that they could not monitor the partner. By considering the person's situation in light of the Victorian Charter and taking a rights-based approach, the organisation in question accepted that the person's wishes should be central in their approach and that no proper grounds had been given for restricting these.<sup>15</sup>

Another organisation reported a client who had been excluded from accessing services because of violent and threatening behaviour towards staff. A worker questioned whether the person's rights had been restricted, and as a result management negotiated

a plan to allow the person restricted access to some services, with a monitoring scheme to identify when staff safety may be at risk.<sup>16</sup>

On the other hand, VCOSS strongly believes that a legislative Human Rights Act must contain effective remedies. It is a well established legal principle that there is no right without a remedy; in practice, the absence of effective remedies substantially reduces the effectiveness of the Victorian Charter. VCOSS has conducted Charter training which has been attended by community sector organisations, advocates, individuals, local government and state government staff. A common theme emerging is that despite the focus on 'dialogue' and on creating a 'culture of human rights', many people (including those who are clearly 'public authorities') do not feel an imperative to incorporate human rights into their policies and planning because there are no repercussions if this is not done.

Even though this is not strictly true with the Victorian Charter,<sup>17</sup> a legal remedy is not only an end in itself but can also provide the impetus for prioritising human rights in departmental and organisational thinking. Most public servants and community sector staff are already grappling with a range of regulatory or practice requirements. While many would like to embrace a human rights approach as best practice, it is unsurprising that a law without apparent consequences is seen as less of a priority for implementation, particularly when taking a risk-management approach to service delivery. A 'carrot' alone is not as effective without a corresponding 'stick'.

The threat of possible action, whether or not it is ultimately used, is often sufficient to encourage people to 'do the right thing'. One participant in the Charter consultations told us, 'I wasn't being charged for an account, and I just kept it open. They started slapping fees on it without telling, I warned them I'd tell the bank ombudsman, and then it was okay.'<sup>18</sup> For every case that gets to court, or is reported to the Ombudsman, or is the subject of a complaint, there will be hundreds of incidents where it was not.

It is also in the interests of fairness that somebody who has been harmed should be able to seek justice.

### **Other protections**

VCOSS recognises the benefits of introducing other forms of human rights protections, and acknowledges that a human rights Act alone cannot be effective without complementary mechanisms, such as a strong, independent and well-resourced Human Rights Commission. We do not intend to address other forms of human rights protections in this submission, other than to acknowledge that they are a necessary adjunct to a human rights Act. This submission has focussed principally on the introduction of a human rights Act, partly because we are drawing on our experiences in Victoria with the Victorian Charter, and partly because we believe that a human rights Act is a necessary frame upon which any human rights protection in Australia must be built.

## Further Information

For further information regarding the VCOSS submission to the National Human Rights Consultation Committee, please contact Carolyn Atkins, Deputy Director:

E: [carolyn.atkins@vcoss.org.au](mailto:carolyn.atkins@vcoss.org.au)

T: 03 9654 5050

For further information regarding the human rights work of VCOSS, see the VCOSS website:

W: <http://www.vcoss.org.au/what-we-do/human-rights/index.htm>

## References

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- <sup>1</sup> S Cauchi, *Using the Charter in policy and practice: Ways in which community sector organisations are responding to the Victorian Charter of Human Rights and responsibilities*. VCOSS, Melbourne, 2008.
- <sup>2</sup> Including the rights enshrined in the International Covenant on Economic Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Declaration on the Rights of Indigenous Peoples, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Rights of Persons with Disabilities (CPD), the Convention Against Torture (CAT) and the Convention on the Status of Refugees (the Refugee Convention).
- <sup>3</sup> Including the Victorian Charter, the ACT Charter, The New Zealand Bill of Rights Act and the United Kingdom Human Rights Act.
- <sup>4</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s38(1).
- <sup>5</sup> Recent amendments to the *Family Violence Protection Act 2008 (Vic)* have in fact recognised the importance of keeping women and children in the family home in situations of violence, and have now made it a presumption that the violent partner will leave.
- <sup>6</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s17, s24.
- <sup>7</sup> Victorian Department of Justice, *Rights, responsibilities and respect: The report of the Human Rights Consultation Committee*, p 30, 2005.
- <sup>8</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, preamble.
- <sup>9</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s6(1) 'Only persons have human rights. All persons have the human rights set out in Part 2.'
- <sup>10</sup> D Griggs & C Atkins, *The Bulk Billing Crisis: A Victorian Perspective*, VCOSS, 2004, p27.
- <sup>11</sup> VCOSS and Emergency Relief Victoria report, *The Rising Cost of Free Education*, p29.
- <sup>12</sup> Department of Premier and Cabinet, State of Victoria *Growing Victoria Together Progress Report*, 2005-06, Appendix B – Service Delivery, p358.
- <sup>13</sup> S Cauchi, *Making human rights real. Final report of the Victorian Human Rights Community Engagement Project*, 2006 VCOSS, Melbourne, p.12.
- <sup>14</sup> *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s41(d).
- <sup>15</sup> S Cauchi, *Using the Charter in policy and practice: Ways in which community sector organisations are responding to the Victorian Charter of Human Rights and responsibilities*. Melbourne: VCOSS, 2008, p.15.
- <sup>16</sup> *Ibid*, p15.
- <sup>17</sup> Repercussions may include internal complaints processes, internal disciplinary procedures, complaints to the Ombudsman, adverse publicity, and implications for further funding, but this is a subtlety not readily apparent on the face of the Charter.
- <sup>18</sup> S Cauchi, *Making human rights real. Final report of the Victorian Human Rights Community Engagement Project*, 2006 VCOSS, Melbourne, p46.