SUBMISSION TO THE 2015 REVIEW OF THE *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006* (VIC) – FITZROY LEGAL SERVICE - 25 JUNE 2015

About Fitzroy Legal Service

The Fitzroy Legal Service (FLS) provides legal services across a broad range of jurisdictions and provides legal advice and casework to in excess of an average 3000 people per annum. FLS operates a five night per week free legal advice clinic, has duty lawyers based at the Neighbourhood Justice Centre, runs a self-funding criminal, infringements, victims of crime, and family law practice for low income earners and persons eligible for grants of legal aid, a drug outreach lawyer and a taxi driver legal support service

In addition, FLS serves the community through community legal education, policy/ advocacy work, and strategic litigation connected with the needs of the community. FLS hosts the following websites - Activist Rights, the NDIS Rights, Law 4 Education, Services Directory for Drug and Alcohol Users. FLS also publishes the Law Handbook Online, accessed by approximately 5,600 users daily.

Background

Following the enactment of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter'), FLS engaged in a community development program (funded by the City of Yarra) to encourage a sense of ownership of, and empowerment through, the frame and discourse of human rights. These events involved partnerships primarily with community members, as well as local community based organisations, with a focus on people experiencing homelessness and human rights, rooming house residents and human rights, drug users and human rights, and local Aboriginal communities and human rights. Each event incorporated the theme, 'Everyone has Human Rights', engaging local performers, speakers, and peer supporters. For example, a free premier screening of a documentary *'Bastardy – A Portrait of Jack Charles'* was promoted through community health services and needle syringe programs operating in the City of Yarra, and played to a packed house within a local art gallery venue provided at low cost with food preparation assisted by peers. A range of peer driven local advocacy initiatives evolved from that process.

FLS has made a number of submissions to the Scrutiny of Acts and Regulations Committee (SARC). FLS also intermittently relies on the Charter in advocacy and law reform submissions, and in litigation contexts. Education on the Charter is incorporated into hosted websites, as well as professional development and community legal education sessions run by FLS.

It is our experience that the language, symbolism, and core values of 'human rights' are accessible and meaningful to disenfranchised, stigmatized communities.

Focus of this submission – Building a human rights culture

At the outset, we make the frank submission from a service delivery perspective that 'human rights culture' in Victoria appears fragile and unpredictable, and is perceived in a cynical light by many of those concerned by breaches, as is the case in relation to 'human rights' culture nationally.

From both a legal case work and advocacy perspective, common law traditions that govern due process, generate balance between conflicting interests, acknowledge disparate power relations and duties of care, protect the individual from undue and/or unjust interference with rights by the State, and maintain separation of powers between the legislature, executive and judiciary, are perceived to provide a surer footing and bring greater gravitas to advocacy.

Whilst we acknowledge there are a number of aspects to growing a more robust legal culture in relation to human rights, it is the Parliamentary process that we seek primarily to address. We note the views of FLS have been put forward in other forums in relation to impediments to litigation. We endorse the submissions of our colleagues at the Human Rights Law Centre in relation to their submission, which we have had opportunity to review.

Before addressing parliamentary processes, we further make two submissions in relation to additional matters we believe would support the building of a human rights culture in Victoria.

A. Community Education

We submit that enhancement of human rights as an embedded cultural understanding requires commitment to community educative processes that place human rights discourse against an historical and political backdrop that informs the question 'why'. The socio-political processes that accompany the degeneration of human rights protections, and provide the preconditions for gross violations, are repeated through time and regions. As a community we have the capacity, and a strong imperative, to promote learning and understanding of the lessons of history and the suffering/ loss of life that has accompanied these processes. Such community education would in our submission enhance meaningful participation in democratic processes by community insistence on transparency, accountability, equality, freedom of political communication, protection of fundamental freedoms and the rule of law.

Recommendation 1 – That investigation is made into educative programs focused on human rights in a socio-historical context, for example in relation to units related to the Second World War, that might be mainstreamed into high school syllabus in Victoria.

B. Access to Justice

From a community legal service perspective, we submit that access to legal advice and representation is fundamental to the protection of human rights. At the time FLS opened in December 1972, access to legal representation in civil and criminal matters was largely dependent on income. Litigants/ accused persons might self represent, seek ad hoc pro bono assistance, or if charged with a serious offence (essentially involving trial) seek assistance through state funded schemes (the Office of the Public Solicitor and the Victorian Legal Aid Committee).

Whilst significant inroads have been made through the operation of legal aid schemes and duty lawyer services, we submit recent changes to legal aid guidelines have had a significant impact on equitable access to justice. E.g. where criminal charges are pending, an immediate term of imprisonment must be likely in order to attract a grant of aid, with extremely limited exceptions; in relation to infringement matters, an individual must owe in excess of $5,000 and have confirmed special circumstances of homelessness, drug dependence, or a mental health diagnosis, in order to attract a grant; in relation to civil debt matters, where equality of arms is often a significant issue, it is our experience legal representation is rarely available.

As such, the vast majority of those on low income engaged with the Courts are reliant on duty lawyers (subject to capacity and guidelines), charitable pro bono schemes, and/ or the assistance provided by under-resourced community legal services (often limited to advice only). Whilst statistically duty lawyers see large numbers of clients, in our submission the capacity to engage with the underlying causes of offending, make appropriate referrals, and provide detailed forensic analysis of briefs is compromised by volume. The commission of relevant evidentiary materials to be provided to the Court in mitigation of plea is also obviously compromised where no grant of aid can be obtained.

We submit the impact of economic disadvantage poverty on the right to a fair trial is a pressing issue upon which a range of other rights are entirely contingent. The narrow scope of eligibility criteria, and lack of weight given to the simple but layered circumstance of poverty, means that many with legitimate and highly entrenched disadvantage face further barriers in engagement with the justice system. We note that, whilst it remains the case that there is no right at common law to publicly funded legal representation, recent times have once again seen the stay of proceedings at the

direction of the bench due to concerns with access to adequate legal representation. Finally, from a community legal perspective, we note 'low level' offending does not generally attract attention in this discourse. The functional tendency to privilege the rights of recidivist offenders, as opposed to pursuing greater parity in provision to persons engaged with the legal system generally, has adverse impacts on early intervention and rehabilitation opportunities. Perhaps more importantly, it fails to acknowledge the potentially devastating impacts of any legal proceeding – commonly for example, crippling debt on a single parent, a criminal record for the family wage earner - and the importance of comprehensive legal advocacy to preserve and protect fundamental rights.

Recommendation 2 – That enhanced eligibility to legal assistance for persons engaged with the justice system be considered integral to the building of a human rights culture in Victoria.

C. Parliamentary processes

It is trite to say that the litmus test of human rights culture is the impact on the most economically and socially vulnerable and stigmatized communities. And yet it is historically and presently so. The two case studies we cite below provide a practical example of erosion of common law rights whilst the Charter has been in operation, with disproportionate impacts on economically and socially vulnerable communities. 'Move on' laws are examined as an example of parliamentary processes and the role of the Scrutiny of Acts and Regulations Committee ('SARC') in the passage of legislation impacting human rights; the infringements system and imprisonment in lieu are examined as an example of process driven legislation impacting human rights absent scrutiny of operational impacts by Parliament and Courts.

We submit as an overarching principle that rigorous, evidence based analysis of impacts of the law (in operation and effect), in a moral framework protective of human rights, is inseparable from building a culture committed to the meaningful protection of human rights. Central to this principle are the concept of proportionality, fairness, and substantive equality before the law. In our submission the investigation required by section 7 (2) of the Charter to date has been dealt with primarily by reference to political hyperbole. The role of the Scrutiny of Acts and Regulations Committee (SARC) in relation to this process is unclear, given the lack of clear guidance as to the relevance of 'evidence' and the professed prohibition on consideration of party policy. As outlined below, the relevance of the manner in which the SARC is constituted (parliamentary members), and the resourcing and time allocation available to SARC requires exploration also, given the current ambit of responsibility and authority with which it is ostensibly tasked.

a. Case Study – Move on powers (2009 – 2015)

The *Summary Offences and Control of Weapons Acts Amendment Bill 2009* (Vic) was introduced into the Legislative Assembly on 10 November 2009.[1] The Statement of Compatibility read 12 November 2009 concluded 'the majority of the bill is compatible with the charter because, to the extent that some provisions may limit human rights, those limitations are reasonable and demonstrably justified in a free and democratic society'.[2] The Statement of Compatibility further concluded that those aspects of the Bill incompatible would be proceeded with in the current form 'as there is considerable concern in the community about the pattern of weapons-related offending with which this legislation is considered.'[3] The SARC report published 24 November 2009 failed to make an explicit finding of incompatibility.[4] The reading of the Statement of Compatibility in the Legislative Council on 25 November 2009 confirmed the position of partial incompatibility.[5] The Bill was passed without an override declaration, and as such, the exceptional circumstances ostensibly required by section 31 were not addressed.

Concern was raised in relation to lack of community consultation prior to the introduction of the bill from experts in the field, and those working with communities perceived likely to be over-represented in engagement with the proposed laws. Despite tight timelines, thirty three submissions were provided by stakeholders, including from the Law Institute of Victoria ('LIV'), the Office of the Victorian Privacy Commissioner and the Victorian Equal Opportunity and Human Rights Commission. Concerns of stakeholders are summarized in the SARC report, but included unjustified intrusion of privacy and dignity, broad discretionary powers, profiling, discriminatory impacts, criminal penalties for previously non-criminal conduct based on predictive perceptions of future conduct.[6] Evidence was provided of interstate experience in relation to discriminatory impacts of 'move on powers'.

From an advocacy perspective, the legislation was the first to attract significant community concern subsequent to the introduction of the Charter. Neither the Statements of Compatibility nor the SARC report articulated meaningfully the evidence base justifying intrusion on protected rights, both in the balancing exercise where compatibility was found, and in the balancing exercise where incompatibility was found. In 2010, the Law Council of Australia summarized the LIV's concerns in relation to the Government's approach to this Bill as follows: 'It suggests that the Government can be selective about when to act compatibly with the Charter and can introduce laws that are incompatible with protected rights without issuing a formal override declaration, and without

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[1] Attachment 1 - *Summary Offences and Control of Weapons Acts Amendment Bill 2009* (Vic)
[2] Attachment 2 - Legislative Assembly Hansard Thursday 12 November 2009, see p 4024
[3] Ibid.
[4] Attachment 3 - Alert Digest No 14 of 2009, pp 33 - 46
[5] Legislative Council Hansard Friday 26 November 2009, 5781
[6] Attachment 3 - Alert Digest No 14 of 2009, pp 34-35

justifying the restriction of the protected right in accordance with the proportionality test under the Charter.'[7] Concern was also expressed by the LIV in relation to the absence of prior consultation, and the haste with which the Bill was introduced and debated.[8]

The *Summary Offences and Sentencing Amendment Bill 2013* (Vic) was introduced into the Legislative Assembly on 11 December 2013.[9] The amendments greatly expanded the scheme introduced through amendments of 2009, including introduction of arrest powers, and imprisonment for repeat recipients of 'move on' directions. The brief Statement of Compatibility identified rights impacted, but maintained inbuilt protections provided the required balance.[10] Ten submissions were received by the SARC, including from the LIV, the Victorian Council of Social Services and the Victorian Human Rights and Equal Opportunity Commission.[11] FLS also made a joint submission to all Parliamentarians with community legal, health, and homeless agencies.[12] To the broad range of stakeholders engaged, the unacceptable impacts on the most marginalised members of the community, and the undermining common law traditions protective of the most fundamental human rights, was evident. A research brief was generated by the Parliamentary Library and Information Service.[13] The SARC report published 4 February 2014 made no reference whatsoever to concerns raised by stakeholders, other than to acknowledge receipt of submissions, and found the Bill compatible with the Charter on the basis of the previous SARC report of 2009. The members of the SARC were divided.[14] A motion was moved (and defeated) to split the Bill on 20 February 2014. The Bill was passed by both houses on 12 March 2014, with a commitment from the opposition to repeal if brought to power.

In 2015 the *Summary Offences Amendment (Move-On Laws) Bill* was introduced.[15] The amendments were found to be compatible with the Charter. [16] Parliamentary debate focused on rights discourse, discriminatory impacts, and counterveilling public interests.[17]

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[7] Law Council of Australia, *Future Direction and Role of the Scrutiny of Bills Committee – Senate Committee for the Scrutiny of Bills*, 6 April 2010, p 22-23
[8] Ibid p 23
[9] Attachment 4 - *Summary Offences and Sentencing Amendment Bill 2013* (Vic)
[10] Attachment 5 – Legislative Assembly Hansard Thursday 12 December 2013, pp 4680 - 4683
[11] Extracted from SARC http://www.parliament.vic.gov.au/sarc/article/916
[12] Attachment 6 – *'Proposed Changes to the Law Impacting Clients of Community Sector Organisations'*
[13] Attachment 7 – Parliamentary Library and Information Service, *'Summary Offences and Sentencing Amendment Bill 2013'*, No 4 February 2014
[14] Attachment 8 – Alert Digest No 1 of 2014, pp 24-26
[15] Attachment 9 - *Summary Offences Amendment (Move-On Laws) Bill 2015* (Vic)
[16] Alert Digest No 1 of 2015, p 13
[17] Attachment 10 – Legislative Council Hansard Tuesday 17 March pp 513-540

In relation to the above case study, it is difficult to identify from advocacy perspective how the Charter has strengthened human rights culture in the context of the Parliamentary process. It is deeply concerning that the Charter may in fact be relied on as a procedural vehicle to justify erosion of entrenched and hallowed common law rights through a 'balancing exercise' requiring nothing in the way of evidence.

FLS does not have expertise to identify the manner in which the SARC should ideally operate. However, we note the independence of the SARC is a matter requiring further investigation. Positioning along party partisan lines has been commented upon by the LIV amongst others. In addition to the above case study, see for example the 14 September 2011 SARC Charter review report, in which the coalition majority recommended limiting the Charter to parliamentary scrutiny.[18] We also note the time allowed and resourcing allocated to production of reports of the SARC, as well as the timing of this remittal being subsequent to the introduction of Bills, raise questions as to whether human rights discourse is being integrated in an optimal fashion into the parliamentary process.

In our submission the most fundamental question is as to the appropriate role and ambit of authority of the SARC. It would seem the balancing exercise envisioned by section 7(2) requires consideration of evidence and policy objectives. The approach of identifying compatibility in the absence of both is somewhat confusing. The exercise, from a bystander point of view, does not require summary of relevant precedent internationally, partnered with a non-critical reference to political rhetoric. It would seem the requirement to assess 'reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom' having regard to the enunciated factors requires localized analysis of evidence relating to the necessity and operational impacts, and existing common law precedent. We do not submit the SARC is the appropriate body to conduct the section 7(2) exercise, we merely note the role of the SARC is unclear. It may or may not be that the balancing exercise most appropriately remains within the political sphere.

We put forward the following as matters for investigation. The SARC is constituted in a manner ensuring independence, and its ambit is clearly identified to include/ exclude policy and evidence considerations. As such, either submissions on evidence and policy would be formally invited and considered, or, a thorough analysis of the existing state of law in the absence of evidence and policy is provided to inform parliamentary debate only. In the former instance, which would require

[18] Law Institute of Victoria, *'Government Interim Review – The LIV rates the Victorian Coalition Government on its performance so far on access to justice, sentencing and protection of rights'*, Law Institute Journal, September 2013, p 21

greater resourcing, assessments of compatibility/ incompatibility would result in override declarations preserving Parliamentary sovereignty, but providing a layer of transparency. In the latter instance, the process may be used to enhance discourse in the parliamentary and public realm regarding human rights, but the SARC would not generally be tasked with making an assessment on compatibility. Again, we reiterate, FLS as a community legal service does not have adequate expertise to advocate for a preferred model. However, we do put forward the recommendation below as within our experience.

Recommendation 3 – The SARC be investigated in relation to ambit of role, independence, transparency, accountability, adequate resourcing, and optimal contribution to discourse regarding protected human rights.

b. Case Study 2 - Infringements

The most common legal issue dealt with by the FLS free legal advice clinic is infringements, the vast majority of which are issued, not by Courts, but by agencies such as local councils, toll road operators, and police. This reflects the global environment in Victoria in relation to financial penalties. For example, in 2012-13, 114,034 Court fines were imposed, whilst during the same time period close to 6 million infringement notices were issued by over 120 different agencies Victoria wide.[19] Around one third of infringement notices are not paid and result in enforcement orders, with the value of warrants issued in 2012-2013 being $470,597,136.[20]

We note that Court fines (as opposed to infringements) are informed by ordinary sentencing principles, i.e. 'that the punishment for an offence be proportionate to the offence committed, and that the law should have equal effect, regardless of a person's financial position. The latter principle informs the requirement in sentencing that a Court must take a person's financial circumstances into account when setting a fine amount.'[21] This is not the case in relation to infringement notices, which allow only extremely limited avenues to review of the principles of proportionate punishment and equality before the law.[22] Generally, the *Infringements Act 2006* (Vic) is concerned with procedurally ensuring payment of financial penalties and costs, through payment plans, powers to seize property, approval of community work, or facilitation of imprisonment in lieu. A specific exception arises

[19] Sentencing Advisory Council, *'The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria: Report'*, May 2014, p 61
[20] Ibid p 62
[21] Ibid pp 36 - 37
[22] In some infringement matters, specific defences may be raised, for example in relation to tolls under the *Melbourne City Link Act 1995* (Vic) s 73(1).

where 'special circumstances' are present (homelessness, mental/ cognitive incapacity, serious drug addiction) such that legal capacity or mens rea in relation to the 'offending' conduct is not made out.[23]

FLS routinely represents persons in the 'special circumstances' list, appeals against non-revocation of infringements, and penalty enforcement hearings. Poverty is not a consideration that can be raised in isolation until warrants are executed and imprisonment in lieu is being considered by the Court - *Infringements Act 2006* (Vic) section 160. At that stage, consideration must be given as to whether 'having regard to the infringement offender's situation, imprisonment would be excessive, disproportionate and unduly harsh', and the Court may discharge the infringements in whole or part.[24] Where section 160 has been relied upon, and a payment plan is in place, a default may result in immediate imprisonment without being brought before a Court. It is unclear at present whether the Court has power to vary such an order even where circumstances have materially changed. We attach a transcript of proceedings relating to this question[25], and a recent report published by Victoria Legal Aid relating to a client assisted by the FLS.[26] In relation to the former matter, our client had become legally blind since the section 160 order was imposed, and as such was unable to continue to work and make repayments. In the latter matter, our client was in treatment for cancer at the time he defaulted on payment. His incarceration interrupted his treatment, and it was only due to the representations of his wife, who does not speak English and attended numerous times at our free legal advice clinic, that a Court hearing was able to be pressed.

From a community legal centre perspective, the overwhelming majority of those who appear before the Court on unpaid infringement matters are greatly disadvantaged through socio-economic circumstance. Without the advantage of funding for a car space, a bank account balance that can accept automatic top ups from toll roads, finance to drink in authorized establishments, the funds or foresight to ensure their myki cards are topped up, or the legal literacy to comprehend the complex regulatory framework in which we live, the impacts of the infringements system can be and are devastating to the communities we work with on a psychological, social, and economic level. As poverty does not attract a grant of legal aid, with the threshold requiring also proof of special circumstances and fines in excess of $5000, many community members proceed as self represented litigants or through the assistance of the duty lawyer present on the day. This is despite the

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[23] *Infringements Act 2006* (Vic) - section 3
[24] Ibid – section 160(3)
[25] Attachment 11 – Victoria Legal Aid, *'When the law says you don't need to ask why: how a cancer patient ended up in prison'* Wednesday 10 June 2015
[26] Attachment 12 – *'Magistrates court transcript in relation to Accused in Penalty Enforcement Hearing to vary/ revoke order previously made – Breach to attract imprisonment in lieu'*

extraordinary quantum of debt frequently involved, and the manifest risks that present in relation to long term payment plans. Additionally, without aids of grant, evidentiary materials that might support exercise of discretion are difficult to obtain. It is the experience of the FLS lawyers that infringement matters are highly contested, as compared with criminal proceedings, with multiple prosecuting agencies present, and zealous submissions opposing the nexus between any extenuating or special circumstances and the 'offending'.

It is our submission that the infringements system, which bears few of the hall marks of due process and substantive equality, raises significant human rights concerns - including the right to equality before the law, right to a fair trial, freedom from arbitrary detention. We note the report commissioned by the then Attorney General in early 2013, authored and published by the Sentencing Advisory Council in May 2014, identifies a range of considerations relevant to charter rights – proportionality, equality before the law, fairness, parsimony, parity – but does not, in close to 800 pages, reference the Charter itself.

Recommendation 4 – That the Government assess *the operation and effect* of existing legislation against Charter rights, and explore a mechanism by which infringement might be investigated and reported upon.

Conclusion

The FLS expresses gratitude for the opportunity to make submissions in relation to this review. We welcome queries or further discussion in relation to any matters raised herein through this process or otherwise.

Yours faithfully

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