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**A Community Legal Centre**

15 June 2011

Mr. Edward O'Donohue, MLC  
Chairperson  
Scrutiny of Acts and Regulations Committee  
Parliament House  
Spring Street  
**EAST MELBOURNE VIC 3002**

By email: [charter.review@parliament.vic.gov.au](mailto:charter.review@parliament.vic.gov.au)

## Inquiry into the Charter of Human Rights and Responsibilities

Fitzroy Legal Service is pleased to have the opportunity to respond to the Government's review of the Charter of Human Rights and Responsibilities Act 2006 ('the Charter'). FLS regards this process as an important opportunity to strengthen the legal protection and practical realization of human rights in Victoria. In this submission we will be addressing the Terms of Reference as set out in the guidelines established by the Scrutiny of Acts and Regulations Committee.

### **Overview - about Fitzroy Legal Service**

Fitzroy Legal Service (FLS) is Victoria's first generalist community legal service. Since it was established in 1972, we have assisted over 70,000 clients through our legal advice clinics, which operate five nights per week.

As well as a night service, we operate a casework practice representing individuals in court and have a strong commitment to community legal education and law reform. We also have over 170 volunteers actively involved in all areas of our work.

The organisation seeks to work with the local community as well as make a contribution to broader policy debates. Like many other CLCs we have a long tradition of advocacy on a range of issues and take pride in the ability to work with those who do not have the means to make their voices heard.

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The clientele of the legal service is diverse in both cultural and linguistic background, and the range of legal matters which we take on is very broad. The majority of our clients are either on low incomes or in receipt of some form of government benefit.

### **1. Should the Charter include additional rights including economic, social, cultural, children's, women's and self-determination rights**

The language of human rights is an international language which has grown from pre-emptory norms designed to reflect the standards of rights accepted at an international level. As such, Australia is a signatory to a number of international treaties including the International Covenant on Economic, Social and Cultural Rights, which ensures the protection of social and economic rights for all citizens. Victoria is committed to just and fair outcomes for all Victorians and legislative recognition of human rights works towards achieving this commitment. The inclusion of social and economic rights in the Charter would ensure that the protections that matter most to the community are enshrined in legislation. We note that in 2005, an overwhelming number of submissions were received by the independent committee investigating the viability of a Charter of Human Rights. Out of the 2500 submissions, approximately 84% (or 92% if we include petitions) supported the improvement of the law via a Charter of Human Rights. We note that many of these submissions (42%) also supported the inclusion of social and economic rights even though the original terms of reference were focused only on civil and political rights. It is imperative that in our proud democratic society that our laws are compatible with and adhere to international standards as enunciated in the various treaties we have ratified. In doing so, we can ensure that all people live with dignity and have the opportunity to participate fully and equally in our community.

#### **Self determination**

We note that in 2010, the Victorian Equal Opportunity and Human Rights Commission ("the Commission") conducted a state-wide consultation on the issue of Aboriginal self determination. The Commission's evidence from the consultation strongly supported the issue of self-determination. FLS therefore endorses the Commission's report in this regard and submits that self determination should be included in the Charter.

### **2. Should there be mandatory regular auditing of public authorities?**

Transparency and accountability of institutions are imperative to support the effective operation of democracy. For this reason, FLS strongly supports the mandatory regular auditing of public authorities in order to ensure that consideration of protected rights and consistency of compliance is promoted. Victoria already relies on mandatory reporting tools to ensure better government such as legislation concerning freedom of information and occupational health and safety laws.

The additional burden of reporting on public authorities need be no greater than other schemes that have recognised the public interest in promoting uniform compliance.

Furthermore, the regular auditing of public authorities plays a vital role in identifying systemic issues and structural issues that can inform Parliamentary and community debate.

### 3. Effects of the Charter

All comments in this section relate to our direct experience as a community legal service in relation to the Charter. We do not seek to report on matters in which we have not had direct involvement, as there are others who are better positioned to provide systemic commentary.

We submit that the obligation to consider and report on Charter implications has worked effectively to focus at least some debate, lobbying, and development/drafting on the balancing of individual rights against collective concerns, in a manner that references not only protected rights under the Charter, but the legal principles underpinning them in a structured and analytical manner. In lobbying to influence development and drafting, Charter rights have provided a useful reference point for stakeholders and community to share their views, and to discuss balancing competing considerations in a productive collegiate way (even where disagreement is stark).

We have been disappointed however at the failure of the Government to engage with protected rights in a meaningful fashion particularly in the sphere of law and order.

#### The development and drafting of statutory provisions

Whilst there has been some disappointment at times in relation to failure to engage in meaningful consideration and debate regarding protected human rights, from our perspective the Charter broadly has a positive effect on developing and/or drafting of legislation. The Charter provides a localised and accessible opportunity to reflect on the powerful historical lessons that have informed human rights advocacy. It has enabled broad education about the legal doctrines that underpin and support democratic representative government and to encourage critical observation of political processes and debates in the present. Finally, it has increased public awareness of the importance of credible and independent information sources as a component of effective democratic engagement. As such, the Charter provides an improved opportunity for meaningful community participation in the development and drafting of law.

#### *Case study – Severe Substance Dependence Treatment Act*

FLS circulated a briefing paper in partnership with other community legal sector organisations through the drug and alcohol service delivery sector regarding the protected human rights implications of proposed legislative reform to detain substance users for treatment in the absence of offending.

The Charter provided a principled approach to enunciate shared concerns and lobby for appropriate protections that could balance (a) concerns for the safety and welfare of people experiencing severe substance dependence with (b) protected human rights such as freedom of movement, freedom from forced treatment and right to a fair trial.

Lobbying influenced the framing of the legislation to some degree, and protections drafted, primarily as a result of pressure through the community sector to ensure any treatment regime was human rights compliant in delivering health services. Human rights compliant health service provision was a shared objective for most across fields. Negotiating the viability and terms of the law included a broader range of community and service provider expertise (through engagement with Charter principles in lobbying) than otherwise would have been the case. This was a positive process, and has flow-on effects in the sense of mainstreaming legal principles (pre-existing but reflected in an accessible/ localised way by the Charter). The process is likely to also encourage evidence based practice and rigour in decision-making processes outside the legal sphere.

Further consideration of these processes is dealt with under section 5- options for reform and improvement.

## Consideration of statutory provisions by Parliament

The assessment process undertaken by the Scrutiny and Acts Regulations Committee (SARC) has provided a useful opportunity for advocates and members of the public to put forward their views. In our experience the opportunity to frame concerns in terms corresponding to those SARC is empowered to consider facilitates critiques of a more analytically thorough nature to be put forward. Furthermore those matters reported against by SARC, and the expectation of that formal process, plays a significant role in mainstreaming civil & political rights. It also performs an educative role around the balancing processes that apply in the context of human rights law. Additionally, parliamentary debate may, explore these matters in a meaningful way through the discussion of the merits and deficits of legislation through a human rights perspective. This provides concerned members of the public an opportunity to have specific issues raised. Further consideration of these processes is dealt with under section 5 options- for reform and improvement.

## Provision of services & other functions by public authorities

In our experience, the commitment of public authorities to Charter obligations vary significantly, depending on the nature and culture of the public authority (or the relevant department thereof). It also varies according to where that public authorities' responsibilities and aspirational commitments primarily lie. In most cases where advocacy has included submissions regarding infringement of protected rights, other laws are also used to support the advocacy, for example, anti-discrimination law, privacy law, common law, constitutional law, international human rights law jurisprudence. The Charter has assisted to frame and specify concerns and provide support for the validity of consideration of these concerns by public authorities.

### *Case Study - Local Councils*

FLS has made submissions to local councils regarding (a) use of public space & (b) freedom of association and freedom of expression.

In both cases, Charter rights provided a useful framework to engage in discussion regarding the competing interests before Council, and to ground the concerns put forward by us on behalf of our clients/ service in the requirement to take these matters into consideration. In one matter, debate proceeded from a more or less shared understanding of the competing social concerns and Charter obligations at play, leading to the adoption of follow up monitoring procedures and investment in measures to ameliorate negative impacts on protected rights. In the other matter, a shared understanding regarding the Charter rights infringed and requirement to give real consideration to the same was unable to be reached, and is likely to be referred to the Victorian Ombudsman for investigation. In both cases, the principles and values underpinning the Charter rights and their importance were formally recognised by Council.

### *Case Study - Department of Human Services*

FLS has recently had opportunity to develop submissions on behalf of public housing tenants with concerns about the anti-social behaviour pilot policy, unintended impacts, and its interaction with protected Charter rights. The submissions derived from - presumably unintended – potential detrimental impacts of the terms of the policy for persons experiencing mental illness, their care givers/ families and victims domestic violence and their children. Matters of procedural fairness, rights of families and children, and right to privacy have been included in this context as Charter rights which the Department is obliged to consider.

The Charter provided an empowerment framework (relating to rights) for these submissions to derive from that, although referencing other areas of the law that are more technical, provides legitimate avenue for the very human experiences/ fears of our peer partners to be communicated to government as deserving of consideration as a matter of legal principle (as opposed to political responsiveness, which may be challenging where minority interests are engaged).

### Litigation and the roles and functions of the courts

FLS submits that the courts play an integral role in developing Charter jurisprudence by hearing and determining matters that raise Charter issues. The courts also play an important role in identifying when public authorities have breached their human rights obligations pursuant to the Charter. Transparency and accountability mechanisms such as these are imperative for good government and democracy. FLS has used the Charter in litigation and court proceedings in a number of ways including those outlined in the case studies below.

#### *Case study - Victims of Crime*

FLS utilised section 17 of the Charter (the protection of the rights of families and children) in establishing cogent reasons why a child chose not to testify against her alleged perpetrators in a criminal trial. FLS successfully advocated that the protection of her rights as a child and the protection of her family unit should be given due regard when taking into account her choice to not provide witness testimony.

Our young client and her family did not feel that our client's best interests would be looked after by putting out client through the process of prosecuting her perpetrators. Our client's relatives were concerned about the harm our client and her family would suffer if she provided witness testimony and was subjected to cross examination.

The Tribunal accepted our arguments and granted special financial assistance in recognition of the trauma involved in her particular circumstance.

#### *Case Study - Bail applications*

FLS has also utilised the Charter on a number of occasions when applying for bail applications. There is a presumption that bail will be granted rather than denied which may be read into the procedural fairness provisions. The presumption of innocence is a fundamental human right which is enshrined in the Charter through the procedural fairness provisions and has been successfully used in this regard.

### *Case Study - Tenancy applications*

FLS was involved in a case where allegations of police providing information to the Department of Human Services (DHS) after they had raided a tenancy for a drug related charge. The DHS then used this information to attempt to evict our client for a contravention of the Residential Tenancies Act for illegal activity, even though our client up until that time had not been charged with any offence. The DHS sought an order for possession and to evict the tenant immediately. The tenant was wheelchair bound, had very limited knowledge of English, and was also suffering from mental health issues. FLS argued that the DHS had a duty of care to the tenant, firstly as they suffered from illness and injury, but also in a broader sense of a persons right to accommodation. The argument was also, under the Charter, that DHS were acting contrary to the presumption of innocence, and that additionally, there had been a breach of procedural fairness, as the tenant was being evicted before there had been a criminal charge of any kind. The case was successfully settled with the district nurses finding the tenant alternate accommodation. This case stood for two important principles, namely the presumption of innocence and procedural fairness.

### Availabilities of remedies for infringement of rights

Stand alone remedies should be available upon findings of an infringement of rights, and should allow for an award of damages where appropriate. Whilst administrative structures exist such as the Ombudsman or complaint and dispute resolution bodies, non-government “public authorities” are not accountable to these bodies.

Clear, timely and effective accountability mechanisms and remedies are essential when human rights have been breached so that communities are able to access justice and the courts should have the discretion to award damages where it is considered appropriate. We endorse the position of the Human Rights Law Centre in recommending an amendment to section 39 of the Charter (legal proceedings) to achieve this aim.

### **4 .What have been the overall benefits and costs of the Charter?**

The most significant benefit of the Charter from the perspective of FLS has been its impacts from an empowerment and educative framework. The mainstreaming of human rights discourse has been a legal discussion picked up most enthusiastically, not by lawyers, but by community members. This is significant as the Charter’s ‘dialogue model’ is aimed at prevention, rather than litigation. It is also significant as the FLS delivers community development support and community legal education in a framework committed to promoting access to justice. The language of human rights from our vantage point plays an important role in promoting the following

- (a) Positive engagement with the law generally as a mode of protecting rights
- (b) Mutual responsibility to observe the law and respect other’s rights
- (c) Self-esteem building and empowerment for people experiencing or who have experienced extensive discrimination and stigma
- (d) Tool for acculturation and education regarding the system of law underpinning representative democracy and protection of minorities

**Community Development** - FLS received local Council funding to promote human rights with celebrations under the banner 'Human Rights are for Everyone!' The events included activities with homeless communities, local Aboriginal communities, people experiencing alcohol and other drug dependence, newly arrived and refugee communities, and Council workers to celebrate and explore the themes of human rights on a strong community participation model. The positive impact of these events was the reinforcement of the value that, regardless of experiences of poverty, hardship, discrimination and stigma, the inherent value of all people is recognised by the law and a cause for positive celebration.

FLS has also worked with community advocates and workers on providing education about the Charter and the relevant protected rights .

**Community Legal Education** - FLS routinely conducts legal education sessions on access to justice issues and the legal system as a core activity. These sessions frequently include education and discussion about the Charter. The sessions are aimed at diverse audiences including new arrivals, young mothers, CALD communities, service providers and general community. The feedback from these sessions has been overwhelmingly positive, with community groups eager to discuss their experiences of human rights protection in Victoria.

From our perspective, the "costs" of the Charter are incurred where community expectations are raised that consideration will be given to Charter rights in developing, drafting and considering legislation, and by public authorities in development of policies/ decision making that are not realised. These costs affect the confidence with which members of the public regard law and law-makers, and are dealt with further in section 5 (options for reform and improvement).

## **5. What options are there for reform and improvement?**

The powers of SARC to scrutinise Bills, request further explanation, and make declarations of incompatibility do not seem to be treated, with sufficient gravitas by Parliament. For example, failure to respond meaningfully to requests for further explanation or evidence from SARC, responses to critiques of legislative framing that rely on appropriate use of discretion that is human rights compliant, use of override declarations without providing adequate evidenced justification for necessity.

This creates a disjunct between expectations on public authorities as opposed to Parliament, and indicates human rights compliance is not yet regarded as a reflection of the quality and integrity of the relevant legislative instrument. Whilst Victoria is in the early stages of developing a culture of legitimacy around human rights norms, failures by the legislature to invest greater authority in SARC processes do not provide a good example of leadership for the rest of the community. Endowing greater powers with SARC may go some way to expressing commitment to human rights considerations as a legitimised and intrinsic mode of considering new development of law.

The human rights compliance of public authorities should not rely on individuals to initiate scrutiny, having regard to the power differentials that may be engaged. This is especially so having regard also to the community interest in compliance with the fairly minimal expectations put forward in the Charter.

The exemption of prison administration and custodial officers from the category of 'Public Authority' as defined in the Charter should be removed. FLS believes this exemption is unreasonable, as prisoners are subject to high levels of state control and corresponding vulnerability to the most serious forms of abuse of human rights.