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Victorian Aboriginal Legal Service Co-operative Limited (VALS) submission to the Human Rights Consultation Committee in response to 'Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee' – sent 17 February 2006 (revised version of submission sent on 1 February 2006)

Thank you for the opportunity to comment on the Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee. The following rights are concentrated on in this submission: self-determination, economic, social and cultural.

SUMMARY

VALS believes that a Charter of Rights such as that proposed by the Human Rights Consultation Committee is a valuable first step to consolidation and improved recognition of rights in Victoria.

VALS believes that the timelines for this review into whether Victoria should have a Charter, the structure of the Committee, the brief from the Government to the Committee and the content of the Committee's recommendations were less than optimal and in many respects failed to consider systemic disadvantage faced by Indigenous Australian people.

The failure to include the right to self-determination in the Charter is unacceptable and the Committee's reasoning put forward for the decision is inconsistent with the views of the Dr William Jonas, the Aboriginal and Torres Strait Islander Social Justice Commissioner in 2002, and against the spirit if not the letter of State Government policy. Given the State Government's diverse effort to improve Indigenous Australian people's rights the Charter's exclusion of self-determination from the Charter is a poor reflection of existing good practice and a similar position to the anti self-determination policies advocated by the Commonwealth Government.

The right to self-determination is included in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESC) (Article 1 respectively). The Commonwealth Government has been opposing the right to self-determination at both an International level and at a domestic level via a range of policies including mainstreaming services and tendering out funds for services. There is no evidence that the State Government supports these measures.

At an International level, the Commonwealth Government has been putting the argument that the right to self-determination is synonymous with support for secession. The Aboriginal and Torres Strait Islander Social Justice Commissioner Report (2002) makes it abundantly clear that this argument is mischievous and wrong in political and legal terms. Dr William Jonas says, "...it is a deliberate untruth aimed at raising fear and opposition from non-Indigenous people" (48). (2002) The Monash University Castan Centre for Human Rights has provided a detailed critique of the Expert Committee's arguments for not

including self determination. This is included as Attachment One to this report. The Castan centre memo makes it clear that self determination should be included in the Charter.

In practical policy terms, the State Government via the Victorian Aboriginal Justice Agreement and via Aboriginal Affairs Victoria's policy work on Indigenous Representative Arrangements, post the abolition of the Aboriginal and Torres Strait Islander Commission, has indicated a commitment to recognition of the right to self-determination and exploring ways to make it a tangible reality. This is in marked contrast to the Commonwealth policy framework.

There is no practical problem with including the right to self-determination in the Charter. If the State Government is concerned that there may be better ways to define the right to self-determination, or that there will be developments in the United Nations or case law which make the definition more clear, then a win-win approach would be to include in the Charter the existing definition of self-determination in the ICCPR and review its appropriateness in the Charter in four years.

Article 1: All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development

If the above recommendation is followed then this would mean that there are four years to use the above definition of the right to self-determination as a guide. The inclusion of this definition would also demonstrate to the Commonwealth Government, in a practical way, that the right to self-determination is not a threat to the sovereignty of Australia.

The arguments made by the Committee to exclude the right to self-determination from the Charter partially rely on the idea that Indigenous Australian rights are best protected by generic protections, rather than specific protections. Indigenous Australian academic Professor Larissa Behrendt is quoted in the Committee's Report as supporting this view. VALS does not believe that this 'either/or' approach is consistent with Behrendt's approach in her book *Achieving Social Justice (2003)* or comments that she made on August 10th at a Melbourne forum about the Charter. Some State Government policies and the analysis by Behrendt exemplify the value of a 'both/and' approach which values both generic and specific policies to protect rights.

VALS strongly urges the State Government to include the right to self-determination in the Charter as it is consistent with the State Government's practice and policy of recognising the unique culture and skills of Indigenous Australians. It is also consistent with the demonstrated benefits of greater Indigenous peoples' involvement in deciding matters that affect their daily life.

Also, VALS is disappointed that inclusion of social, economic and cultural rights in the Charter has not occurred. Nor is there any proposal for policy or bureaucratic measures to ensure that Government policy is better informed by these rights ahead of the review that is to occur in four years time.

VALS suggests that the State Government is in a strong position to demonstrate practically, that self-determination, like all the other Civil and Political rights, can usefully and safely be included in a Charter.

INTRODUCTION

In this submission VALS is critical of the Human Rights Consultation Committee's arguments that lead to the exclusion of the right to self-determination and economic, social and cultural rights from the Charter of Rights.

There was a relatively high level of input by Koorie individuals and organizations to the review as to whether Victoria should have a Charter. Unfortunately, the Recommendations made by the Committee fail to reflect many of the concerns that Koorie people had.

The high level of input occurred in spite of wide ranging criticism about the short timelines, the narrow terms of reference, and the absence of a Koorie person on the Committee.

Right to self-determination

The Charter should recognise the right to self-determination. The Charter should include the definition of the right to self determination in the ICCPR and review the inclusion of this right in the Charter in four years:

Article 1: All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development

The Committee's Basis for Rejecting the Inclusion of the Right to Self-Determination in the Charter

The Monash University Castan Centre for Human Rights has provided VALS with a detailed critique of the Expert Committee's arguments for not including self determination. This is included as Attachment One to this report. The Castan centre memo makes it clear that self determination should be included in the Charter.

The Committee appears to believe that the right to self determination is something to be feared as is reflected by the following quote:

“[t]he Committee is concerned that, in the absence of settled precedent about the content of the right as it pertains to Indigenous peoples, the inclusion of a right to self-determination may have unintended consequences.”

There has seldom been a piece of legislation which does not have unintended consequences so it is difficult to contest this assertion by the Committee.

The Committee's argument about the 'unintended consequences' of introducing the right to self-determination in the Charter is an argument that invokes emotion rather than an objective risk assessment of the impact of implementing the right to self-determination in Australia.

If Government's or communities waited for 'settled precedent' prior to doing anything the role of Governments in making legislation would be very limited. Deferring consideration of

self-determination until there is settled precedent is tantamount to deferring it for a very considerable time.

'Both/and' Approach versus an 'Either/Or' Approach to Self-Determination

The Committee uses the argument that generic measures are best advanced through laws that are applicable to everyone as a rationale for excluding the right to self-determination from the Charter. This position excludes the both/and option of generic and specific protections.

The Committee Report does not specifically address the issue of formal versus substantive equality but in the discussion of individual versus group rights it says: "Although the Committee recognizes that many people see their rights as having a communal aspect, we note that generally human rights are seen as attached to individuals. Therefore the Committee believes that the Charter should only confer rights upon individuals" (pg.51). VALS believes that this approach will disadvantage cultures which place less emphasis on individual rights. It is a form of systemic disadvantage. It is also another example of unnecessary use of 'either/or' thinking. It is open to the Committee to include individual and group rights in the Charter, which is a 'both/and' approach.

One who takes a 'both/and' approach argues that there is a place in a Charter for *both* rights that reflect the theory of 'formal equality' *and* rights that reflect the theory of substantive equality. These two notions can co-exist. This would mean that the Charter could apply to individuals and groups and include generic and specific provisions.

The 'both/ and' approach is adopted by the Committee in part as it applies this approach to cultural rights. However, the Committee does not apply this approach to the right to self-determination and VALS is critical of this inconsistency.

Committee Report is In Line with Commonwealth Government Policy on Self-Determination

The Commonwealth Government refuses to recognise the specific right of Indigenous Australians to self-determination. This stance is influenced by the Government's fear of the right to self-determination, in terms of it leading to secession.

Similarly, the Committee quotes the historical use of the term in relation to secession and the fear of "unintended consequences" to argue that the right to self-determination is too risky to consider including it in the Charter.

According to Dr William Jonas, the Federal Government's rejection of the right to self-determination relies upon:

"...inflammatory, provocative untruths" which is shown by the "suggestion mysteriously made 'by some' but clearly endorsed by the government's uncritical recitation of it, that self-determination may amount to a unilateral right to secede from Australia (47). He states that "...there is no historical precedent or basis in international law for the suggestion that a state could be dismembered unilaterally. It is in fact such an absurd suggestion that the only

conclusion that can be drawn from the Government's reliance upon it is that it is a deliberate untruth aimed at raising fear and opposition from non-Indigenous people" (48). (2002)

The verbal advice that VALS has received from legal academics is similar to the view of Dr Jonas, that the idea of secession is nonsense and would only ever be possible by consent.

The Castan Centre for Human Rights has suggested that the concept of self-determination is more usefully thought of as an evolving set of policies and practices. The Castan Centre suggest that Anaya (1996, Indigenous Rights and International Law) explains this well. Anaya suggests that self-determination has a 'constitutive' aspect, relating to the requirement that the governing institutional order be developed through the will of the peoples governed. It also has an 'ongoing' aspect, which means that the governing order be one that people can live in, and develop freely within, on a continuing basis (p 81). He suggests that de-colonialisation does not require turning the clock back but that remedies can be developed in accordance with the present day aspirations of the aggrieved peoples (from p 83)

This approach suggests that the Committee approach, which is to wait until there is certainty about what self-determination means, misses the point that the meaning of self-determination will evolve on the basis of practice, policy and dialogue.

Anaya also suggests five standards which are really elements of self determination:

- Nondiscrimination;
- cultural integrity, (eg: right of self-definition - in terms of the basic concept of Aboriginality (recognised by, and accepted as) Aboriginal peoples are entitled to determine who is an Aboriginal person, and eg: cultural heritage rights - right to adequate protection by appropriate procedure)
- lands & natural resources, (eg ref to recognition and affirmation of existing Aboriginal rights/native title rights. –
- social welfare and development, and;
- self government (especially in matters re indigenous internal and local affairs, including culture, religion, education, information, health, housing, economic activities etc as per the Draft Declaration on Indigenous peoples Art 33) (see chapt 4 Anaya).

VALS support for an evolving 'Both/And' Approach to self-determination

VALS supports the 'both/and' approach to self-determination eg generic protections which (at least on paper apply to all) and specific protections where necessary which apply to minorities. This approach has already been partially adopted by the Victorian Government. The Victorian Government policy is reflected in the document titled 'A Fairer Victoria' and 'Victorian Aboriginal Justice Agreement' (VAJA) and Aboriginal Affairs Victoria's policy work on Indigenous Representative Arrangements post Aboriginal and Torres Strait Islander Commission. The VAJA is underpinned by the recognition of the specific right of self-determination as it is based on the Government working in partnership with the Victorian Aboriginal community. The VAJA has introduced initiatives such as the Koori Court, which

empowers Elders/Respected persons. Also, Section 4 of the VAJA articulates a commitment to consult with Indigenous Australians.

It is interesting, in light of Anaya's idea of an evolving understanding of self-determination that the Victorian Government is now renegotiating the VAJA. This highlights the idea of self-determination as something which evolves in response to circumstances, relationships and knowledge.

In contrast, the Commonwealth Government has opposed the right to self-determination, at an international and national level. The Howard Government has often expressed its concern that Indigenous self-determination implies, or eventually leads to, demands for secession and the establishment of a separate, independent Indigenous State or States.¹

Commonwealth Liberal Government Opposition to Self-Determination at an International level

Dr William Jonas, the then Aboriginal & Torres Strait Islander Social Justice Commissioner, in his Social Justice Report for 2002, argues that the right to self-determination is understood as a collective right, and as a right to distinctiveness or cultural identity, and furthermore that this right is granted on the basis of a complex, cultural, pre-modern relationship with the land. It is based on the belief that Aborigines are substantively distinct from the 'mainstream' Australian society, and the Government that represents it. As such, Indigenous peoples who declare their right to self-determination perceive themselves as autonomous or sovereign in some way.

Dr Jonas's conclusion is a logical outcome of the following arguments:

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) offers a much deeper and revealing definition of self-determination (cited in the Social Justice Report 2002, p.19) than the simple principle noted by the Committee that self determination means 'decision-making' :

“[Self-determination is] an ongoing process of choice for the achievement of human security and fulfillment of human needs with a broad scope of possible outcomes and expressions suited to different specific situations. These can include, but are not limited to, guarantees of cultural security, forms of self-governance and autonomy, economic self-reliance, effective participation at the international level, land rights and the ability to care for the natural environment, spiritual freedom and the various forms that ensure the free expression and protection of collective identity in dignity.”
(emphasis added)

The last two lines of this passage indicate that these 'guarantees' listed under the right to self-determination all support providing Indigenous peoples with the right and/or capacity to live and be recognised as 'collectives' (ie. as 'a people') that are distinct from the 'mainstream' of the modern, post-colonial society. Working from UNESCO's loose definition of self-determination, it can be understood as a) a necessarily collective right, and

¹ For example, see the quotes from P. Ruddock, then Minister for Aboriginal and Torres Strait Islander Affairs, on pages 33-4, 36 & 38, of the Social Justice Report 2002.

b) a right to 'difference', to be recognised as belonging to a substantively distinct culture, community or people. These two aspects of self-determination are inseparable and should really be thought of as two sides of the same coin. (This is especially so in the modern liberal society, in which Indigenous peoples declaring their right to self-determination see themselves as a collective distinct from the individualist mainstream.)

The distinctiveness of Indigenous peoples is granted on the basis of their status as the "First Peoples" of the country, and the unique needs, values and beliefs that arise from this special relationship to the land. Cobo (as quoted in the Social Justice Report 2002, p.16) says:

"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or part of them. They form at present, non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."

The right to self-determination is therefore particularly important for Indigenous peoples because of the strong relationship between land and culture. Daes (quoted in the Social Justice Report 2002, p.24) provides four points on the importance of land for Indigenous self-determination: "(i) a profound relationship exists between Indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to Indigenous peoples' identity, survival and cultural viability."

Dr Jonas continues by making an argument to allay the concerns for the Government. Contrary to the Federal Government's fears, the above concept of self-determination does not necessarily entail challenging the territorial integrity of Australia and demanding an independent and autonomous Indigenous State. First, not only are such concerns unfounded in Australia, where the Indigenous population is so small and dispersed and claims for secession have not been made (p.27), but "the equation of self-determination with secession is made without reference to the existing state of international law and without an eye to history." (p.26) For example, where a right to self-determination has been drafted, as in the Draft Declaration on the Rights of Indigenous Peoples, provisions are included that protect the territorial integrity of states (p.11, 26).

According to Jonas, the Federal Government's rejection of the right to self determination relies upon:

"...inflammatory, provocative untruths" which is shown by the "suggestion mysteriously made 'by some' but clearly endorsed by the government's uncritical recitation of it, that self-determination may amount to a unilateral right to secede from Australia (47). He states that "[there is no historical precedent or basis in international law for the suggestion that a state could be dismembered unilaterally. It is in fact such an absurd suggestion that the only

conclusion that can be drawn from the Government's reliance upon it is that it is a deliberate untruth aimed at raising fear and opposition from non-Indigenous people" (48).

It is difficult to understand why the Committee's approach to self-determination is similar to the Commonwealth Government position after the Social Justice Commissioner has so strongly criticised the Commonwealth Government's understanding of the issue as flawed.

Commonwealth Policy within Australia

At a National level the Federal Government has adopted a policy of mainstreaming Indigenous services and in some cases putting Indigenous services out to tender. This means the Federal Government is removing Indigenous Australian specific services (substantive equality) and replacing them with mainstream services (formal equality). This policy undermines the right to self-determination as Indigenous Australian specific service delivery is an expression self-determination or empowerment as it enables people to take control of their lives (substantive equality). The Committee has taken the same approach as the Federal Government (ie: 'either/or thinking').

Australians have seen a dramatic turning away from self-determination in Commonwealth Government policy in recent years. The abolition of ATSIC and the failure to replace it with something better weakens the opportunity for Indigenous people to contribute to effective policy development in Australia. If there is going to be any Government support for progress in recognizing Indigenous Australian Peoples' right to self-determination it is going to have to come from the States in the short to medium term. VALS suggests that the State Government is in a position to demonstrate practically, that self-determination, like all the other Civil and Political rights can usefully and safely be included in a Charter. VALS argues that such a move would be of benefit to all Victorians.

However, if the Government follows the advice of the Committee, and excludes the right to self-determination from the Charter it is in danger of missing the opportunity to protect the principle and the practice and to celebrate a proud record of putting self determination into practice.

The Victorian Government should take the next logical step and enshrine the right to self determination in the Charter. This will better enable the State to build on the strengths that have been achieved to date. The failure of the Government to include the right to self-determination in the Charter will send a negative message to many Indigenous Victorians. And there is a real risk of losing the trust of many Indigenous Australians as they are likely to become more skeptical about the Government commitment to the VAJA and other initiatives.

Generic protections are best?

The Committee rejects outright the right to self-determination; apparently the right to self-determination belongs in the too hard basket.

According to the Committee "[w]hile we agree that these rights are important, we have not recommended that they be included in the Charter at this stage. Based on what we have been

told by the community, we think that the focus should be on the democratic rights that apply equally to everyone.”² The Committee goes on and states: “We accept the view of Indigenous scholar Professor Larissa Behrendt that the rights of Indigenous peoples are generally best advanced through laws that are applicable to everyone in the community.”³

VALS rejects the above argument of the Committee because:

- We believe that this is contrary to Behrendt’s writing which recognises a place for ‘both’ substantive equality and ‘formal equality’. Behrendt in fact took this stance at the Indigenous Australian Human Rights Forum in August 2005. She argued that the Charter should include generic rights and Indigenous Australian specific rights. In her book titled ‘Achieving Social Justice’ Behrendt took a ‘both/and’ approach as opposed to a ‘either or approach’ to rights. She defined general protection of rights as difference blind liberalism and Indigenous Australian specific rights protection as multi-cultural liberalism). She does not treat these two forms of equality as in opposition to one another, but complimentary. Behrendt is also critical of the ‘either/or’ approach adopted by the Federal Government which rejected the right to self determination in favour of a ‘practical reconciliation’. Behrendt argues that argues that ‘practical reconciliation’ and a rights based framework of reconciliation are interconnected and need each other in order to achieve successful change.
- The Committee position fails to recognise that the right to self-determination is a universal right that granted does have particular significance to Indigenous Australians but also applies to non-Indigenous Australians. The failure to include the right to self determination in the Charter not only denies Indigenous Australians this right, but also non-Indigenous Australians.
- It is a tokenistic gesture to reflect the right to self-determination in the Preamble. The preamble is only “an overarching statement of values underpinning the Charter”. The Committee has made it clear that the right to self-determination does not underpin the Charter. This is akin to building a handsome façade with no building behind it
- The Committee does not apply the ‘either/or’ approach to formal/substantive equality consistently as it takes a ‘both/and’ approach in relation to the following:
 - The Committee includes formal and substantive equality in the Charter by including the Indigenous Australian specific right to culture.
 - The Committee recognises the place for substantive equality by including in the Charter provision that measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination (7(4) proposed Charter of Human Rights and Responsibilities Act 2006). VALS is critical that the

² ‘Rights, Responsibilities and Respect’ The Report of the Human Rights Consultation Committee (December 2005) iii

³ op cit 39

Committee does not take this approach in the context of self-determination. The failure of the Committee highlights an inconsistency in their logic.

Self-Determination is Healthy For You

Muriel Bamblett, CEO of Victorian Aboriginal Child Care, in her presentation about the Charter on August 10th 2005 that self-determination was good for peoples' health.

VALS questions why the Committee placed the right to self-determination in the too hard basket when:

- It has been demonstrated by the Harvard research that higher levels of self-determination in communities contributes to improved health and other improved outcomes.
- The Commonwealth Government fear campaign is baseless.
- There is strong Indigenous Australian community support for including it in the Charter.

The Committee proposal is overlooking the fact that in the intermediate period (ie: 2006 to 2010) there is no authority or safe guard to protect and emphasise the importance of self-determination

Deferral of inclusion also means there will be four years less experience of implementing the principle.

The meaning of self-determination will of necessity be an evolving idea

In the opinion of one member of the Indigenous Australian Human Rights Consultation in August 2005 - the right to self-determination is not one egg in a basket of human rights, but the basket itself.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

VALS is disappointed that the Committee only recommended that Civil and Political rights be included in the Charter and not Economic, Social and Cultural Rights as well (recommendation 5). VALS is not reassured by the inclusion in Recommendation 5 that Charter should state that, in protecting these rights (ie: civil and political), does not limit or exclude any of the other rights. Despite this, the message is being sent that civil and political rights are more important than other rights.

The sentiment that Economic, Social, Cultural Rights should be included in the Charter was reflected in:

- VALS' preliminary submission which contains the minutes of the Human Rights Consultation on 10 August 2005.

- VALS' secondary submission which contains the minutes of the meetings on 10 August and 7 September 2005.
- Petition which contained 284 signatures.
- Other submissions as recorded by the Committee which expressed that Economic, Social and Cultural Rights should be included in the Charter.

Reasons given for this include:

- Human Rights are indivisible.
-
- Civil and Political Rights are best secured by ensuring protection for Economic, Social and Cultural Rights.
-
- Economic, Social and Cultural Rights are the most important rights for disadvantaged people.⁴

VALS questions the rationale for the Committee to exclude Economic, Social, Cultural Rights from the Charter. The exclusion of these rights is premised on the percentage break downs of support for the various rights: 95% of submissions supported including civil and political rights in the Charter and 45% of submissions supported including Economic, Social and Cultural Rights in the Charter. This difference in the level of support may be partially attributable to the fact that the Government brief was to examine Civil and Political rights only.

VALS is critical of premising the exclusion of Economic, Social, Cultural Rights on the basis of the above figures because the Committee appears to accept the reliability of these figures without question. This is another example of the Committee taking the easy option. VALS questions the reliability of the figures on the basis that it is likely that the above statistics are skewed in favour of advantaged people who had the time and resources to write submissions. In contrast disadvantaged Australians faced barriers to engaging with the Committee. As a result it is likely that the perspective of middle class Australians will dominate the submissions received by the Committee.

The perspective of disadvantaged community members is acknowledged by the Committee: Economic, Social and Cultural Rights are more important to disadvantaged people. The perspective of advantaged community members was described by Larissa Behrendt argued in a paper titled, 'Protection of Human Rights in the ACT and Canada', presented at the Indigenous Australian Human Rights Forum on 10 August 2005. She argued that middle class Australians were generally supportive of a Bill of Rights in the ACT but were much less supportive of any proposals for minority rights. Including economic, social and cultural rights will not make much of a difference to the lives of people who are relatively wealthy, whereas it would be a major difference to the lives of disadvantaged people who share the common experience of denial of rights. The above is supported by the following quote: "The groups of citizens and community members whom local governments find hard to reach, for

⁴ op cit 28

particular purposes, can include those facing barriers, the disadvantaged and the disengaged” and particular mention is made to Indigenous Australian communities.⁵

VALS would be interested to know what percentage of the 2524 submissions that were written by people from disadvantaged and advantaged communities. The Committee should have given more standing to the voice of disadvantaged Australians who called for Economic, Social and Cultural Rights recognition.

Also, VALS is critical of premising the exclusion of Economic, Social and Cultural Rights on the basis of statistics because the Committee is inconsistent in its treatment of statistics. The Committee included in the Charter and based the title of the Charter on the perspective of 1% of submission writers who argued that the Charter should include the notion of ‘responsibilities’.

The Victorian Charter of Rights will be the first Charter of Rights in Australia to mention the specific cultural rights of Indigenous Australians which is positive. It is also in line with the interpretation of the United Nations Human Rights Committee that Article 27 of the ICCPR extends to the cultural rights of Indigenous peoples, such as the relationship of Indigenous peoples to their lands and waters.⁶

POLICY AND INSTITUTIONAL CHANGE

The State Government should put in place protection at a policy and institutional level of the rights to self-determination and Economic, Social and Cultural Rights in the event that these rights are included or are not included in the Charter.

1. Independent Human Rights Unit

That an Independent Human Rights Unit be established with at least the following functions:

- In consultation with the Australian community, check if legislation conforms to Human Rights Instruments. In the event that Civil and Political Rights are the only rights legislated, there should be an implementation plan for inclusive policy development and monitoring strategies for Economic, Social and Cultural Rights. The Australian community should be consulted about the implementation plan.
- Recommend a Community Review Order (eg: where there is significant non-conformity with Human Rights there should be a twelve month review period to introduction of the Bill to allow for community comment). If the matter is too urgent to do this there should be a sunset clause to limit how long the Act is in force.

⁵ Brackertz, Nicola et al ‘Community Consultation and the ‘Hard to Reach’: Concepts and Practice in Victorian Local Government, Report of the Swinburne University of Technology Institute for Social Research, December 2005, p25 as at http://www.sisr.net/cag/docs/HardtoReach_main.pdf

⁶ ‘Rights, Responsibilities and Respect’ The Report of the Human Rights Consultation Committee (December 2005) 41

- Fund an Indigenous rights, governance facilitation and community support team.

2. Indigenous Rights Assessment and Policy Development Project:

The State Government fund Indigenous organizations to contribute to a rights policy framework and to have input in UN reviews of compliance with Covenants and Conventions. State Governments could assist Indigenous Australian organisations to develop submissions to UN Committee Reviews. The UN reviews could be managed by a consortium of Indigenous Australian organisations and funded by State Governments. Indigenous Australians should have input to Economic, Social and Cultural Rights policy development in State Government (and eventually Commonwealth).

3. Government Functions and Processes:

Strategic Policy Advice and Analysis

1. That the Commonwealth and State Government enter into negotiations and policy development (re conforming with the Convention on Economic, Social and Cultural Rights).
2. Indigenous Policy Impact Assessment Team:

This team would:

- Advise Government at an early stage of policy or legislative development of possible impacts on Indigenous Australian individuals or communities. There needs to be systematic consideration of Indigenous issues at the beginning of the policy and legislation process.
- Provide advice regarding the likely impact of policy or law reform on the Indigenous Australian population, at the earliest stage of policy development.
- Develop policy protocols, (eg, inclusive policy development based on research on best practice)

OVERRIDE CLAUSE

VALS does not accept Recommendation 15 or section 31. VALS argues that:

- The Charter should not include an override clause: “expressly declaring in the law it is intending to pass that an Act or provision is to operate notwithstanding that it is inconsistent with the Charter”. The clause defeats the purpose of having a Charter as Parliament can override it and an Act
- If the Charter is to include an override clause, there should be repercussions for not using it correctly, resulting in the override clause not applying. However, there are not repercussions for not complying with section 31(2) which states that a statement must be made to the Legislative Council/Assembly explaining the exceptional circumstances that justify the inclusion of the override declaration. Instead, section 31(7) states that “failure to comply with sub0seciton (2) or (3) in relation to any Bill

that becomes an Act does not affect the validity, operation or enforcement of that Act or of any statutory provision. Also, there is no clarity on what will be exceptional circumstances that justify the inclusion of an override declaration and VALS has concerns about the interpretation.

CONCLUSION

VALS is critical of the Committee's arguments that lead to the exclusion of the right to self-determination and Economic, Social and Cultural Rights from the Charter. VALS argues that the Charter should:

- The Charter should recognise the right to self-determination and if necessary review the appropriateness of the wording of this right in the Charter in four years:
- The Charter should reflect a 'both and' approach rather than a 'either or' approach to the debate about whether to include the right to self determination in the Charter.
- The Victorian Government should take the opportunity to have the charter recognize its own policy and practice in relation to Indigenous policy and programs which has been to combine generic and indigenous specific approaches to achieving better outcomes and better protection of human rights.
- The Charter should recognise economic, social and cultural rights as defined in the International Covenant on Economic, Social and Cultural Rights (ICESCR).
- The Victorian Government should put in place protection at a policy and institutional level of the rights to self-determination and Economic, Social and Cultural rights in the event that these rights whether or not they are included in the Charter.

REFERENCES

Anaya, S J *Indigenous Peoples in International Law*, Oxford Press, 2004
Behrendt Larissa, *Achieving Social Justice* (2003)

Brackertz, Nicola et al 'Community Consultation and the 'Hard to Reach': Concepts and Practice in Victorian Local Government, Report of the Swinburne University of Technology Institute for Social Research, December 2005, p25 as at http://www.sisr.net/cag/docs/HardtoReach_main.pdf

Jonas, Dr William, *Aboriginal and Torres Strait Islander Social Justice Commissioner Report* (2002)

Attachment One

Memorandum

From: Melissa Castan and David Yarrow, Castan Centre for Human Rights Law

Date: 16 February 2006

Re: **Self-determination and the Human Right Consultative Committee**

Introduction

VALS has asked the Castan Centre for Human Rights Law to comment on the conclusion of the Human Right Consultative Committee (the 'Committee') that in it is not appropriate to include a right to self-determination, either for Indigenous Victorians or as a general right. This memo should be read in conjunction with the Committee's final report released on 20 December 2005. For the reasons set out below, we do not believe there are any reasonable grounds for excluding self-determination from the proposed Victorian Charter of Human Rights and Responsibilities.

Inclusion in a Victorian Bill of Rights is crucial

Self-determination is central to protection of all human rights. It appears in a number of international human rights instruments, and has done for many years. The Committee isolates the ICCPR as the baseline for determining the appropriate statement of human rights principles for Victoria. Whilst we do not agree that the content of human rights should be confined to the ICCPR, it is obvious that self-determination appears in that instrument as article 1. Self-determination is a civil and political human right co-equal with other rights articulated in the ICCPR.

It is no accident that self-determination is included in both the ICCPR and the ICESCR which together are recognised as the primary statement of human rights principles in the UN human rights system. The concept of self-determination protects human dignity by guaranteeing full and free participation in civil and political processes. These processes are central to the enjoyment of all human rights. Almost every aspect of public life, and particularly government decision making, interacts with the right to self-determination.

Another valuable part of the right to self-determination is the way it promotes social solidarity and goodwill between citizens and communities. Even when people don't agree with policy outcomes, if they are committed to the process by which the outcomes are achieved, those people are more prepared to abide by the outcomes. This is the responsibility aspect of a Charter of Human Rights and Responsibilities. A system of government that does not respect or protect self-determination for all citizens permits governance without effective citizen participation.

Proper protection of self-determination, such as in a Charter of Rights, creates an institutional imperative to respect and enhance the democratic process. This is the fundamental rationale of any such a charter. Failing to recognise self-determination undermines the process. For example, without a right to self determination, action such as the wholesale dismissal of local governments by executive action (such as occurred in the early 1990s) will not be subject to adequate human rights deliberation. As this shows, wholesale dismissal of representative, democratic institutions can occur. Government action should be subject to human rights scrutiny and recourse when it impacts upon the

communities' participation and political autonomy. This is true for Indigenous and non Indigenous contexts.

The Committee recommends against the inclusion of self-determination in a Charter of Rights for Victoria on a number of grounds including that:

- (a) the concept of self-determination is uncertain; and
- (b) there is a lack of community consensus about the meaning of self-determination;
- (c) inclusion of a right of self-determination may have unintended consequences.

We do not agree. Each of the grounds raised by the Committee do not withstand scrutiny.

Uncertainty

It is a substantial oversimplification to present the right to self-determination as uncertain in law. Self-determination is defined as a people's right to freely determine their political status and freely pursue their economic, social and cultural development. There is extensive literature and jurisprudence which clarifies the right. Although some elements of international law and policy concerning self-determination are contested, such as the secession entitlements of colonised peoples, these are issues at the margin of the meaning of self-determination. While these issues are important, they do not apply in the Australian context and do not detract from the clear core meaning of the right.

Lack of community consensus

In addition to legal uncertainty, the Committee characterised self-determination as incoherent, and contested, at a community level. We do not agree with this description of community understanding nor its relevance to the inclusion of a right of self-determination in a charter of rights for Victoria. While it is true to some extent that the community at large does not have the same level of understanding of the right of self-determination as that of, say, an international jurist, the fact remains that community debate is about the very substance of self-determination. What is the role of the Indigenous community in decision making that directly impacts the community, like adoption, family placement and child protection? What is the division of responsibility between the State and the Indigenous community in cultural heritage? Who decides? How is decision making power divided? The debate about the community involvement and control of decision making demonstrates a good understanding, albeit not an expert one, of the right of self-determination and the parameters of debate about its implementation. It is common for communities to contest the meaning of human rights, as part of the political process. If anything, this is evidence of the relevance of self-determination in Victoria. Contesting the content of a particular right is also an aspect of self-determination.

Furthermore, the content of debate within the Indigenous community and the importance they attach to it, evince their commitment to asserting self-determination as a right worthy of recognition. This militates in favour of inclusion of the right of self-determination in a charter of rights.

Even if there is uncertainty within the community about the meaning of the right of self-determination, the Committee's reference to this uncertainty does not provide any reason to withhold any recognition of the right. There are numerous other human rights for which community understanding is limited yet the Committee has recommended protection for them. For example, the scope of a right to a fair and public hearing is not well understood by the community at large and yet the report recommends its inclusion in a charter of rights.

Unintended consequences

The Committee's point about the potential for unintended consequences rests on its claim that the content of a right to self-determination is uncertain. As noted above, while there is debate about some particular aspects of self-determination, the core meaning of self-determination is as reasonably stable as that for the other human rights for which inclusion in a charter of rights for Victoria are recommended. The consequences of inclusion of the right of self-determination will be those arising from the minimum content of that right. It is to that content we now turn.

The content of the right to self-determination

The debate about self-determination is often presented as a matter of competing claims to the sovereignty of a territory. This false dichotomy has long been discredited. It fails to accurately represent the wide range of state obligations to minorities and Indigenous people the vast majority of which fall well short of any sovereign claim.

Self-determination has been a central issue in international law and policy since the Treaty of Versailles. Numerous scholarly treatments, opinions of leading jurists and international judicial and treaty bodies give concrete meaning to the concept of self-determination. It is now clear that self-determination is susceptible of clear definition. The leading scholar in this area, Professor S. James Anaya, gives expression to such a definition. Anaya suggests that self-determination has a 'constitutive' aspect, concerning the requirement that the governing institutional order be developed through the will of the peoples governed. It also has an 'ongoing' aspect, which means that the governing order be one that people can live in, and develop freely within, on a continuing basis. He suggests that decolonisation does not require turning the clock back (returning governance arrangements to their previous state) but that remedies sensitive to present day aspirations of the peoples denied self-determination can be developed. In this way, remedial justice for the denial of self-determination is both backward looking and prospective in nature.

Anaya suggests five elements which constitute the right to self determination:

- non-discrimination;
- cultural integrity;
- lands and natural resources;
- social welfare and development; and
- self-government.

Non-discrimination

Non-discrimination is more than mere 'equal treatment' or the creation of anti-discrimination law standards. Substantive equality is the goal of non-discrimination and it is well understood that achieving this for different communities with differing histories may require, at least temporarily, targeted beneficial treatment. Non-discrimination as an aspect of self-determination addresses communities, as much as the treatment of individuals. Anti-discrimination laws (like the *Equal Opportunity Act 1986* (Vic)) provide for individual complaints about breaches of duties to give equal treatment in specified areas. Non-discrimination (in Anaya's sense) requires equal respect and concern for peoples and particular communities. Inclusion of self-determination in a charter of rights for Victoria would require government action to give equal respect and concern to and between all communities. This is not a difficult concept.

Cultural integrity

Self-determination includes the right of communities to express, protect, preserve and transmit to future generations their culture. Together, these enable communities to maintain their cultural integrity both in the present and for the future. Culture, as envisaged by the right to self-determination, encompasses language, traditional practices, religion, spiritual values, preservation of group identity and self-definition. In some cases, the maintenance of cultural integrity can be

achieved without government action. Where it cannot, respect for the right of self-determination will require government intervention in the form of policies, programmes and legislation. For example, legislation in Victoria provides for a measure of protection of Aboriginal cultural heritage values on private land. This legislation seeks to reconcile the public interest in cultural heritage protection with the private interest of property rights. Whether the legislation is adequate, in face of the right to self-determination, will be determined by the legislation's capacity to provide a stable platform for the maintenance of Aboriginal cultural integrity.

Lands and natural resources

Land is an important aspect of Indigenous identity and social harmony. Traditional and spiritual beliefs and practice based in the Indigenous relationship to land and use of natural resources are also fundamental. The right to self-determination encompasses both of these. Without them, Indigenous people cannot survive as Indigenous people. Consequently, this aspect of the right to self-determination requires that the law of a State:

- provide adequate protection for existing Indigenous rights to land and natural resources;
- provide access to a land base sufficient for maintaining the way of life of an Indigenous group;
- facilitate the use of natural resources central to Indigenous cultural and economic practices.

Uncontroversially, the Victorian Parliament has already acknowledged that Aboriginal Victorians are the original custodians of the land that is now Victoria (*Constitution Act 1975* (Vic) s. 1A).

Social welfare and development

Rights of social welfare and development are inherent aspects of the UN charter (art. 55 and 56) and of the International Covenant on Economic Social and Cultural Rights. In addition, Anaya (at 108) emphasises that social welfare and development are part of self-determination. Not only do these rights benefit individuals, but also they extend to 'peoples'. Anaya identifies a 'special rubric' of entitlements and duties that have developed regarding Indigenous peoples. These are aimed at remedying the historical treatment of Indigenous people that underpins much of their current economic disadvantage. One aspect of this relates to the historical dispossession of Indigenous people from their land and resources, leaving them in impaired economies 'the poorest of the poor'. Another aspect is the discriminatory treatment of Indigenous people, excluding them from the social welfare generally available to others.

Anaya says that 'a core consensus exists that states are in some measure obligated' regarding social welfare and development (109). He goes on to quote Robert Tickner (then Minister for Aboriginal and Torres Strait Islander Affairs) saying in 1992 that Australia is committed at all levels of government to 'take steps and commit resources to advance the social welfare and development of Indigenous individuals and communities'.

This aspect of self-determination requires government action to improve and promote the economic and social welfare of Indigenous people. For example the Aboriginal Child Placement Principle is directed to the special social and cultural circumstances of Aboriginal Victorians.

Self-government

Self-government is often characterised as the internal aspect to self-determination. The allocation of rights and entitlements within an Indigenous group are determined by the group itself, rather than dictated by an external authority. Self-government has a process orientation – it gives force to the way Indigenous groups make and enforce decisions which affect them as a group. But it is a mistake to think that self-government means decision making authority about group members alone. Implementing decisions about the use of group resources, for example, may have impacts upon non-

group members. For example, a decision to deny access to a non-group member would require enforcement of the exclusion of those non-group members.

Self-government also has relevance for the administration of programmes and policies for Indigenous people. In Victoria, this means that Aboriginal people should have a central role in decision making for such programmes and policies. For example, in the judicial realm, the establishment of a Koori Court and Koori Children's Court aims to increase the involvement and engage the authority of Koori elders in the administration of criminal justice. It is not hard to imagine similar arrangement in other parts of the judicial system. Similar delegation, participation and inclusion within executive functions would enhance recognition of self-government.

Respect for self-government does not require the creation of territorial units with primary Indigenous control of administration. Rather, it is the principled collaboration in, and sharing of, administrative functions in areas affecting Indigenous interests.

Conclusion

There is no principled ground on which to distinguish between the right of self-determination and the other rights enunciated in the ICCPR when considering the content of a charter of rights for Victoria. The right to self-determination is no less important than any of the other rights of the ICCPR. If anything, a failure to include the right to self-determination undermines the recognition of the other rights proposed for inclusion. For Indigenous and non-Indigenous Victorians, the inclusion of a right to self-determination would promote democratic inclusion and accountability.

The inability to engage with the implications of the internationally recognised, and protected, right of self-determination appears to be endemic in Australian policy deliberations. For example, recent policy studies concerning Indigenous customary law in Australia have largely avoided any detailed examination of the consequences of self-determination for Australian domestic law (see Cunneen and Schwartz (2005) and Northern Territory Law Reform Committee (2003)). This does not sit well with Australia's obligation to legislate to protect and promote human rights in general (for example, see Dunbar (2006)).

The Victorian Government should not accept the recommendation of the Committee but should closely examine the real benefits that will accrue from the inclusion of a right to self-determination in a charter of rights for Victoria.

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