



Victorian Aboriginal Legal Service Co-operative Limited (VALS)

# Review of the Victorian Charter of Human Rights and Responsibilities

Submission to the Scrutiny of Acts and Regulations Committee (SARC)

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## About the Victorian Aboriginal Legal Service Co-operative Limited

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) was established as a community controlled Co-operative Society in 1973 to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. VALS plays an important role in providing referrals, advice, duty work or case work assistance to Aboriginal and Torres Strait Islander peoples in the State of Victoria. Solicitors at VALS specialise in one of three areas of law, being criminal law, family law and civil law. VALS maintains a strong client service focus which is achieved through the role of Client Service Officer (CSO). CSOs act as a bridge between the legal system and the Aboriginal and Torres Strait Islander community.

VALS is actively involved in community education, research and advocacy around law reform and policy development. VALS strives to:

- a) Promote social justice for Aboriginal and Torres Strait Islander peoples;
- b) Promote the right of Aboriginal and Torres Strait Islander peoples to empowerment, identity and culture;
- c) Ensure that Aboriginal and Torres Strait Islander peoples enjoy their rights, are aware of their responsibilities under the law and have access to appropriate advice, assistance and representation;
- d) Reduce the disproportionate involvement of Aboriginal and Torres Strait Islander peoples in the criminal justice system; and
- e) Promote the review of legislation and other practices which discriminate against Aboriginal and Torres Strait Islander peoples.

For further information about VALS, please see our website: [www.vals.org.au](http://www.vals.org.au)



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## 1. Introduction

VALS welcomes the opportunity to comment on the review of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* ('the Charter') with the aim to strengthen and extend the Charter. While VALS considers the current Review to be a positive opportunity to strengthen and extend the Victorian Charter, we feel it is relevant to note our disappointment at the appointment of the Scrutiny of Acts and Regulations Committee (SARC) to this review process. On Human Rights Day of 2010, VALS publically called on the Baillieu Government and Victorian Attorney-General to ensure that the review team was independent and reflective of the diversity of the community.<sup>1</sup> Specifically, VALS urged for a person of Aboriginal and Torres Strait Islander decent to be part of the review team to encourage the consideration of Aboriginal and Torres Strait Islander community views by the review team.

The absence of an Aboriginal and Torres Strait Islander representative on the panel that considered whether Victoria should introduce a Charter in 2004 was a disappointing oversight that has unfortunately been repeated. VALS does not wish to cast a negative light over the opportunities currently available through this review process, but feels compelled communicate our disappointment in the processes being utilised in the current consultations. This point is especially pertinent considering the Terms of Reference direct comment on the inclusion of self-determination rights.

VALS is encouraged by Terms of Reference's breadth, directing comment on the strengthening of existing rights and the extension of the Charter to include additional rights. VALS recommends that at minimum, the rights currently provided for in the Charter be retained. VALS believes that the commencement of the Charter was a first step towards a reconciled society in Victoria where disadvantage and marginalisation of Aboriginal and Torres Strait Islander peoples could begin to be addressed. Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, recently argued that all of the challenges facing Aboriginal and Torres Strait Islander communities, such as poverty, education, effective engagement, health, protection of culture and heritage, incarceration rates, protection of women and children are all human rights issues.<sup>2</sup> VALS echoes Mick Gooda's wisdom that we need to have a framework through which to address disadvantage and advance reconciliation, and that human rights provides such a framework:

*Human rights are useful because they provide governments' and the people a set of minimum legal standards which if applied to all people establishes a framework for a society to foster dignity and equality whilst celebrating difference.*<sup>3</sup>

Mr. Gooda suggests that in relation to Aboriginal and Torres Strait Islander peoples and human rights, there is a document that offers the ideal framework for a reconciled nation - this document is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP contains

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<sup>1</sup> [http://vals.org.au/static/files/assets/aa48fcbc/Human\\_Rights\\_Day\\_Media\\_Release\\_10122010.pdf](http://vals.org.au/static/files/assets/aa48fcbc/Human_Rights_Day_Media_Release_10122010.pdf)

<sup>2</sup> Mick Gooda, 'Effective engagement: The tonic for a reconciled nation', University of Sydney Reconciliation Week Public Lecture (30 May 2011), at [http://www.humanrights.gov.au/about/media/speeches/social\\_justice/2011/20110530\\_reconciliation.html](http://www.humanrights.gov.au/about/media/speeches/social_justice/2011/20110530_reconciliation.html)

<sup>3</sup> *Ibid*

‘minimum standards for the survival, dignity and well-being of the indigenous peoples of the world’<sup>4</sup> and reaffirms that Aboriginal and Torres Strait Islander peoples, like all Indigenous peoples of the world, are entitled to all human rights recognised in international law without discrimination. ‘It also acknowledges that, without recognising the collective rights of Indigenous peoples and ensuring protection of our cultures, Indigenous people can never be truly free and equal.’<sup>5</sup>

It is within this framework that we will make argument for the Charter to be extended to include economic, social and cultural rights, self-determination rights, and rights for women and children. This submission also discusses and makes 13 recommendations on areas such as the positive affect the Charter has had on the operation of public authorities; issue with using Charter arguments in advocating for VALS clients in the criminal justice system; and the need for further community education and training on human rights.

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<sup>4</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), Article 43.

<sup>5</sup> Mick Gooda (2011) *op cit*.

## 2. Background

VALS has long been vocal about the need for formal human rights protections in Australia, particularly to improve the lives of those most disadvantaged and marginalised in our society. VALS believes much of what we have previously advocated on behalf of our clients and their communities still holds relevance and is worth mentioning in the current submission in order to provide an informed context and the correct orientation from which to advocate for human rights protections today. VALS has a number of useful resources that explore self-determination rights and what they mean to Kooris.

### 2.1. 2010 Self-determination Forum

Most recently (12<sup>th</sup> May 2010) VALS co-hosted a forum with the Victorian Council of Social Services (VCOSS) and the following Aboriginal Community Controlled Organisations:

- Victorian Aboriginal Community Services Association Limited (VACSAL);
- Victorian Aboriginal Education Association Limited (VAEAL);
- Victorian Aboriginal Child Care Agency (VACCA);
- Victorian Aboriginal Community Controlled Health Organisation (VACCHO);

The forum was targeted at staff from Aboriginal Community Controlled Organisations (ACCOS) and was attended by a range of representatives of ACCOS and community members. A report has been subsequently produced by VALS on behalf of the peak/statewide Aboriginal organisations and can be found as an annexure to this submission. We urge SARC to consider its contents in recommending to Government the inclusion of self-determination rights in the Charter. We also refer SARC to the VCOSS report following this forum which has been forwarded to the Department of Justice. The VALS report contains the outcomes of the workshop component of Forum. Participants were asked to discuss questions such as:

- What does self-determination mean for you?
- What is the role of Aboriginal community controlled organizations in self-determination?
- How can these organisations be strengthened?
- What impact do barriers to achieving self-determination have on Aboriginal Victorians and their communities?
- Are human rights or the Charter of Human Rights and Responsibilities useful?
- How can self determination be achieved?
- How do you want to be consulted?

The themes that emerged from the Forum included:

- Culture
- Identity
- Community
- Holistic approach
- Local approach
- Dignity

- Capacity
- Resources
- Education
- Equity
- Decision making
- Voice
- Control
- Participation
- Autonomy
- Independence
- Inclusion
- Rights
- Empowerment
- Responsibility
- Leadership
- Importance of ACCOS
- Collaboration

Self-determination rights are discussed in further sections of this submission.

## 2.2. VALS' 2005 Forum

VALS facilitated the *Indigenous Australian Human Rights Forum* at the Aborigines Advancement League on 10th August 2005.<sup>6</sup> The purpose of the Forum was to enable members the Koori community to discuss how the human rights of Aboriginal and Torres Strait Islander peoples in Victoria should be protected. The introduction of a Victorian Bill of Rights was discussed. Seven Koori organisations supported the Forum with seventy five people in attendance.

Common themes from the presenters at this Forum included: A Victorian Bill of Rights should recognise the specific rights of Aboriginal and Torres Strait Islander peoples, particularly the right to self-determination as fundamental human right for Aboriginal and Torres Strait Islander peoples; and the specific rights of Aboriginal and Torres Strait Islander children, particularly those in the Child Protection system.

Then CEO, Frank Guivarra, presented a paper on behalf of VALS titled 'A State Government Charter of Rights - Will it work for Koories?'<sup>7</sup> In this presentation, it was noted that, amongst other things:

- a) The Victorian Government proposal for a human rights document only provides for Civil and Political Rights. The Government has split Civil and Political rights from Economic, Cultural and Social rights and it does not make sense to do this.

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<sup>6</sup> VALS was also involved with community consultations about whether to introduce the Charter of Human Rights and Responsibilities as follows: August 2005, Thornbury; September 2005, Thornbury; and September 2005, Healesville.

<sup>7</sup> [http://vals.org.au/static/files/assets/a0e6c743/FG\\_talk\\_presented\\_070905.2.pdf](http://vals.org.au/static/files/assets/a0e6c743/FG_talk_presented_070905.2.pdf)

- b) The right to self-determination is important to Aboriginal and Torres Strait Islander peoples. It is disappointing that the right to self-determination is not mentioned in the Discussion Paper's list of rights. We have not seen dramatic improvements in Commonwealth Government policy to self-determination. If there is going to be any Government support for progress in recognising Aboriginal and Torres Strait Islander people's right to self-determination, it is going to have to come from the States in the short to medium term.

The paper contained the following recommendations:

- a) Broad Goal: the Commonwealth and State Government legislation must conform to United Nations Human Rights Instruments, Covenants and Conventions.
- b) Objectives: That an Independent Human Rights Unit be established with at least the following functions:
  - i. Check if Legislation conforms to Human Rights Instruments (all conventions and covenants);
  - ii. 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.
  - iii. Recommend a Community Review Order (e.g. 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.
  - iv. Promote understanding of Human Rights. We need to strengthen community understanding of and pride in Rights. There needs to be a proposal to provide meaningful community education about rights issues.
  - v. Fund an Aboriginal and Torres Strait Islander rights, governance facilitation and a community support team.
- c) Indigenous Rights Assessment and Policy Development Project: The State Government could fund Aboriginal and Torres Strait Islander organisations to contribute to a rights policy framework and to have input in United Nations reviews of compliance with Covenants and Conventions. State Governments could assist Aboriginal and Torres Strait Islander organisations to develop submissions to United Nations Committee Reviews. The UN reviews could be managed by a consortium of Aboriginal and Torres Strait Islander organisations and funded by State Governments. Aboriginal and Torres Strait Islander peoples should have input to Economic, Social and Cultural Rights policy development in State Government (and eventually Commonwealth).
- d) Government Functions and Processes: Strategic Policy Advice and Analysis. This work would often be politically sensitive and would need to be done by a part of government.

- i. Commonwealth - State negotiations and policy development (conforming with the Convention on Economic, Social and Cultural Rights).
- ii. Indigenous Policy Impact Assessment Team. This team would: Advise Government at an early stage of policy or legislative development of possible impacts on Aboriginal and Torres Strait Islander individuals or communities for there to be systematic consideration of Aboriginal and Torres Strait Islander issues at the beginning of the policy and legislation process; Provide advice regarding the likely impact of policy or law reform on the Aboriginal and Torres Strait Islander population, at the earliest stage of policy development; and Develop policy protocols (e.g. inclusive policy development based on research on best practice).

**Recommendation 1: Rights contained within the Charter should be not only legislated for, but an implementation plan for policy development and monitoring established.**

### **2.3. 2006 submission to in response to, 'Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee'<sup>8</sup>**

In 2006 VALS argued that the Human Rights Consultation Committee's ('the Committee') recommendations for the protection of rights in Victoria were less than optimal and in many respects failed to consider systemic disadvantage faced by Aboriginal and Torres Strait Islander peoples. VALS' submission generally held that there was a high level of input by the Koori community into review of whether Victoria should have a Charter, however the recommendations of the Committee failed to reflect many of the concerns that the Koori community had.

#### **2.3.1. Self-determination rights**

VALS argued that the failure to include the right to self-determination in the Charter was unacceptable and the Committee's reasoning put forward for the decision to overlook this right was inconsistent with the views of 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.

It was noted that the State Government, via the Victorian Aboriginal Justice Agreement and Aboriginal Affairs Victoria's policy work on Indigenous Representative Arrangements (post the abolition of the Aboriginal and Torres Strait Islander Commission) indicated a commitment to recognition of the right to self-determination and exploring ways to make it a tangible reality. VALS argued in 2006, and believes it holds true today, that approaches to self-determination have already begun in Victoria with the support of Government and have produced positive outcomes for the whole community. Examples include initiatives such as the Koori Court.

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<sup>8</sup>[http://vals.org.au/static/files/assets/5c7e647f/VALS\\_revised\\_submission\\_in\\_response\\_to\\_HR\\_Report\\_sent\\_170206.pdf](http://vals.org.au/static/files/assets/5c7e647f/VALS_revised_submission_in_response_to_HR_Report_sent_170206.pdf)

It was subsequently argued that the inclusion of self-determination rights in the Charter 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.

VALS therefore strongly urged the State Government to include the right to self-determination in the Charter as it was consistent with the State Government's practice and policy of recognising the unique culture and skills of Aboriginal and Torres Strait Islander peoples. This argument was supported by the Monash University Castan Centre for Human Rights who provided VALS with a detailed critique of the Committee's arguments for not including self-determination (discussed later in this submission).

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

*The 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<sup>9</sup>*

We argued then, and maintain now, that 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 Victoria.

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 ... 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.<sup>10</sup>*

VALS' 2006 submission also noted the Committee's failure to specifically address the issue of formal versus substantive equality. Interesting, however, in the discussion of individual versus group rights the Committee says:

*Although the Committee recognises that many people see their rights as having a communal aspect, we note that generally human rights are seen as attached to*

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<sup>9</sup> Human Rights Consultation Committee, 'Rights, Responsibilities and Respect: The report of the Human Rights Consultation Committee' (2005) Victoria Department of Justice, p.36  
at <http://www.liv.asn.au/PDF/News/HumanRightsFinalReport2006>

<sup>10</sup> William Jonas, 'Social Justice Report 2002: Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner' (2002) Human Rights and Equal Opportunity Commission, p. 47-48 at [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport02/Social\\_Justice\\_Report02.pdf](http://www.hreoc.gov.au/social_justice/sj_report/sjreport02/Social_Justice_Report02.pdf)

*individuals. Therefore, the Committee believes that the Charter should only confer rights upon individuals.*<sup>11</sup>

VALS argued that this approach has the power to disadvantage cultures which place less emphasis on individual rights. It is an example of counterproductive either/or thinking rather than a both/and approach that considers the inclusion of individual and group rights in the Charter. The latter reflects recognition of formal equality *and* rights that reflect the theory of substantive equality. These two notions can co-exist. This approach was somewhat adopted by the Committee insofar as it applies this to cultural rights. However the Committee did not apply the same approach to the right to self-determination and VALS was critical of this inconsistency.

Self-determination is a tool that government and community can use in order to work together to improve the rights of Aboriginal and Torres Strait Islander peoples and the same time improve the likelihood of successful outcomes when government and community work together. Self-determination rights are not considered nor designed locally or internationally to be a threat to political or territorial sovereignty and therefore it is ignorant and counterproductive for Governments or others to argue otherwise. The inclusion of self-determination rights will be further examined for inclusion in a revised Charter in section 3.1.

### **2.3.2. Economic, cultural and social rights**

In our 2006 submission to the Committee, VALS also expressed disappointment that the inclusion of economic, cultural and social rights was overlooked. The support for the inclusion of economic, social and cultural rights was communicated to the Committee in a VALS preliminary submission in 2005 that minuted a Human Rights Consultation, VALS' secondary submission containing further minutes of a subsequent meeting and a 284 signature petition. Economic, social and cultural rights were urged for inclusion in the original drafting of the Charter on the basis that:

- 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 of critical importance to the most disadvantaged people in our society

Further exploration for the inclusion of economic, social and cultural rights can be found in section 3.2.

### **2.3.3. Policy and Institutional Change**

VALS' 2006 submission to the Committee also recommended a number of measures to be put in place by state government to place protection on self-determination and economic,

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<sup>11</sup> *Ibid*, p. 51.

social and cultural rights at a policy and institutional levels in the event that these rights were not included in the Charter. For example, it was suggested that:

- an independent human rights unit be established to, amongst other things, recommend 'community review orders' in the case where significant non-compliance with human rights exists in a Bill, whereby a review period before the introduction of the Bill allows for community comment. If the Bill is urgently ascended and is incompatible with human rights, a sunset clause should limit how long the Act is in force.
- an Aboriginal rights assessment and policy development project fund Aboriginal organisations to contribute to a rights policy framework.
- government create an Aboriginal policy impact assessment team to advise government at early stages of policy or legislative development of possible impacts and Aboriginal and Torres Strait Islander individuals and communities.

#### 2.4. 'A Fairer Victoria for Indigenous Communities: A Framework for Action'

In October 2006 a proposal for building the capacity of community-controlled Aboriginal organisations in Victoria was released.<sup>12</sup> Prepared by the Victorian Aboriginal Community Services Association Limited (VACSAL), Victorian Aboriginal Education Association Limited (VAEAI), Victorian Aboriginal Child Care Agency (VACCA), Victorian Aboriginal Community Controlled Health Organisation (VACCHO), and Victorian Aboriginal Legal Service Co-operative Limited (VALS), this report talks to the following:

- **Self-determination.** The Victorian Labor Government's social policy platform, *A Fairer Victoria*, was first released in 2005 and updated and expanded in 2006. It stresses the importance of supporting communities to be self-determining and effective (Strategy 13). Self-determination is internationally recognised as a human right. It is fundamental to building the capacity of our communities to overcome disadvantage.
- **Culture.** Culturally-centred approaches to overcoming Aboriginal and Torres Strait Islander disadvantage are the most effective. Aboriginal and Torres Strait Islander cultures are the longest continuing cultures in the world: sophisticated and holistic, linking spirituality with politics, education, economics, ecology and law. Victoria is rich in a diversity of Aboriginal and Torres Strait Islander cultures that are not static but constantly changing and evolving. Policy that is grounded in a respect for culture and an understanding of the need to ensure that it thrives into the future is vital.
- **Whole-of-government.** *A Fairer Victoria* promotes cross-sectoral, 'whole-of-government' approaches to social policy and service delivery. We strongly support this move; we have long believed in holistic approaches to policy and service provision. Linking services is the most effective way to ensure that the needs of the Aboriginal and

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<sup>12</sup> [http://vals.org.au/static/files/assets/f72dc9eb/A\\_Fairer\\_Vic\\_Oct10\\_final.pdf](http://vals.org.au/static/files/assets/f72dc9eb/A_Fairer_Vic_Oct10_final.pdf)

Torres Strait Islander community are met. Our organisations already have extensive representative models and community consultation structures which have proven to be effective in consulting Aboriginal and Torres Strait Islander communities.

- Formal partnerships between state-wide and peak organisations and government are a highly effective means of promoting culturally appropriate and relevant best-practice strategies.

VALS believes that the Charter is a mechanism where these sophisticated and inclusive aspirations can be incrementally and systemically enshrined throughout Government and Government agencies through strengthening of the Charter. Including self-determination and economic, social and cultural rights in the Charter ensures that the whole-of-government consider these rights in the drafting and debate of Bills, and in the delivery of services. The inclusion of these rights into law also protects these fundamental rights from being overlooked by subsequent governments, thereby giving the community a chance to experience progression towards the full enjoyment of these rights.

Self-determination rights and economic, social and cultural rights will be discussed further in sections 3.1, 3.2 and 7.

### 3. Additional Rights

#### 3.1. Self-determination rights

Considering the experience of marginalisation, dispossession and profound disadvantage of Aboriginal and Torres Strait Islander peoples coupled with their unique status as the First Peoples of this land, any human rights statute must specifically address the rights of Aboriginal and Torres Strait Islander peoples.<sup>13</sup> Self-determination is significant to Aboriginal and Torres Strait Islander peoples due to historical and present experience of dispossession and marginalisation.<sup>14</sup>

The right to self-determination is protected by Article 1 of the United Nations International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and is the only substantive right protected by both Conventions.<sup>15</sup> The Declaration on the Rights of Indigenous Peoples ('the Declaration'), which Australia supports, affirms this right:

*Indigenous peoples have the right to self-determination. By virtue of that rights they freely determine their political status and freely pursue their economic, social and cultural development.*<sup>16</sup>

The definition of self-determination under international law is necessarily flexible in order to benefit many distinct groups. There are a number of groups in Victoria that have attempted to capture what self-determination means to Aboriginal and Torres Strait Islander peoples in Victoria.<sup>17</sup> While there exists no globally agreed upon definition of this right,<sup>18</sup> consistent themes have been identified and some ideas around how the contents of such a right could be realised have been reached.

For example, the National Human Rights Consultation report found that while some equated the right to self-determination with Aboriginal and Torres Strait Islander sovereignty, others identified it as an essential ingredient in addressing disadvantage or a way to increase Aboriginal and Torres Strait Islander peoples' participation in mainstream political processes.<sup>19</sup> The United Nations Educational, Scientific and Cultural Organisation (UNESCO) provide an in-depth description of what they consider to be self-determination:

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<sup>13</sup> Amy Maguire, 'The Right of Self-Determination for Indigenous Peoples in Australia,' *Submission to the National Human Rights Consultation* (2009)

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *United Nations Declaration of the Rights of Indigenous Peoples*, General Assembly Resolution 61/295 (2007) at <http://www.un.org/esa/socdev/unpfii/en/drip.html>

<sup>17</sup> See Victorian Equal Opportunity and Human Rights Commission's 'Indigenous self-determination and the Charter of Human Rights and Responsibilities- A framework for discussion' (2010); 'Talking rights: consulting with Victorians about economic, social and cultural rights and the Charter (2011); at [http://www.humanrightscommission.vic.gov.au/index.php?option=com\\_k2&view=itemlist&layout=category&task=category&id=68&Itemid=690](http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=itemlist&layout=category&task=category&id=68&Itemid=690); and VALS report – see annexure.

<sup>18</sup> See Victorian Equal Opportunity and Human Rights Commission's (2010) (2011) *Id.*

<sup>19</sup> Frank Brennan, Mary Kostakidis, Tammy Williams, Mick Palmer, 'National Human Rights Consultation Report' (2009) at <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report> pg 217.

*...self-determination as an ongoing process of choice for the achievement of human security and fulfilment 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.*<sup>20</sup>

In its refusal to agree to the Declaration in 2007, the Federal Government has previously commented that it 'does not support an interpretation of self-determination that has the potential to undermine Australia's territorial integrity or political sovereignty'.<sup>21</sup> It has been argued that this is not only an inaccurate perception of the nature of self-determination generally, but also of the types of claims to rights typically advanced by Aboriginal and Torres Strait Islander peoples.<sup>22</sup> Furthermore, the United Nations General Assembly has stated that the right to self-determination does not permit action that threatens the territorial integrity of the State.<sup>23</sup> As pointed out in the National Human Rights Consultation, this position is affirmed in UNDRIP which states that the right does not permit any action which threatens the territorial integrity of a State Party.<sup>24</sup>

There is currently preambular recognition in the Charter of the special importance human rights have 'for the Aboriginal people of Victoria, as descendents of Australia's first people, with their diverse spiritual, social cultural and economic relationship with their traditional lands and waters.'<sup>25</sup> While the Victorian Charter states it is a law founded on this principle, Aboriginal and Torres Strait Islander specific rights, such as self-determination, are not dealt with in the provisions of the Act itself. The protection of Aboriginal and Torres Strait Islander peoples' right to self-determination in the Charter should ensure that parliament is bound to actively protect and promote this right. Furthermore, revision of the Charter has the power to ensure that parliaments will not enact future laws that violate or limit the right of Aboriginal and Torres Strait Islander peoples to self-determination.

It is especially pertinent when discussing self-determination for VALS to acknowledge that we cannot speak on behalf of all Aboriginal and Torres Strait Islander peoples in Victoria. VALS'

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<sup>20</sup> UNESCO, 'Conclusions and recommendations of the conference' in van Walt van Praag, M (Ed), *The implementation of the right to self-determination as a contribution to conflict prevention* ( 1999) UNESCO Centre of Catalonia, Barcelona , p19 at <http://www.unpo.org/article/446>

<sup>21</sup> Commonwealth of Australia, 'Australia—core document forming part of the reports of States Parties' (2007), 45.

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~a00000Updated+-+Common+Core+Document+-+25+July+2007.pdf/\\$file/a00000Updated+-+Common+Core+Document+-+25+July+2007.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~a00000Updated+-+Common+Core+Document+-+25+July+2007.pdf/$file/a00000Updated+-+Common+Core+Document+-+25+July+2007.pdf)

<sup>22</sup> Amy Maguire, 'The Right of Self-Determination for Indigenous Peoples in Australia,' *Submission to the National Human Rights Consultation* (2009)

<sup>23</sup> For example, UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, (1960) at <http://untreaty.un.org/cod/avl/ha/dicc/dicc.html>

<sup>24</sup> Article 46(1)

<sup>25</sup> Preamble, *Charter of Human Rights and Responsibilities Act 2006* (VIC)

[http://www.legislation.vic.gov.au/domino/Web\\_Notes/LDMS/LTObject\\_Store/LTObjSt1.nsf/DDE300B846EED9C7CA257616000A3571/0B84180464750A8ACA257761001B9823/\\$FILE/06-43a003.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/LTObjSt1.nsf/DDE300B846EED9C7CA257616000A3571/0B84180464750A8ACA257761001B9823/$FILE/06-43a003.pdf)

stance on the right to self-determination was made public record through a petition VALS produced in 2005. In the petition VALS called for the following and wishes to recommit to this position:

- A preamble in the Victorian Charter of Rights which recognises the traditional owners and custodians of the lands and waters of Victoria and Indigenous persons in Victoria as self determining peoples in accordance with Article 1 of the ICCPR and ICESCR.
- Inclusion in the body of the Charter of Rights the explicit right to self-determination for Aboriginal and Torres Strait Islander peoples in Victoria in regard to their lands and waters, the protection of their culture and early engagement with Government policies and procedures which impact on their future.

It is important to note that VALS considers preambular recognition alone to be insufficient and tokenistic. The above stance is also consistent with some of the options canvassed in Behrendt and Vivians' options paper *Indigenous self-determination and the Charter of Human Rights and Responsibilities – A framework for discussion*.<sup>26</sup> This paper was prepared as a tool by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) for the current review to engage the Aboriginal and Torres Strait Islander community about the right to self-determination. The options in the paper included the following:

- Option 1: To have the right to self-determination specifically protected in the Charter. For example: 'The right to self-determination held by the Aboriginal peoples of Victoria is hereby recognised and affirmed.'
- Option 3: To have a preamble to the Charter that places self-determination as a key principle against which the rights within the Charter need to be interpreted. For example, by including the words: 'human rights, including the right to self-determination, have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.'

VEOHRC also engaged Ingenuity - SED Consulting to engage the Aboriginal and Torres Strait Islander community about the right to self-determination. The resulting report noted that one participant couldn't see why not all 4 options revealed in Behrendt's and Vivian's option paper be implemented.<sup>27</sup> VALS can see merit in the remaining options canvassed in Behrendt and Vivians's options paper as follows:

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<sup>26</sup> Larissa Behrendt and Vivian Alison, 'Indigenous self-determination and the Charter of Human Rights and Responsibilities – A framework for discussion' (2010), at [http://www.humanrightscommission.vic.gov.au/index.php?option=com\\_k2&view=item&id=1119:indigenous-self-determination-and-the-charter-of-human-rights-and-responsibilities—a-framework-for-discussion&Itemid=690](http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&id=1119:indigenous-self-determination-and-the-charter-of-human-rights-and-responsibilities—a-framework-for-discussion&Itemid=690)

<sup>27</sup> Victorian Equal Opportunity and Human Rights Commission (prepared by Ingenuity – SED consulting) 'Talking rights: Consulting with Victoria's Indigenous community about the right to self determination and the Charter' (2011) p. 26.

- Option 2: To have several rights added to the Charter that would assist Aboriginal people in Victoria exercise the right to self-determination. For example: ‘The right to education, the right to adequate housing, a duty to consult and the right to free and informed consent when rights of Indigenous people have been adversely affected.’
- Option 4: To have a mechanism that supports the enforcement of rights in the Charter that are central to self-determination.

VALS agrees with the findings in the SED Report outlined below. The findings are consistent with the findings in the VALS 2010 Self-determination Forum.

1. Finding 1: The needs, goals and aspirations of Indigenous People are diverse, extend across many sectors and vary in priority.<sup>28</sup> The VALS 2010 Self-determination Forum produced related points:

*“Focus on individuals, families and communities.*

*Equitable rights, control of factors determining our lives and resources  
inclusivity at all levels in all areas*

*An impact on identity has an impact on everything*

*ensure our children and their children are proud to learn and know their human  
rights, their culture and their heritage;*

*self determination can divide community and contributes to/creates lateral violence*

*A two edged sword: Board controls + facilitate voice of community”*

2. Finding 2: The right to self-determination is important to Indigenous people in Victoria.<sup>29</sup> The importance of self-determination rights to Aboriginal and Torres Strait Islander Victorians was reflected at the VALS 2010 Self-determination Forum:

*“Self determination is our constitutional right. Self determination is part of our  
constitutional rights, there should be recognition in the Constitution of the First  
Peoples.*

*Self determination is identity: self determination is an expression of  
identity/individual/family/community. There is an identity crisis without self  
determination.*

*We will never become self sustained if we don’t achieve self determination*

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<sup>28</sup> Victorian Equal Opportunity and Human Rights Commission (prepared by Ingenuity – SED consulting) *Talking rights: Consulting with Victoria’s Indigenous community about the right to self determination and the Charter*, (2011) p. 5

<sup>29</sup> *Id.*

*Being Aboriginal community controlled empowers you to deliver services appropriately to the Aboriginal community in a culturally appropriate, relevant safe environment (i.e. recognize difference in law laws/lore)”*

3. Finding 3: Providing a definition of self-determination for Indigenous people in Victoria must allow for individual perspectives in its application.<sup>30</sup> SED describe Finding 3 as follows:

*...[t]he risk of including the right to self-determination for Indigenous peoples without further engagement is that the reference is not relevant or is considered tokenistic...establishment of an ongoing working or reference group to further progress some options for inclusion of the right to self-determination in the Charter, with opportunities for discussion with Indigenous Victorians regarding the detailed and relevant wording, should be considered. The working group could seek broad representation across demographics and could include community representatives and individuals with relevant legal and human rights expertise.<sup>31</sup>*

VALS agrees with Finding 3 as it is consistent with findings at the VALS 2010 Self-Determination Forum. What was also made clear at the Forum was that consultation was not enough:

*“We want collaboration not consultation. We do not just want to be consulted, instead we want involvement from the start = real investment.*

*We want to be involved in the developments from the start, negotiation not consultation, collaboration, not just consultation”*

During the 2010 Forum it was asked ‘how do you want to be consulted?’ The question was asked with the motive of informing the Government on how to approach the process of reviewing the Charter. It is interesting to note that the clear message was that consultation is not enough and that expectations are higher. In fact, it was found that consultation is the wrong word to use in the context of self-determination.

What was clear from the 2011 SED Report was that their consultation around self-determination rights was considered by the Aboriginal and Torres Strait Islander community as a first step. They felt that not enough time had been afforded the community to be provided with information or discuss the issue in detail. This echoes the sentiment that we found in 2005 in relation to the introduction of the Charter. The SED report notes that ‘in a number of discussions, individuals were only just becoming more familiar with the term “self-determination” and the definition of

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<sup>30</sup> Victorian Equal Opportunity and Human Rights Commission (prepared by Ingenuity – SED consulting) *Talking rights: Consulting with Victoria’s Indigenous community about the right to self determination and the Charter*, 2011, p. 5.

<sup>31</sup> *Id.*

the term. Importantly, this did not reflect a lack of understanding of the underlying principles, but an absence of the discussion in participants' immediate networks.<sup>32</sup>

### 3.1.1. Fear and uncertainty around self-determination rights

VALS wishes to emphasise that in noting the above, we are cautious not to arouse fear around the inclusion of self-determination rights in the Charter insofar as they cannot be tightly defined. VALS believes self-determination rights should be embraced by the current Inquiry. One reason for the differing perspectives around whether self-determination rights should be feared or embraced is that the holders of these perspectives have different legal consciences. Legal consciousness is a concept that relates to the individual and collective understandings and experiences of the law and looks at the relationship between the individual, law and society. It relates to rights and responsibilities and sense of entitlement. VALS argues that if a legal consciousness is influenced by 'where we were born, our cultural background, wealth and gender,' then Aboriginal and Torres Strait Islander people's legal consciousness will be affected by a lack of access to rights.<sup>33</sup> It is not surprising then that the inclusion of self-determination in the Charter is appealing. Equally, it is not surprising that those who have had their rights respected under the status quo would be fearful of change, such as recognition of the right to self-determination.

As already touched on, scaremongering around self-determination rights, such as the argument that self-determination rights may amount to a unilateral right to secede from Australia, are not only inflammatory and provocative untruths,<sup>34</sup> but contrary to the Declaration itself which rules out secession.<sup>35</sup>

The concept of self-determination is portrayed as something to be feared because it is confusing to some and public opinion or media coverage on this subject can be contradictory or misleading. Confusion around self-determination rights for a non-Aboriginal and Torres Strait Islander person was demonstrated at VALS' 2005 Thornbury community meeting. Melissa Castan who spoke at the event admitted that she approached the topic '...as a white middle class person who is part of the Western legal system. White middle class people are unable to digest the Indigenous Australian perspective on human rights'.<sup>36</sup> She said that

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<sup>32</sup> Victorian Equal Opportunity and Human Rights Commission (prepared by Ingenuity – SED consulting) *Talking rights: Consulting with Victoria's Indigenous community about the right to self determination and the Charter*, 2011, p. 25

<sup>33</sup> Victorian Aboriginal Legal Service Co-operative Limited, 'A State Government Charter of Rights - Will it work for Koories?' Presented at Indigenous Australian Human Rights Forum on 10 August 2005, VALS submission to the Department of Justice in response to the Discussion Paper - 'Have Your Say about Human Rights in Victoria', (2005) p. 5, at

[http://vals.org.au/static/files/assets/fc56a999/VALS\\_preliminary\\_submission\\_sent\\_300805.pdf](http://vals.org.au/static/files/assets/fc56a999/VALS_preliminary_submission_sent_300805.pdf)

<sup>34</sup> Aboriginal and Torres Strait Islander Commissioner, 'Social Justice Report 2002' Australian Human Rights Commission (2009)

<sup>35</sup> Article 46(1).

<sup>36</sup> Melissa Castan, 'International Standards' presented at Indigenous Australian Human Rights Forum on 10 August 2005, in VALS' submission to the Department of Justice in response to the Discussion Paper - 'Have Your Say about Human Rights in Victoria', (2005), p. 19, at

[http://vals.org.au/static/files/assets/fc56a999/VALS\\_preliminary\\_submission\\_sent\\_300805.pdf](http://vals.org.au/static/files/assets/fc56a999/VALS_preliminary_submission_sent_300805.pdf)

when this occurs it is a tragedy that is the fault of the listener, not the speaker. An interaction with a participant at the forum highlighted her point. She said that self-determination is important but you should not put all your efforts into it: '[d]o not put all your eggs in the one basket.' Another participant response: 'self-determination is the basket itself that the other rights sit in' (emphasis added)<sup>37</sup>.

The Human Rights Consultative Committee argued in its report that the concept of self-determination is uncertain. When VALS engaged the Castan Centre for Human Rights to critique this analysis it was concluded that

*...it is a substantial oversimplification to present the right to self-determination as uncertain in law. 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.*<sup>38</sup>

At the time VALS argued that the meaning of self-determination will of necessity be an evolving idea and that this was entirely acceptable and appropriate.

The Human Rights Consultative Committee also argued that the inclusion of a right of self-determination may have unintended consequences. The notion that unintended consequences may eventuate is relevant to the example of the Aboriginal and Torres Strait Islander Commission (ATSIC) which has been painted as a failure of self-determination. The Centre for Aboriginal Economic Policy Research (CAEPR) makes a related finding: '...there may be a concomitant blurring of departmental accountability for the allocation of resources and for key outcomes, where Governments can shift blame on to Indigenous organisations and their peoples for their failures.'<sup>39</sup> Behrendt's analysis of the abolition of ATSIC is that 'the lack of any clear right to self-determination made it easier for the Commonwealth Government to abolish ATSIC and not replace it with an alternative. It means that Indigenous Australian organisations have to argue the case for representation, for involvement in decision making, for cultural inclusion over and over again.'<sup>40</sup>

Lack of Aboriginal and Torres Strait Islander people's capacity may be raised as a reason to exclude self-determination from the Charter. The child protection system in Victoria provides a good model in relation to capacity building. The *Children, Youth and Families Act 2005* makes provision for guardianship to be transferred to the Aboriginal and Torres Strait Islander community. It is envisaged that this will occur in a staggered manner to

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<sup>37</sup> Melissa Castan, (2005) *op cit*.

<sup>38</sup> *Id.*

<sup>39</sup> Hunt Janet et al 'Contest Governance: culture, power and Indigenous institutions in Australia', Centre for Aboriginal Economic Policy Research, ANU, Research Monograph 29, 2008, page 12

<sup>40</sup> A State Government Charter of Rights - Will it work for Koories?

Presented at Indigenous Australian Human Rights Forum on 10 August 2005 as included in the VALS submission to the Department of Justice in response to the Discussion Paper - 'Have Your Say about Human Rights in Victoria', (24/08/05), page 4, a

t [http://vals.org.au/static/files/assets/fc56a999/VALS\\_preliminary\\_submission\\_sent\\_300805.pdf](http://vals.org.au/static/files/assets/fc56a999/VALS_preliminary_submission_sent_300805.pdf)

acknowledge the need for capacity growth with the Aboriginal Community Controlled sector.

The Victorian Aboriginal Child Care Agency (VACCA) has worked with the Government in relation to this initiative. The importance of capacity was expressed by VACCA CEO, Muriel Bamblett, at the VALS 2008 meeting in Thornbury: '[u]nfortunately, self-determination was poorly resourced and not enough thought was put into building the capacity of Indigenous communities to exercise their self-determination. Self-determination muscles had been unused for decades and we needed the right exercise plan to restrengthen them.'<sup>41</sup>

There are other practical examples of what self-determination can, and in some cases does, look like. It can be argued that these may include (to varying degrees):<sup>42</sup>

- The Victorian Aboriginal Justice Agreement: an agreement between the Government and leaders of the Aboriginal and Torres Strait Islander community in relation to justice issues. Interestingly, in debate about whether Tasmania should have a human rights Act, it was noted that '[t]he Act could support the agreements already existing between the Aboriginal and Torres Strait Islander community and the Government (i.e. service delivery, land agreements, development of protocols).'<sup>43</sup>
- Koori Court: The Koori Court does not recognise Aboriginal customary law but recognises the authority of Elders and Respected Persons in Aboriginal and Torres Strait Islander culture. This authority sits within a Western structure, and the Magistrate still has ultimate authority, yet Elders and Respected Persons can provide advice to the Magistrate. The authority of the Elders and Respected persons on the defendant is apparent as their opinion about the defendant has more authority than that of Magistrate. Anecdotal evidence suggests that the power of the Elders and Respected Persons means that some defendants choose to appear in the mainstream Magistrates' Court if they reoffend rather than face the scorn of the Elders or Respected Persons again.

The Koori Court is an example of restorative justice. VALS has experienced arguments against restorative justice options because it gives a place to Aboriginal and Torres Strait Islander community in the justice system and it is difficult to pin the guidelines for restorative justice down as one model is different to that in another community. However, VALS argued that just because restorative justice is difficult to pin down there is no need to not try it as this is counterproductive.

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<sup>41</sup> Muriel Bamblett, 'Getting 'Rights' Right and Righting the Wrongs: A Rights Framework for Aboriginal and Islander Communities and Their Children' presented at Indigenous Australian Human Rights Forum on (10 August 2005), included in the VALS submission to the Department of Justice in response to the Discussion Paper - 'Have Your Say about Human Rights in Victoria', (2005), p. 17, at [http://vals.org.au/static/files/assets/fc56a999/VALS\\_preliminary\\_submission\\_sent\\_300805.pdf](http://vals.org.au/static/files/assets/fc56a999/VALS_preliminary_submission_sent_300805.pdf)

<sup>42</sup> As suggested at Healesville Community Forum, 18 October 2005; and Community Meeting Re: Human Rights for Indigenous Australians 7 September 2005 at the Aborigines Advancement League.

<sup>43</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice Report 2008' Australian Human Rights Commission (2009) p. 48, at [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport08/downloads/SJR\\_2008\\_full.pdf](http://www.hreoc.gov.au/social_justice/sj_report/sjreport08/downloads/SJR_2008_full.pdf)

- Representative body
- Aboriginal and Torres Strait Islander Social Justice Commissioner
- Guardianship (per above)
- Quota in parliament
- Aboriginal and Torres Strait Islander political party
- Aboriginal and Torres Strait Islander public servants
- Stronger intellectual property rights rules to Aboriginal and Torres Strait Islander peoples have ownership of their words, ideas and pictures.
- International voice: Fund Aboriginal and Torres Strait Islander organisations to contribute to a rights policy framework and to have input into United Nations reviews of compliance with human rights instruments.

### **3.1.2. Self-determination and health**

Recognition of self-determination rights also has the potential to positively affect health in a number of ways. It has been argued that recognition of the right to self-determination is good for the health of Aboriginal and Torres Strait Islander peoples through a comparison of life expectancy statistics that show Indigenous peoples who have treaties and various self-determining rights have far better health outcomes.<sup>44</sup>

### **3.1.3. Self-determination, colonisation and incarceration**

There is a clear link between recognition of the right to self-determination and the prevention of repeating the mistakes of the past resulting from denial of self-determination (i.e. the colonisation process).

According to Richard Edney, former VALS' criminal law solicitor, '[t]he principle and practice of self-determination cannot be separated from the nature of Indigenous imprisonment.'<sup>45</sup> Edney states colonial policies have 'subjected Indigenous peoples to a higher degree than normal of state regulation...imprisonment, however stood as the most complete and

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<sup>44</sup> Muriel Bamblett, 'Getting 'Rights' Right and Righting the Wrongs: A Rights Framework for Aboriginal and Islander Communities and Their Children', presented at Indigenous Australian Human Rights Forum (10 August 2005) in the VALS' submission to the Department of Justice in response to the Discussion Paper - 'Have Your Say about Human Rights in Victoria', (2005), p. 17, at [http://vals.org.au/static/files/assets/fc56a999/VALS\\_preliminary\\_submission\\_sent\\_300805.pdf](http://vals.org.au/static/files/assets/fc56a999/VALS_preliminary_submission_sent_300805.pdf)

<sup>45</sup> Richard Edney, 'Self Determination and Aboriginal Imprisonment', presented at Best Practice Interventions in Corrections for Indigenous Peoples Conference, Australian Institute of Criminology, (October 2001) page 3.

obvious example of a pattern of non-indigenous control...The act of imprisoning an Indigenous person thus has a political dimension.<sup>46</sup>

#### **3.1.4. Statements of compatibility**

The inclusion of the right to self-determination in the Charter is most likely to be exercised in the development and scrutiny of new legislation. Part 3, Division 1 of the Charter provides that a member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.<sup>47</sup> This statement of compatibility with the Charter must be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.<sup>48</sup> The Charter further requires that a statement of compatibility must state whether in the members opinion, the Bill is compatible with human rights and how so. The minister must further provide his or her opinion as to whether any part of the Bill is incompatible with human rights and the nature and extent of incompatibility. In addition to this process, the Victorian Charter makes provisions for the Scrutiny of Acts and Regulations Committee (SARC) to consider any Bill introduced in to Parliament and must report to Parliament as to whether the Bill is incompatible with human rights.

The inclusion of self-determination rights, therefore, could influence not only ministers' consideration of the content of the Bill being presented to the parliament, but could also have the potential to influence the way in which the content of a Bill is brought about itself as self-determination rights are understood in international law to include free, prior and informed consent.

#### **3.1.5. Statement of impact**

The Human Rights Consultation Committee found it is possible for the right of Aboriginal and Torres Strait Islander peoples to self-determination to be meaningfully expressed subject to workable limitations through a low-cost and moderate-impact initiatives such as requiring a statement of impact on Aboriginal and Torres Strait Islander persons to be prepared when intending to legislate exclusively for them, having ensured that there has been consent or at least full consultation with interested parties and potential beneficiaries. This could act as either a separate mechanism, adjunct or incorporated into, the statement of compatibility processes already being utilised.

#### **3.1.6. Free, prior and informed consent**

As part of her postdoctoral research, Amy Maguire interviewed a range of Aboriginal and Torres Strait Islander respondents on their perceptions of the meaning of self-determination.<sup>49</sup> She notes that respondents acknowledged the right to be consulted and to

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<sup>46</sup> Edney, Richard (VALS), 'Self Determination and Aboriginal Imprisonment', presented at Best Practice Interventions in Corrections for Indigenous Peoples Conference, Australian Institute of Criminology, 809 October 2001, page 3

<sup>47</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), s28(1).

<sup>48</sup> s28(2)

<sup>49</sup> Amy Maguire (2009) *op cit*.

give or withhold free, prior and informed consent to decisions that will affect Aboriginal and Torres Strait Islander peoples as *central* to self-determination.<sup>50</sup>

UNDRIP is an instrument that affirms that the world's Indigenous Peoples are equal to all others while recognising distinct rights. The Declaration provides that Indigenous Peoples have the right to self-determination and the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures.<sup>51</sup>

VALS recently endorsed the Joint Intervention on Free, Prior and Informed Consent through our participation at the Tenth Session of the United Nations Permanent Forum on Indigenous Issues in New York as part of the Indigenous Peoples Organisations Network of Australia. This Intervention to the United Nations Economic and Social Council (ECOSOC) argued that, amongst other things:

- The principle of free, prior and informed consent must be understood in context of the Declaration on the Rights of Indigenous Peoples.
- Free, prior and informed consent is a fundamental constituent of the right of self-determination. It is a collective right of 'peoples' who hold authority linked to the rights of autonomy, governance and decision-making.
- To assume free, prior and informed consent, Indigenous Peoples should have access when needed to adequate legal and technical representation in order to prevent rights being infringed upon by illegal or corrupt practices of governments or the private sector.
- States and institutions should review policies, programs and approaches in consultation with Indigenous peoples, to ensure the implementation of the principle of free, prior and informed consent and to create a true partnership for development.
- Ensure free, prior and informed consent principles and mechanisms are assessed to ensure Indigenous people's full consent is provided before any policies, project and/or plans affecting their lifestyles or properties are implemented. Where appropriate states should implement legislation.

Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, builds on this, highlighting that UNDRIP provides guidance on how to undertake reform through the principle of free, prior and informed consent.

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<sup>50</sup> An intervention is currently being developed by the Indigenous Peoples Organisations (IPO) Network of Australia on free, informed and prior consent for delivery at the tenth session of the United Nations Permanent Forum on Indigenous Issues.

<sup>51</sup> Articles 3 and 18.

Put simply, Gooda describes free, prior, and informed consent as a universally recognised right to give - or not give - our consent before certain actions affecting us can occur.<sup>52</sup> Gooda says that in speaking to people in government he often detects anxiety about what free, prior and informed consent means, particularly in relation to a right of veto. Gooda highlights that there is no “veto” since human rights exist relative to the rights of others. Furthermore, there is no reference to veto in the Declaration. Free, prior and informed consent is instead more about equal footing when it comes to decisions that affect Aboriginal and Torres Strait Islander peoples.

Gooda notes that this principle applies not only to administrative acts and decisions, and the exploitation of our resources and lands, but also to the legislative process itself per UNDRIP Article 19.

*Too often governments in Australia interpret their obligation to consult with Indigenous people more like a duty to tell us what has been developed on our behalf, and what eventually will be imposed upon us. Rather than involving us in developing solutions that will best address our issues, and our priorities.*<sup>53</sup>

Gooda provides guidance to governments ‘mystified by consultation’ by illustrating some features of a meaningful and effective consultation process drawing on the spirit and intent of UNDRIP:

- The objective of the consultations should be to obtain the consent or agreement of the Aboriginal and Torres Strait Islander peoples affected by a proposed measure.
- Consultation processes should be products of consensus.
- And should be in the nature of negotiations.
- Consultations need to begin early and should, where necessary, be ongoing to enable meaningful participation in all stages of policy and program design, implementation and evaluation.
- Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance.
- Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision.
- Adequate timeframes should be built into consultation processes.
- Consultation processes should be coordinated across government departments. This will assist to ease the burden upon Aboriginal and Torres Strait Islander peoples of responding to multiple discussion papers and reform proposals.
- Consultation processes need to reach the affected communities.
- Consultation processes need to respect representative and decision-making structures.
- Governments must provide all relevant information and do so in an accessible way.<sup>54</sup>

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<sup>52</sup> Mick Gooda (2011) *op cit.*

<sup>53</sup> *Op cit.*

<sup>54</sup> *Id.*

**Recommendation 2: Self-determination rights be included in the Charter.**

**Recommendation 3: The Charter define self-determination in broad terms to ensure flexibility.**

**Recommendation 4: The preamble to the Victorian Charter recognise the traditional owners and custodians of the lands and waters of Victoria and Aboriginal and Torres Strait Islander persons in Victoria as self-determining peoples in accordance with Article 1 of the ICCPR and ICESCR.**

**Recommendation 5: Self-determination rights be included as a standalone human right in the body of the Victorian Charter as guided by the Declaration and informed by the Victorian Aboriginal and Torres Strait Islander community. Self-determination rights must include free, prior and informed consent.**

**Recommendation 6: Part 3, Division 1 of the Charter be amended to include a mechanism for the requirement of a statement of impact of Aboriginal and Torres Strait Islander peoples when legislating for this group of peoples. Performed by the Scrutiny of Acts and Regulations Committee, or other, statements of impact should be provided with the full consultation with interested parties and give consideration to self-determination rights for Aboriginal and Torres Strait Islander peoples in Victoria with regard to their lands and waters, the protection of their culture and procedures that impact their future.**

The economic benefits of self-determination rights are discussed in section 7.

### **3.2. Economic, cultural and social rights**

Article 3 of the Universal Declaration of Human Rights ('Universal Declaration') was adopted by the General Assembly of the United Nations on 10 December 1948 and articulates the first major premise of the document as they relate to civil and political rights. It is these civil and political rights that the *Charter of Human Rights and Responsibilities 2006* (Vic) was modeled on. Article 22 of the Universal Declaration states the second major premise of the Universal Declaration, forming the basis of what is known as economic, social and cultural rights:

*Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.*<sup>55</sup>

Articles 23-27 of the Universal Declaration set out the other economic, social and cultural rights, among them: the right to form and join trade unions; the right to a standard of living adequate for health and well-being; the right to education; and the right to participate in the cultural life

<sup>55</sup> The Universal Declaration of Human Rights at <http://www.un.org/en/documents/udhr/index.shtml>

of the community. Being one of the first statutory embodiments of civil and political rights Australia, the Charter was restrained in its drafting and not only failed to acknowledge what is considered to be the full realisation of civil and political rights, but consciously omitted recognition of economic, cultural and social rights.

The idea of two sets of rights has resulted in a legacy of artificial separation of civil and political rights (historically referred to first-generation rights) from economic, social and cultural rights (second-generation rights). These rights are embodied in the aforementioned ICCPR and ICESCR respectively.<sup>56</sup> The Committee on Economic, Social and Cultural Rights has strongly recommended that Australia incorporate the International Covenant on Economic, Social and Cultural Rights (ICESCR) into domestic legislation.<sup>57</sup>

Despite the ICCPR and ICESCR being adopted by the same General Assembly Resolution<sup>58</sup> and General Assembly Resolutions subsequently affirmed the rights in both Covenants as being interconnected and interdependent, their division is very real in the way rights contained within these Covenants are realised on the ground. It has been argued that the division of the Universal Declaration into the two Covenants reflects ideological and philosophical differences where the “Western doctrine” sees civil and political rights as being of primary importance, while socialist States and the developing world defend economic, social and cultural rights.<sup>59</sup> Others argue that the international community has started to devote more attention to second-generation rights and that we should not be discouraged from the challenges faced by their realisation, but instead take heart at the development and maturation in certain circumstances.<sup>60</sup> For example:

- The Council of Europe has established a complaints process for economic, social and cultural rights;
- The Inter-American Commission on Human Rights and the African Commission on Human and Peoples’ Rights is taking economic, social and cultural rights seriously and has already made findings relevant to health and healthcare.<sup>61</sup>
- South Africa has incorporated economic, social and cultural rights into its Constitution;
- Indian courts adjudicate on economic, social and cultural rights by reading them into civil and political rights. This practice is similarly emerging in the United Kingdom where

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<sup>56</sup> It is not the intention of the current discussion to cover the history of the International Covenants on Human Rights and the debate surrounding the reinforcement of the separation of economic, social and cultural rights from civil and political rights.

<sup>57</sup> National Association of Community Legal Centres, the Human Rights Law Resource Centre and Kingsford Legal Centre, ‘Freedom Respect Equality Dignity: Action NGO Submission to the UN Committee on Economic, Social and Cultural Rights Australia. Executive Summary’ (2009).

<sup>58</sup> 2200A(XXI) of 16 December 1966 at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/03/IMG/NR000503.pdf?OpenElement>

<sup>59</sup> Daniel Warner, ‘An Ethics of Human Rights’ (1996) 24 *Denver Journal of International Law and Policy* 395.

<sup>60</sup> Paul Hunt, ‘Reclaiming Economic, Social and Cultural Rights’ (1993) *Waikato Law Review* 141.

<sup>61</sup> See *Jorge Odir Miranda Cartez v El Salvador* Inter-American Commission on Human Rights 2001 and *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* African Commission of Human and People’s Rights (2001).

some judges are interpreting the *Human Rights Act 1998* containing, civil and political rights, in a way that reinforces elements of economic, social and cultural rights.<sup>62</sup>

Some argue that it is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity and therefore States are as responsible for violations of economic, social and cultural rights as they are for civil and political rights.<sup>63</sup> The Charter remains testament to the fact that some States still believe civil and political rights *can* be separated from economic, social and cultural rights. The Victorian Charter has shown that even civil and political rights can be considered *of themselves* divisible by the State, as in its current form it does not exist as a statutory realisation of the full extent of rights contained within the ICCPR.

Recently both the Tasmanian and Western Australian Governments conducted consultations on the need for human rights legislation. Both consultations recommended that human rights legislation should be enacted and that these instruments should enshrine economic, social and cultural rights as well as civil and political rights.

It is likely that the current review of the Charter will produce submissions that resurrect long-held, outdated views about the unworkability and therefore inappropriateness of the extension of the Victorian Charter to include economic, social and cultural rights. Classic examples include that unlike civil and political rights, economic, social and cultural rights are:

- Resource-intensive
- Progressive
- Vague
- Unmanageably complex
- Ideologically divisive and political
- Aspirational<sup>64</sup>

It has also been argued, however, that there is a currently a 'trend' of States and civil society groups in taking economic, social and cultural rights more seriously and while this trend is contested and uneven, it is unmistakable and on the rise.<sup>65</sup>

VALS argues that Victoria should take stock of the experiences in other States and learn how to extend the Charter to not only include the full extent of rights found in ICCPR but also consider the adoption of economic, social and cultural rights as found in ICESCR. This is not to say that the implementation of economic, social and cultural rights is unproblematic, it is to say that there are viable options for progressive realisation of these rights through the Charter via the current review process.

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<sup>62</sup> Paul Hunt, 'Reclaiming Economic, Social and Cultural Rights' (1993) *Waikato Law Review* 141.

<sup>63</sup> *Id.*

<sup>64</sup> Craig Scott, 'The Interdependence and Permeability of Human Rights and Norms: Towards a partial fusion of the International Covenants of Human Rights,' (1989) 27 *Osgoode Hall Law Journal* 769.

<sup>65</sup> *Id.*

There currently exists some protection of economic, cultural and social rights in Victoria. For example, the Victorian Equal Opportunity Act makes it unlawful to discriminate against a person on the basis of a protected attribute including in the provision of services and education.<sup>66</sup> This protection is enforceable through a complaints mechanism that is serviced by VEOHRC. Other examples of economic, social and cultural rights protections that exist in Victoria outside the Charter include access to education, residential tenancy laws that protect limited rights to housing, and regulatory schemes intended to maintain standards of health care.<sup>67</sup> While these existing protections do not equate to a comprehensive system of rights protections as outlined under the ICESCR, it does demonstrate that the protection of economic, cultural and social rights can be effectively legislated for.

Pre and post-commencement of the Charter, there were many critics that warned of this legislation bringing with it the potential for a “lawyer’s picnic”. It is now generally accepted that these critics abjectly failed in their predictions of a flood of litigation, the transfer of power from Parliament to judges, or the end of democracy.<sup>68</sup>

*Far from a tidal wave, the flow of cases has been barely a trickle. Every case litigated under the charter was also brought on non-charter grounds. The myth that charters of rights create a lawyers’ picnic is unsubstantiated. With almost no exceptions, charter cases for disadvantaged Victorians are run pro bono.*<sup>69</sup>

The Charter has already been utilised by public interest groups and Non-Government Organisations in a way to force the obligation of respect for economic, social and cultural rights. Phil Lynch argues that outside the courtroom, the Charter is being used to address disadvantage and promote dignity – a fact conveniently ignored by critics of the Charter.

*You won’t have read, for example, that the charter prevented the eviction of a single mother and her kids from public housing into homelessness or that it assisted an elderly woman with brain injury to access critical medical assistance...You’re unlikely to have heard that a 19-year-old woman with cerebral palsy relied on the charter to obtain support services and case management. And you won’t have read that, just a few weeks ago, children with autism were deemed eligible for disability support services after their advocates invoked the Victorian Charter.*<sup>70</sup>

In light of experiences thus far, VALS considers arguments against the strengthening and expansion of the Charter along the lines of fear of dramatically increased litigation and the transfer of power to the judiciary to be misguided and misleading.

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<sup>66</sup> John Tobin, ‘Economic, social and cultural rights and the Charter of Human Rights and Responsibilities,’ *Victorian Equal Opportunity and Human Rights Commission* (2010) Occasional Paper.

<sup>67</sup> *Id.*

<sup>68</sup> Phil Lynch, ‘The UN, business and human rights’ *Lawyers Weekly Online*, at <http://www.lawyersweekly.com.au/blogs/opinion/archive/2009/02/27/the-un-business-and-human-rights.aspx>

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

### 3.2.1. Obligations

Like civil and political rights, economic, social and cultural rights impose obligations to respect, protect and fulfil. The failure to respect, protect and fulfil these rights constitutes a violation of these rights.<sup>71</sup> When the common argument against the adoption of economic, social and cultural rights is invoked – that extreme budgetary, judicial and administrative and other measures are required for their realisation – it is not commonly acknowledged by resistant States that the first obligation, to *respect*, requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. The obligation to respect economic, social and cultural rights, therefore, cannot be diminished or postponed on the basis aforementioned argument invoked by States. The obligation of the State to *protect* economic, social and cultural rights involves the monitoring and prevention of violations of these rights by third parties. It is reasonable to assume that there would need to be a strong administrative arm of the State to fulfil this obligation and would therefore attract time and monetary commitment to this end, especially in the establishment phase. This could not reasonably be described, however, as injurious burden on the State, especially in the case of Australia. The obligation of the State to *fulfil* economic, social and cultural rights is where the strongest resistance by States is found. The obligation to fulfil economic, social and cultural rights requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the realisation of these rights.<sup>72</sup>

Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources."<sup>73</sup> It has been argued that compliance with such obligations may be undertaken by *most* States with relative ease and without significant resource implications.<sup>74</sup> In terms of the means by which States choose to implement measures pursuant to their obligations, there is a margin of discretion. Universal minimum standards have, however, been developed through the application of legal norms to cases effectively, actions of international treaty monitoring bodies, and domestic courts. So too has there been a subsequent development of a common understanding of the scope, nature and limitations of economic, social and cultural rights.<sup>75</sup>

Like some civil and political rights, the full realisation of economic, social and cultural rights can only be achieved progressively. International human rights law dictates that this does not vary the legal obligation on States which dictates that certain steps be taken immediately and others in the medium to long-term.

Violations of the ICESCR are determined by the United Nations Committee on Economic, Social and Cultural Rights.

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<sup>71</sup> *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) *op cit*.

<sup>72</sup> *Id.*

<sup>73</sup> Committee on Economic, Social and Cultural Rights, General Comment 3, *The nature of States parties obligations* (Art. 2, par.1) fifth session 1990, at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument)

<sup>74</sup> *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) *op cit*.

<sup>75</sup> *Id.*

*The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.*<sup>76</sup>

No formal codification of these rights exist in Australia and therefore it can be said that Australia is failing to meet its obligations under international law. While this may change though process underway by means of the National Human Rights Action Plan, the responsibility to uphold and protect these rights has fallen to the States and Territories.

The National Human Rights Consultation report notes the argument that introducing human rights legislation which focuses on civil and political rights and excludes economic, social and cultural rights, is unlikely to contribute to significant improvements to the daily lives of Aboriginal and Torres Strait Islander peoples.<sup>77</sup>

The 2009 Australian National Human Rights Consultation Report found that the most basic economic and social rights matter most to Australians, namely the highest attainable standard of health, the right to housing, and the right to education. The Report noted that these rights were the most important to the community because these rights are at greatest risk, especially for vulnerable groups in the community.<sup>78</sup>

### **3.2.2. Justiciability**

VALS notes that there are well place concerns about the justiciability of economic, social and cultural rights. VALS does not believe, however, that the challenges faced in the progressive realisation of economic, social and cultural rights are beyond the realm of the Charter. There are numerous examples of States formally recognising economic, social and cultural rights in their courts and tribunals. And, contrary to the fears of commentators opposed to their formal protection, jurisprudence has thus far revealed judiciaries acting in a manner mindful of fiscal implications for the legislature when making orders concerning economic, social and cultural rights.

While VALS argues that economic, social and cultural rights should ultimately be legally enforceable and justiciable, we also recognise the complications inherent in providing judicial remedies for breaches of economic, social and cultural rights. VALS therefore

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<sup>76</sup> Committee on Economic, Social and Cultural Rights, General Comment 3, *The nature of States parties obligations* (Art. 2, par.1) fifth session 1990 at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument)

<sup>77</sup> Curtin University of Technology, Centre for Human Rights Education, *Submission to National Human Rights Consultation* (2009) at [http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/BD1FB61D8130DA3DCA25760F0005EFCC/\\$file/Linda%20Birkman\\_AGWW-7T28ZA.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/BD1FB61D8130DA3DCA25760F0005EFCC/$file/Linda%20Birkman_AGWW-7T28ZA.pdf)

<sup>78</sup> National Human Rights Consultation Committee, *Report of the National Human Rights Consultation* (2009) at [http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)~NHRC+Report+\(Prelims\).pdf/\\$file/NHRC+Report+\(Prelims\).pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)~NHRC+Report+(Prelims).pdf/$file/NHRC+Report+(Prelims).pdf)

suggests, at minimum, the Charter should provide for the Human Rights Commissioner/Victorian Equal Opportunity and Human Rights Commission to receive individual complaints of alleged breaches of economic, social and/or cultural rights.

**Recommendation 7: The Charter provide the Human Rights Commissioner/Victorian Human Rights and Equal Opportunity Commission to receive individual complaints of alleged breaches of economic, social and/or cultural rights.**

**Recommendation 8: In recognition that the most basic economic, social and cultural rights (such as highest attainable standard of health, the right to housing and the right to education) matter to most Australians, especially for vulnerable groups in the community, economic, social and cultural rights protections be included in the Charter.**

### 3.3. Children's rights

#### 3.3.1. Children's rights and the criminal justice system

VALS strongly advocates for the inclusion of the rights of children in the Charter. VALS argues that children and young people are unfairly discriminated against because of their age, status as children and young people, over-policing and by way of their lawful social practices and assembly - that is their occupation of public space. This is especially so in the case of Aboriginal and Torres Strait Islander children.

VALS considers the importance of the Government retaining the Charter with reference to children in the criminal process whereby:

- An accused child who is detained or a child detained without charge must be segregated from all detained adults.
- An accused child must be brought to trial as quickly as possible.
- A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.
- A child charged with a criminal offence has the right to a procedure that takes into account his or her age and the desirability of promoting the child's rehabilitation.<sup>79</sup>

**Recommendation 9: The Charter be retained in order to protect the basic rights of children who come into contact with the criminal justice system.**

VALS also believes graffiti, weapons and stop and search laws in Victoria discriminate and criminalise children in their use of public space and violate their human rights. For this reason, amongst others, we advocate for the Charter to include specific rights for children as

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<sup>79</sup> s23 and 25(3)

outlined in the United Nations Convention on the Rights of the Child (CROC).<sup>80</sup> Relevant to this point is CROC Articles as follows:

*Article 3*

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

*Article 37*

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

*Article 40*

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to

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<sup>80</sup> <http://www2.ohchr.org/english/law/crc.htm>

have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

**Recommendation 10: Section 23 of the Charter be expanded to include the full protection of children's rights when in contact with the criminal justice system as outlined in the United Nations Convention on the Rights of the Child (CROC) Articles 3, 37 and 40.**

### **3.3.2. Best interests of the child and the child protection system**

For expert advice for how the rights of Aboriginal and Torres Strait Islander children and the best interests of the child can most effectively be incorporated into the Charter, VALS refers SARC to the Victorian Aboriginal Child Care Agency (VACCA).

VALS has done some work in this area where the importance and effectiveness of recognising the rights of the child is demonstrated. Please refer to our 'Review of Victoria's Child Protection Legislative Arrangements: Submission to the Victorian Law Reform Commission April 2010' submission.<sup>81</sup>

VALS is also mindful of the limitations on children's rights when they come before the Youth Parole Board (YPB) which has been granted an exemption as a public authority under the Charter. This issue is further discussed in section 4.2.

VALS and Aboriginal and Torres Strait Islander Legal Services (ATSILS) have done some recent work in this area and is currently drafting a submission to the Committee on the Rights of the Child for the review of Australia. We urge SARC to consider our work in this area for consideration in the current Inquiry which will be available mid-July.

#### *Child Rights Taskforce*

VALS made a submission December 2010 to the Child Rights Taskforce for the Australian NGO Report to the United Nations Committee on the Rights of The Child.<sup>82</sup> In this submission VALS noted that the Charter was a positive step forward for the protection of rights for Aboriginal and Torres Strait Islander young people.

### **3.4. Women's rights**

Aboriginal and Torres Strait Islander women represent some of the most marginalised and disadvantaged people in the Victorian community. VALS therefore strongly advocates for the inclusion of the human rights of women within the Charter. As VALS has not done significant work or investigation on this subject matter, we feel we are not well placed to comment on the most effective way to incorporate human rights for women into the Charter.

We refer SARC to UNDRIP Articles 21(2) and 22 whereby in the implementation of UNDRIP, women (in addition to children, youth, children and people with disabilities) are entitled special measures to ensure their full enjoyment of rights and full protection and guarantees against all forms of violence and discrimination. We also refer SARC to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

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<sup>81</sup>[http://vals.org.au/static/files/assets/35393702/Review\\_Victoria\\_Child\\_Protection\\_Legislation\\_VLRC\\_Sub\\_Final\\_April\\_2010.pdf](http://vals.org.au/static/files/assets/35393702/Review_Victoria_Child_Protection_Legislation_VLRC_Sub_Final_April_2010.pdf)

<sup>82</sup><http://vals.org.au/law-reform-and-policy-development/submissions/post/convention-on-the-rights-of-the-child-submission-to-child-rights-australia-taskforce/>

## 4. Impact of the Charter

### 4.1. The development and drafting of statutory provisions and the consideration of statutory provisions by parliament

Part 3 of the Charter ensures that human rights are considered in the preliminary stages of legislative and regulatory development. Part 3, Division 1 of the Charter provides that a member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill. This statement of compatibility must be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill. The Charter further requires that a statement of compatibility must state whether in the members opinion, the Bill is compatible with human rights and how so. The minister must further provide his or her opinion as to whether any part of the Bill is incompatible with human rights and the nature and extent of incompatibility.

SARC notes that the requirement that Bills be accompanied by a statement of compatibility has a dual purpose: to inform parliamentary debate; and ensure that human rights are properly considered when Bills are developed.<sup>83</sup> SARC will also write to Ministers if they consider a statement of compatibility to be inadequate in describing provisions that may engage or infringe a rights within the Charter.

VALS considers the mechanism outlined above to not only ensure that human rights are considered in the development of legislation and informs the debate that accompanies it, but provides an opportunity for community input in the development of legislation. This is one area that VALS believes could be strengthened. VALS has attempted to engage with SARC in the past, and while recognising their time constraints, we found it hard to have meaningful input to the process due to SARC's limited capacity to consult with community, and their subsequent inability to consider and communicate community views to relevant ministers.

#### *Equal Opportunity Bill 2010*

VALS made a submission to SARC last year regarding the *Equal Opportunity Bill 2010* (Vic). VALS communicated to SARC that the Bill failed to take on concerns relating to discrimination on the basis of an irrelevant criminal record and homelessness that were not covered under the Bill.<sup>84</sup> It was argued that:

- Failure to recognise discrimination on the basis of homelessness and irrelevant criminal record perpetuates disadvantage and renders poor treatment of people that fall into one or both of these categories as lawful

<sup>83</sup> Scrutiny of Acts and Regulations Committee, *Alerts Digest No 11 of 2009* (2009).

<sup>84</sup> The Victorian Aboriginal Legal Service Co-operative Limited's comments to the Scrutiny of Acts and Regulations Committee concerning the *Equal Opportunity Bill 2010* (Vic). <http://vals.org.au/law-reform-and-policy-development/submissions/post/equal-opportunity-bill-2010/>

- Spent convictions occurs in the context of *Parliamentary Committees Act 2003*<sup>85</sup>. VALS discusses of s17(a)(viii), relating to compatibility of the Bill to the Charter of Human Rights and Responsibilities, argues that neither the Bill or Charter are effective instruments to protect people from discrimination on the basis of an irrelevant criminal record.
- VALS also discusses section 17(a)(iii) and questions whether the Bill makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions in the context of investigations and public inquiries into systemic discrimination.
- As it is the function of SARC to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly trespasses unduly on rights or freedoms, VALS argues that the Bill's omission of considerations of discrimination on the basis of an irrelevant criminal record presents a barrier to the enjoyment of the right to work. The Bill should be acting as a special measure designed to *address* significant barriers to the enjoyment of the right to work faced by many Aboriginal and Torres Strait Islander Peoples.
- In their submission to the Victorian Department of Justice Equal Opportunity Review Discussion Paper 2007, the Victorian Equal Opportunity and Human Rights Commission highlighted a clear link between the limitations on the enjoyment of economic rights as a result of a criminal record.<sup>86</sup>
- VALS' Civil Law Solicitor is aware of the following examples of alleged discrimination in employment on the basis of criminal record towards Aboriginal and Torres Strait Islander peoples:<sup>87</sup>

A client applying for a position with an Aboriginal organisation was refused a job because of a conviction for a driving offence (he was to be a driver of a small bus-this position required a Comprehensive Car Insurance Policy).

A client who had a position as an Indigenous Prison Liaison Officer was sacked because of a criminal record relating back to his early childhood (he didn't disclose the minor theft conviction).

A client applying for a position with a Government Department was refused an offer of employment because a criminal record disclosed a conviction for being drunk many years ago.

<sup>85</sup> s17(a)(i): direct or indirect trespass unduly on rights or freedoms, and s17(a)(iv): unduly requirement or authorisation of acts or practices that may have adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*.

<sup>86</sup> <sup>86</sup> Victorian Equal Opportunity and Human Rights Commission, 'Equal Opportunity Review: Discussion Paper 2007 submission to the Victoria Department of Justice' (2008) at [www.equalopportunitycommission.vic.gov.au/pdf/equal%20opportunity%20review%20response.pdf](http://www.equalopportunitycommission.vic.gov.au/pdf/equal%20opportunity%20review%20response.pdf)

<sup>87</sup> Per VALS' *Discrimination in Employment on the Basis of a Criminal Record Discussion Paper December 2004* (submitted 3 March 2005).

- The absence of a spent conviction scheme makes it incumbent on instruments like the Bill to ensure that discrimination doesn't occur on the basis of an irrelevant criminal record.
- Another function of SARC is to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly unduly requires or authorises acts or practices that may have adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*. The Information Privacy Principles (IPP) in schedule 1 of the Information Privacy Act 2000 lists "sensitive information" to mean information or an opinion about an individual's: racial or ethnic origin; or political opinions; or membership of a political association; or religious beliefs or affiliations; or philosophical beliefs; or membership of a professional or trade association; or membership of a trade union; or Sexual preferences or practices; or criminal record.

VALS argued that there are not adequate systems in place to ensure that information about a person's criminal record are not inappropriately provided to employers.

- It is also a function of Scrutiny of Acts and Regulations Committee is to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly incompatible with the human rights set out in the Charter of Human Rights and Responsibilities. Section 8 of the Charter provides that:
  - Every person has the right to recognition as a person before the law;
  - Every person has the right to enjoy his or her human rights without discrimination; and
  - Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination

"Discrimination" for the purposes of section 8 of the Charter is limited to the attributes set out in the *Equal Opportunity Act 1995* and *Equal Opportunity Bill 2010*, which currently does not include irrelevant criminal record.

Through this process VALS found little consideration of irrelevant criminal records or homelessness by SARC and therefore Government. This is despite numerous submissions from the community legal sector that argued for these changes.

### *Police powers legislation*

In 2009 and 2010, amending Acts were introduced in Victoria that increased police powers to be able to stop and search people including children, give "move on" orders and issue disorderly

conduct fines.<sup>88</sup> When these laws were proposed there was widespread concern throughout community organisations that, amongst other things, the laws would be discriminatory in effect, especially in the case of people who occupy public space in particular ways such as young people, homeless people, and members of the Aboriginal and Torres Strait Islander community.

In addition to a member of the Victorian Parliament acknowledging that the discretionary powers of police to randomly search people in public places without reasonable suspicion that the person is carrying a weapon could not be justified as reasonable or proportionate,<sup>89</sup> SARC also identified that police powers could be used repeatedly without threat of violence or disorder.<sup>90</sup> Furthermore, SARC noted that amendments were potentially incompatible with privacy and liberty rights as well as the rights of children under the Charter.<sup>91</sup>

These concerns did not stop these pieces of legislation being passed through parliament unamended with three provisions incompatible with the Charter. Despite this disappointing outcome, VALS considers the high level of debate in the community and in the parliament around the human rights implications on pieces of legislation such as these to be valuable.

#### *Mental Health and Guardianship Act*

Mental illness is a causal factor in Aboriginal and Torres Strait Islander people's contact with the justice system, as well as a consequence. There are a significant number of VALS clients who experience mental illness and therefore engage not only with the criminal justice system, but that of mental health and guardianship systems. In recent years the *Mental Health Act* and the *Guardianship Act* have been under review with both requiring a reconsideration of the legislation in human rights terms as articulated in the Charter. Both reviews have recognised the Charter rights that come into play through the legislation and generally the proposals for reform have had a human rights focus.

#### **4.2. The provision of services and the performance of other functions by public authorities**

*Education for police and prison employees about the terms of the Charter would be a good start. Perhaps it would lead to less instances of human rights breaches whilst in custody<sup>92</sup>*

VALS considers the requirement of government bodies to consider and comply with human rights to be an element of the Charter's operation where positive change is occurring for our clients. As a public authority, Victoria Police are subject to the Charter and as such have implemented a Human Rights Project. The Human Rights Project Team has, for example,

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<sup>88</sup> Per *Summary and Control of Weapons Acts Amendment Act 2009* (Vic) and *Control of Weapons Act 2010* (Vic).

<sup>89</sup> Control Of Weapons Amendment Bill: Statement of Compatibility in Hansard (2010)

[http://www.parliament.vic.gov.au/images/stories/daily-hansard/Council\\_Feb-Jun\\_2010/Council\\_Daily\\_Extract\\_24\\_June\\_from\\_Book\\_10.pdf](http://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_Feb-Jun_2010/Council_Daily_Extract_24_June_from_Book_10.pdf)

<sup>90</sup> Scrutiny of Acts and Regulations Committee, *Alert Digest 8 of 2010*

[http://www.parliament.vic.gov.au/archive/sarc/Alert\\_Digests\\_10/Alert%20Digest%20No%208%20of%202010.pdf](http://www.parliament.vic.gov.au/archive/sarc/Alert_Digests_10/Alert%20Digest%20No%208%20of%202010.pdf)

<sup>91</sup> *Id.* (Under sections 13(a) and 21(1) and 17(2) respectively).

<sup>92</sup> VALS criminal law solicitor

conducted human rights introductory seminars for employees ‘to foster an understanding of human rights and their relevance to policing’ and conducted pilot projects with all regions focusing on the higher human rights risk areas such as prisoner custody and arrest.<sup>93</sup> Also, the Office of Police Integrity (OPI), responsible for the oversight of Victoria Police’s compliance with the Charter, has produced a toolkit aimed to provide a framework for assessing conditions in police cells.<sup>94</sup> This framework has regard to human rights and is based on standards set out in the Charter as well as United Nations instruments and publications.

This toolkit has been subsequently used by the OPI Audit Team to assess the impact of the Charter on the area of policing as it relates to police cells<sup>95</sup> that are used for purposes such as: for people who are intoxicated or appear to be mentally ill; those who have been charged and are awaiting transfer to a remand centre; and prisoners who are on remand and are in transit before or after appearing in court. Police cells are high risk for potential human rights abuses. This is a particular area of concern for VALS and its clients - as it is for the broader Aboriginal and Torres Strait Islander community - due to the criminalisation of public drunkenness in Victoria that leads to high levels of police contact and subsequent custody in police cells. The OPI notes that there a number of features that distinguish police cells from prisons managed by correctional facilities, such as staff in prisons are specifically trained to look after prisoners whereas police are not.<sup>96</sup> Also, police cells are not designed to accommodate individuals for long periods of time, as prisons are. For these reasons and more, this remains one of VALS most critical concerns due the increased probability this law has on policing and police custody and therefore Aboriginal and Torres Strait Islander deaths in custody. While today governments have failed to achieve full implementation of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommendations 20 years after its publication, the Charter has refocused the responsibilities of government in this area.

In this regard the Charter is having a clearly positive affect. The OPI have used their standards for police cells toolkit to assess police cells in Victoria and have identified human rights compliant and non-compliant practices across the State as they apply to: access to exercise and fresh air; geographic isolation of detainees from family; and access to training facilities.<sup>97</sup>

Despite improvements in some police cells in protecting detainee’s human rights, the lack of uniformity and minimum standards in custodial conditions across the state remains a major concern.<sup>98</sup> This sort of reporting by OPI is evidence of how the Charter is delivering benefits. The continual improvement in the treatment of people that come into contact with police and police cells as required under the Charter is argument enough for the preservation and strengthening of the Charter.

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<sup>93</sup> Victoria Police, ‘Victoria Police Annual Report 2007-2008’

<sup>94</sup> Office of Police Integrity Victoria, ‘Policing and Human Rights: Standards for police cells’(2008).

<sup>95</sup> Office of Police Integrity Victoria, ‘Update on conditions in Victoria Police Cells,’ (2010).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

#### 4.2.1. Exceptions of public authorities under the Charter

VALS argues that the Charter could be strengthened by addressing the ongoing exemptions that apply to some public authorities that essentially allow for non-compliance with basic human rights protections. VALS acknowledges the time needed to reform the policies and practices of public authorities in order to bring operations in line with responsibilities contained within the Charter, however notes that some large organisations such as the Department of Human Services and Victoria Police have managed to move towards compatibility, while smaller authorities have not. VALS questions the exemptions extended to the Adult Parole Board (APB) and the Youth Parole Board (YPB).

Key sections of the *Corrections Act 1986* (Vic) that relate to the powers of the APB include:

- Section 66(6) enables the APB to regulate its own procedure, subject to regulations.
- Section 69(2) expressly provides that *the* APB is not bound by the rules of natural justice in exercising its functions. Therefore, there are no formal avenues for appeals against a decision of the board, but a prisoner may request a review of any decision of the board.<sup>99</sup> Also, legal representatives do not have standing to appear on behalf of prisoners before the Board.
- Section 59 provides at the request of the prisoner, the Board may make a home detention order if satisfied that: the prisoner will have served at least two-thirds of the minimum term of imprisonment; the prisoner will be eligible for parole or release in 6 months or less; the prisoner is being held under minimum security conditions.<sup>100</sup>
- Section 71 confers on the APB the power to take evidence.<sup>101</sup>

The APB conducts two types of meetings:

1. Paper meetings - APB reviews progress of offenders and parolees based solely on the papers. The prisoner or parolee is not given the opportunity to participate in the decision-making process. Decisions are generally made with respect to non-contentious matters such as requesting further progress reports and scheduling further reviews. Contentious decisions are generally not made without meeting the individual concerned.
2. Interviews – APB reviews the matter and interviews the prisoner (via video-link with the prison) or parolee who attends personally. Interview meetings generally involve, inter alia: A review of the paper file; the relevant Community Correctional Services officer (this usually happens in the absence of, and prior to interviewing, the offender); and an interview of the offender where the offender is orally informed of

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<sup>99</sup> A prisoner dissatisfied by a decision of the Parole Board may challenge the decision by means of judicial review in limited circumstances (see *Fletcher v Secretary of the Department of Justice and Anor* (2006) VSC 354 at 27-41 per Justice Gillard).

<sup>100</sup> Home detention is not available for certain offenders, as specified section 60A with conditions of section 60B of the *Corrections Act 1986* (Vic).

<sup>101</sup> The APB also has specific functions under the Serious Sex Offenders Monitoring Act 2005 (SSOMA) such as court imposed extended supervision orders (ESO) for a period of up to 15 years following completing of custodial sentence (with court reviews at 3 year intervals). The APB determines 'instructions or directions' applicable to offenders that are subject to an ESO.

decisions and the reasons for it. If an interpreter is required, prison staff are to be contacted so appropriate arrangements can be made. Prisoners are allowed to bring along documents they would like the Board to consider. Prisoners are also allowed a support person with the prior approval of the Chairperson of the Board. This person may include an outreach worker or the Aboriginal Wellbeing/Indigenous Liaison Officer.

Information used by the APB in making its decision includes:

- The offender's criminal history.
- The Judge's sentencing notes.
- Notes of interviews with the offender.
- Victim submissions/correspondence from other affected persons (not disclosed to offender if requested by the victim).
- Reports from Corrections or Community Correctional Services, including: parole assessment reports; parole progress reports; and breach reports. Reports made by Corrections are ordinarily produced at the request of the APB and cover matters including:
  - The offender's background/social history.
  - Information relating to the offending.
  - In the case of assessment reports, information relating to the offender's progress prison including: rehabilitation, treatment and education programs undertaken; conduct in prison (disciplinary offences such as violent behaviour or drug use); a parole plan addressing issues of accommodation, employment and treatment; and a recommendation with respect to release on parole.
  - In the case of persons already on parole, information relating to the offender's progress, including: compliance with parole conditions; general progress with employment and family etc; concerns for risk of offending (i.e. breakdown of family or association with other know offenders etc); any recommendations to changes to conditions.
  - The reports are not disclosed to the offender.

APB is exempt from the *Freedom of Information Act 1982* (Vic; 'FOI'). It is the APB's policy to not provide copies of any reports or meeting minutes to those who make a request, even if the request is accompanied by a 'written authority'.<sup>102</sup> However, APB says the privacy principles contained in the *Information Privacy Act 2000* (Vic) prescribe how they handle information collected and/or received about offenders. Interestingly, the Information Privacy Principles (IPP) contained within the *Information Privacy Act 2000* (Vic) includes the following:

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<sup>102</sup> Adult Parole Board of Victoria (2009). *Fact Sheet 3: General Guide to Prisoner Interviews*. (Provided via email correspondence).

- IPP 1 – Collection
  - 1.3: *At or before the time (or, if that is not practicable, as soon as practicable after) an organisation collects personal information about an individual from the individual, the organisation must take reasonable steps to ensure that the individual is aware of (b) the fact that he or she is able to gain access to the information...*
  - 1.5: *If an organisation collects personal information about an individual from somewhere else, it must take reasonable steps to ensure that the individual is or has been made aware of the matters listed in IPP 1.3*
  
- IPP 5 – Openness
  - 1.5: *An organisation must set out in a document clearly expressed policies on its management of personal information. The organisation must make the document available to anyone who asks for it.*
  - 5.2: *On request by a person, an organisation must take reasonable steps to let the person know, generally, what sort of personal information it holds, for what purposes, and how it collects, holds, uses and discloses that information.*

If the APB holds personal information about an offender, it is not required to provide the offender with access to that information on the request of the offender under the IPP because denying access is authorised under FOI law.

The Charter imposes obligation on all ‘public authorities’ to conduct themselves with respect for human rights. Before the Charter came into full effect in 2008, the APB and YPB were granted exemption from its operation. This initial exemption expired in December 2008 and was then extended to December 2009. Specific rights likely to be engaged by decisions of the Parole Boards include liberty rights, the right to privacy, the right to freedom of movement, and the right not to be subjected to compulsory medical treatment.

The Government obtained legal advice suggesting that the Boards may be subject to an unacceptable risk of being found not to comply with the obligations that public authorities have under the Charter, if the interim exemptions were not in place. For instance:

- The operation of section 69(2) of the *Corrections Act* and sections 438(2) and 449(2) of the *Children, Youth and Families Act* provide that the APB/YPB are not bound by the rules of natural justice would not exclude the requirements imposed by some rights under the Charter to observe certain elements of procedural fairness inherent in some rights (such as section 21 which requires procedural fairness be afforded in cases where a person is detained).
- APB/YPB do not operate transparently or in accordance with any particular criteria. This gives rise to issues as to potential arbitrariness and particularly to questions about whether any limitations on human rights applied by the Boards are ‘under

law' as required by section 7(2), and certain specific rights (e.g. section 21(3), the right to liberty.<sup>103 104</sup>

To comply with the Charter it is likely that the APB would have to, at a minimum, institute a more formal and structured decision-making process. This would require:

- That the Boards consider all relevant human rights when making decisions, particularly when making decisions regarding the cancellation of parole or the imposition or variation of conditions on parolees;
- That this consideration include an assessment of the potential impact of any interference with any relevant human right(s) taking into account any countervailing considerations, such as that any limitation can be seen to be demonstrably justifiable under the Charter; and
- Some measure of recording of decisions to demonstrate that the above processes have been applied, and that balance has been struck in individual cases.

Certain elements of procedural fairness may also be necessary, such as:

- Written reasons for Board decisions to be given in certain circumstances (most likely with respect to decisions to cancel parole and decisions that affect the right to privacy); and
- Increased opportunity for prisoners or parolees to respond to information (such as from information from victims or their family members) that may have an adverse effect on a prisoner or parolee's status or conditions. This is generally done in practice, but more formal measures (such as a gist statement setting out the principle ground or adverse information relied upon) may be required.
- Establishment of accessible and predictable criteria<sup>105</sup> for decisions may be required in order to establish that any limitations on human rights are made 'under law'.

Practices and procedures necessary to achieve compliance with the Charter will likely inhibit the flexibility of the Boards' decision-making. Costs and benefits of changes include, but are not limited to, the following areas:

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<sup>103</sup> Key subsections on liberty rights in the Charter (section 21) are:

- 2) A person must not be subject to arbitrary arrest or detention
- 3) A person must not be deprived of his or her liberty except on grounds, and accordance with procedures, established by law.
- 4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceeding to be brought against him or her.

<sup>104</sup> The Allen Consulting Group, 'Proposed Charter of Human Rights and Responsibilities (Public Authorities) Regulations: Regulatory Impact Statement (2009) at

[http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/DOJRegulatoryImpactStatement/\\$File/DOJ%20RegulatoryImpactStatement.pdf](http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/DOJRegulatoryImpactStatement/$File/DOJ%20RegulatoryImpactStatement.pdf)

<sup>105</sup> Accessible and predictable criteria could either be implemented completely in legislation, or with some principles and criteria set in legislation and supported by guidelines (The Allen Consulting Group 2009).

- The case management approach – is partly dependent on the ability of the Boards to operate flexibly and customise their decisions to individual cases. Criteria that mandate the balance of considerations in all cases can erode this flexibility.
- Requirements for more stringent decision-making processes could potentially change the nature of the Board hearings from more open and informal to restrictive and adversarial.<sup>106</sup>
- Fettering the power to cancel parole may inhibit the granting of parole.

The Allen Consulting Group (2009) recommended that:

- A further four-year exemption would allow Boards to continue current practice and procedures while continuing to review their operations and processes in relation to the Charter. In this time additional staff could review alignment with the Charter and can consider changes within the broader review of the Charter (planned for 2011).
- Regulations be made to exempt the Boards from compliance with the Charter until 2013.

However, the Federation of Community Legal Centres Victoria (FCLC) argue that other public authorities with arguable greater human rights obligations than the Board have managed to achieve substantial compliance with the Charter in a relatively short time. Victoria Police, Corrections Victoria and the Department of Human Services had less than two years to achieve compliance (from the enactment of the Charter to the date it became fully operational, 1 Jan 2008). FCLC argued that if an exemption was granted again in 2009, it should be the Boards final exemption and should be for no longer than 12 months. FCLC further recommended that if a longer exemption was granted, the Boards should be required to make regular, public reports on its efforts to become Charter compliant.<sup>107</sup> VALS supports FCLC in their position.

### 4.3. Litigation and the roles and functioning of courts and tribunals

The introduction of the Charter was met with enthusiasm at VALS. And while it was at no time understood to be a panacea in addressing human rights violations for our clients, potential was seen within the Charter to address the violations of human rights towards Aboriginal and Torres Strait Islander peoples in Victorian. At minimum, VALS solicitors had hoped that the Charter would help bolster their advocacy efforts for VALS clients, however this has not eventuated as

<sup>106</sup> The Allen Consulting Group (2009) suggest that the Boards would be in this instance be required to comply with requirements of procedural fairness (such as providing further details to offenders and allowing the right to be heard) that would formalise Board proceedings. They suggest this would require a substantial 'cultural' shift from Boards from an open, informal manner. It is also likely that Boards would require more detailed and fulsome evidence be provided by support services (health professionals etc). The Allen Consulting Group (2009) believe this would impose substantial administrative burden on these services.

<sup>107</sup> Federation of Community Legal Centres Victoria (2009) *Proposed Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009, Regulatory Impact Statement Submission*.

expected. Five years later VALS believes that the Charter’s potential to addressing human rights injustices in the courts remains largely unrealised.

*I agree with the Charter in theory but just haven’t seen any practical use for it in any of my matters thus far. And even if there was a use for it, I don’t really see how it can fit into the hectic criminal justice system where the bench and prosecution will probably not be receptive to it.<sup>108</sup>*

VALS solicitors identified that there was an alarming ‘cultural resistance’ within the legal profession which operated to delegitimise the Charter. One VALS solicitor maintains that the delegitimation is essentially emanating from the judiciary, which in turn was sending a rippling message into the rest of the legal profession about the futility of adopting Charter arguments in court. In relation to advocacy within the lower courts, a solicitor maintained that ‘the arbitrary nature of the Magistrates’ Court does not lend itself to Charter arguments’. He felt that the Magistrates’ Court was a ‘conveyor belt designed to process defendants’.

Another solicitor agreed with this reasoning, adding that within the Magistrates’ Court ‘you have a script which you are informally bound not to derogate from, and this leaves no room for Charter arguments’. Certain solicitor’s distressingly stipulated that they felt as though they could not raise Charter arguments ‘without being laughed out of court’.

*There is immense pressure on all parties to a matter in the Magistrates Court due to the large amounts of cases listed per day and the pressure from the judiciary and prosecution to hear a matter expeditiously. This time-poor environment is not ideal for testing Charter arguments...Criminal procedure is quite ingrained and with that comes some strongly established customs and culture in the court. It may be that a practitioner doesn’t want to be seen to be disrupting the established way of doing things by referring to the Charter. A practitioner may not think that disturbing current procedures is in the best interest of the client if it is perceived to be grating on the magistrate or prosecution.<sup>109</sup>*

**Recommendation 11: Education be provided to the judiciary and members of the broader legal profession to address cultural resistance to the Charter.**

**Recommendation 12: An investigation be launched into the nature and operation of the Magistrate’s Court to address environmental and procedural barriers to the use of Charter arguments.**

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<sup>108</sup> VALS criminal law solicitor.

<sup>109</sup> VALS criminal law solicitor

Although VALS was not directly involved in the all legal representation of the following cases, there have been some significant court decisions in child welfare, employment, and residential tenancy disputes where Charter arguments were utilised to protect human rights for Aboriginal and Torres Strait Islander Victorians. Even in some cases where desired outcomes were not achieved, these examples serve as a testament to the Charter's *potential* to generate just outcomes through judicial interpretation.

#### Public Behaviour Offences v Freedom of Expression

In *Ferguson v Walkley and Another* (2008) 17 VR 647, VALS appealed the verdict of an Aboriginal defendant who had contravened s17(1)(c) and (d) of the Summary Offences Act 1966 (Vic) for using insulting words and behaving in an insulting manner towards police officers in a public place. Section 15 of the Charter was raised to argue freedom of expression, which maintains 'the freedom to seek, receive, and impart information or ideas of all kinds'. Justice Harper dismissed the appeal even after acknowledging the potential of the offence to 'be used as an instrument of oppression' (at [37]) and even though 'police officers routinely used language of this kind, albeit in different contexts, among themselves' (at [36]).

There have been disappointing judicial findings amounting to what one VALS solicitor describes as an array of missed opportunities to correct breaches of human rights enshrined within the Charter. Particularly within the realm of criminal law, VALS solicitors believe that there has been judicial reluctance to read in protections directed at offenders. One criminal solicitor criticised the Charter as functionally amounting to a 'toothless tiger' as he believed it served only as 'aspirational rhetoric'. This is evidenced by an analysis of the Charter's impact into two areas within the criminal law, namely public behaviour offences and bail restrictions.

The Baillieu government recently announced that it would be introducing amendments to the *Summary Offences Act 1966* (Vic) so as to allow police to issue on-the-spot-fines of \$240 for anyone using indecent or offensive language in public, rather than the matter going before the court on summons. Attorney-General, Robert Clark, explained that the current process was 'taking up a lot of police time, and public resources'. VALS considers it to be a gross oversight on the part of the government to not consider the indirect discriminatory impact this sort of law can have on Aboriginal and Torres Strait Islander Victorian community. There is grave concerns that in direct opposition to the governments aims, the amount of 'public resources' expended due to this change will in fact be expended when such fines are arbitrarily issued to Aboriginal and Torres Strait Islander Victorians who will likely end up in front of the courts and within the prison system for unpaid fines. Discriminatory legislation of this nature is a prime example of why VALS believes the Charter must be strengthened in the criminal law context.

#### Bail Applications v Freedom of Movement

In 2010, section 3A was introduced into the *Bail Act 1977* (Vic) to ensure that Aboriginal cultural background, family and place ties, as well as cultural issues were taken into consideration in all bail applications by Aboriginal and Torres Strait Islander peoples. However, a VALS criminal solicitor explained that prior to the imposition of this provision VALS was unsuccessful in invoking a Charter argument to challenge a bail condition which restricted an

Aboriginal defendant from entering a certain geographical region where the defendant's kin resided.

VALS believed the condition had essentially 'set the defendant up' for breach of bail, as this client is culturally required to provide primacy to family, social obligations, and on loyalty to kin even at the cost of imminent imprisonment. The right to freedom of movement under section 12 of the Charter was contended, but according to the judiciary this was not sufficient to defeat the condition. The defendant was caught in the region and impelled back into remand for breach of bail.

#### Bail & homelessness

VALS solicitors also state that prior to the Bail Act amendments, prosecutors commonly relied upon social disadvantage outcomes to deny Aboriginal and Torres Strait Islander Victorians the right to bail. For example, homelessness was considered to be the core means of demonstrating a risk of failure to answer bail.<sup>110</sup> The Supported Accommodation Assistance Program (SAAP), a federal government initiative to address homelessness in Australia, reported in 2006 that a staggering 18.3 per cent of its client-base consisted of Aboriginal and Torres Strait Islanders.<sup>111</sup> Unfortunately, homelessness statistics of this nature also failed to convince the judiciary that the Bail Act was operating contrary to its obligation to guard against indirect discrimination under s 8(3) of the Charter.

#### Child Welfare

The Charter has been utilised to return four Aboriginal children back to the care of their maternal grandmother. Justice Bell in *Secretary to the Department of Human Services v Sanding* [2011] VSC 42 found that in considering the best interest of the children within s10 of the *Children, Youth and Families Act 2005* (Vic), consideration had to be afforded to children's rights under the Charter. These included, the protection of the family as the fundamental group unit within society (s 17(1)), the right to such protection as was in their best interest and was needed by them as children (s 17(2)), and their cultural rights as Aboriginal children (s 19(1) and (2)).

#### Employment law

McKenzie DP in *Department of Human Services and Department of Health (Anti-Discrimination Exemption)* 2010] VCAT 1116 (29 June 2010) granted an anti-discrimination exemption for the Department of Human Services and the Department of Health to advertise and employ up to 118 Aboriginal people over a three-year period. The exemption was granted with reference to s 18(2)(b) of the Charter which maintains a right to have equal access to the Victorian public sector, and s 8(2) and (3) which outlines the right to equality.

<sup>110</sup> The inability to provide 'sureties' was also seen as a primary reason for why Indigenous Victorians were unable to receive bail.

<sup>111</sup> *Overcoming Indigenous Disadvantage: Key Indicators* (2009) Steering Committee for the Review of Government Services Provision. [9.5]

## Tenancy

The right to a home and family under s 13(a) of the Charter was invoked to defend against a tenancy notice to vacate by the Director of Housing. Justice Bell in *Director of Housing v Sudi* [2010] VCAT 328 (31 March 2010) held that the Director of Housing acted unlawfully under s38(1) of the Charter in seeking to evict a refugee father and son from their commission house without justification after the primary tenant, the mother in the home, died.

Areas that VALS hopes Charter arguments will become successful and more common place, and will be working to bring this to light, involve issues concerning delay (especially in children's court proceedings), bail applications, prisoner transport, and banning/exclusion notices as they engage with the Charter.

The cultural resistance may indeed be a direct consequence of the Charter's young age. Nevertheless, VALS submits that these responses indicate an urgent need to educate the legal services industry, including the judiciary, about the rights, responsibilities, and opportunities available within the Charter.

### **4.4. The availability of accessible, just and timely remedies for infringements of rights**

VALS solicitors found it challenging to answer the question of how the system could better respond to Charter arguments brought before the court. They argue that there is currently little incentive for people to pursue Charter arguments in the 'especially if they are facing immediate criminal charges and have other imminent concerns and difficulties. Perhaps of the provisions were more enforceable, with greater penalties for breaches...there would be more incentive to mount Charter arguments.<sup>112</sup>

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<sup>112</sup> VALS criminal law solicitor.

## 7. Overall Benefits and Costs of the Victorian Charter

It is difficult to assess or attach an economic figure to the positive aspects generated by the Charter. As mentioned earlier, there have been significant benefits delivered to VALS clients and other Victorians through the improved services of public authorities. It will no doubt be highlighted in the current Inquiry that cost has been incurred by the Government and public authorities due to policy reviews and implementation of changes to operations for compliance with the Charter. VALS argues that this short-term cost should not negatively impact the long-term potential of the Charter.

The Allen Consulting Group provide analysis that highlights that the cost of training government services to understand human rights obligations are outweighed by the value that is added through better quality services. They also suggest there are associated savings gained by avoiding breaches to human rights.<sup>113</sup> They argue that there is clear potential for cost savings in economic and social terms where human rights systems are strengthened.

For an analysis of cost savings through the use of the Charter in relation to preventing homelessness, we refer the Inquiry to the PILCH HPLC submission.

### *Self-determination*

It has recently been argued that there are economic benefits in recognising self-determination rights. Jon Altman recently wrote a useful article that discusses the virtues of hybrid or diverse economies, not just in remove Australia, but everywhere.<sup>114</sup> Altman explains that a hybrid or diverse form of economy recognises a customary or non-market sector alongside the private and public sectors. Altman developed this model because he found in his work it was impossible to explain economic activity if he chose to ignore the existence of the customary sector and its connection with market and state sectors.

Altman notes the 2008 National Aboriginal and Torres Strait Islander Survey (NATSISS) in attempting to answer the question around whether economic development should just focus on mainstreaming, or whether the prospects of Closing the Gap are positively or otherwise affected if governments ignore harvesting and cultural production.

*In my view development is about people having freedom to pursue lives that they have reason to value, including through hybrid economies with vibrant customary sectors and within a set of values that may differ from that of mainstream Australia.*<sup>115</sup>

Altman is well placed to comment on this issue. He is a research professor at the Australian National University and has worked on Aboriginal and Torres Strait Islander economic development since 1976. He suggests that more effective policies might be generated if we first ask people at diverse local levels what their economic aspirations might be; look at what is possible; and look at what has worked and might be replicated with assistance from the State. Altman argues that in other Third World contexts this is called participatory development, 'in other settler majority societies, self-

<sup>113</sup> The Allen Consulting Group, *Analysis of Options Identified During the National Human Rights Consultation: Final Summary Report* (2009).

<sup>114</sup> Jon Altman, 'Important questions for Indigenous police makers' *The Drum on ABC news* (2011) at <http://www.abc.net.au/unleashed/2692730.html>

<sup>115</sup> *Id.*

determination. And it works more effectively in addressing socio-economic disadvantage than Australia's current approach of normalisation.<sup>116</sup>

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<sup>116</sup> *Id.*

## 8. Further Options for Reform and Improvement of the Victorian Charter

### 8.1. The Declaration on the Rights of Indigenous Peoples

Finding 5 of the aforementioned SED report was that UNDRIP was considered a benchmark for an Australian and Victorian human rights framework.<sup>117</sup>

The value of the UNDRIP is apparent in a recent speech by James Anaya (United Nations Special Rapporteur on the Rights of Indigenous Peoples).<sup>118</sup> Anaya labels UNDRIP valuable because it 'is the product of 3 decades worth of a standard setting process involving Indigenous peoples and States'.<sup>119</sup> If UNDRIP, which speaks of self-determination, is the product of discussion, involving Governments, then it is something that is well considered and legitimate, not an out of control threat. Anaya states UNDRIP 'finds its legitimacy in both its approval by the United Nations General Assembly and its grounding in the worldwide indigenous movement'.<sup>120</sup> VALS agrees that as UNDRIP is a 'blueprint for change for indigenous peoples' and 'instrument of reparation and reconciliation'.<sup>121</sup>

**Recommendation 13: The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) be considered a benchmark for the Victorian human rights framework, and therefore the Charter.**

### 8.2. Education, training and resources

VALS notes that the SARC guidelines state that strengthening the Charter should not be focused on funding or resources, however we feel that it is critical to highlight that it is felt within the community that more education, training and resources are needed. At the VALS 2010 Self-Determination Forum, the Victorian Aboriginal and Torres Strait Islander community in attendance made it very clear that unless the community knows about the Charter, it will not be useful to them. Participants also highlighted that it is the people who need the knowledge of the Charter the most that do not know enough about it (see the Forum report in the annexure). There is obviously still a great need for ongoing, if not increased, efforts for human rights education around the Charter in the community at grassroots level and at organisational level.

### 8.3. Civil and Political Rights

In line with the ICCPR, s7 of the Charter should be amended to recognise human rights that are absolute, specifically the right to protection from torture and cruel, inhuman or degrading

<sup>117</sup> Victorian Equal Opportunity and Human Rights Commission (2011) *op cit*, p. 5.

<sup>118</sup> Anaya James (United Nations Special Rapporteur on the Rights of Indigenous Peoples) key note speech, 'Be Informed, Be Involved, Be Inspired', delivered at the New South Wales Aboriginal Land Council Conference (5 April 2011).

<sup>119</sup> *Id*

<sup>120</sup> *Id*

<sup>121</sup> *Id*

treatment. It has been argued that access to justice is a human right in itself<sup>122</sup> considering that the ICCPR requires States to protect and respect the right to a fair hearing (article 14), certain rights in criminal cases (articles 14 and 15) and the right to recognition as a person before the law (article 16).

The United Nations Human Rights Committee have noted that the lack of adequate access to justice for Aboriginal and Torres Strait Islander peoples and recommended that Australia ensure equality in access to justice by providing services to assist Aboriginal and Torres Strait Islander people and adequately funding Aboriginal and Torres Strait Islander legal aid, including interpreter services.<sup>123</sup> VALS argues that fundamental civil and political rights, such as the right to a fair trial, are not fully protected or enjoyed by Aboriginal and Torres Strait Islander peoples.

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<sup>122</sup> Human Rights Law Resource Centre (now Human Rights Law Centre) 'Educate, Engage, Empower,' submission to the National Human Rights Consultation Committee (2009) at <http://www.hrlrc.org.au/files/hrlrc-submission-2-engage-educate-empower.pdf>

<sup>123</sup> Human Rights Committee, *Concluding Observations – Australia* (2009) at <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm>

**SELF DETERMINATION FORUM  
REPORT ON WORKSHOP OUTCOMES**

**12<sup>th</sup> May 2010**

**10.00-12.30pm**

**Aborigines Advancement League**

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# INTRODUCTION

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The *Self-Determination Form* ('the Forum') was targeted at staff from Aboriginal Community Controlled Organisations (ACCOS) and attended by a range of representatives of ACCOS and community members on 12<sup>th</sup> May 2010.<sup>124</sup> It was hosted by:

Victorian Aboriginal Community Services Association Limited (VACSAL);  
Victorian Aboriginal Education Association Limited (VAEAI);  
Victorian Aboriginal Child Care Agency (VACCA);  
Victorian Aboriginal Community Controlled Health Organisation (VACCHO);  
Victorian Aboriginal Legal Service Co-operative Limited (VALS).

This document contains the outcomes of the workshop component of Forum that occurred. Participants split into 5 groups to discuss the following questions:

1. What does self determination mean for you?
2. What is the role of Aboriginal community controlled organizations in self determination?
3. How can these organizations be strengthened?
4. What impact do barriers to achieving self determination have on Aboriginal Victorians and their communities?
5. Are human rights or the Charter of Human Rights and Responsibilities useful?
6. How can self determination be achieved?
7. How do you want to be consulted?

The participants had heard earlier from the following people to set the context for discussion.

- Frank Guivarra (CEO of VALS) who provided an Aboriginal Community Controlled Organisation perspective on self determination
- Professor Larissa Behrendt who spoke about human rights, including the right to self determination.
- Emily Howie, Human Rights Law Resource Centre, who provided training on the *Charter of Human Rights and Responsibilities* (i.e. connecting human rights to our everyday lives and work).

The forum was organised in anticipation of the 2011 review of the Charter of Human Rights and Responsibilities (2006). The forum was focused on the right to self-determination because consideration of inclusion of this right in the Charter is one aspect of the 2011 review of the Charter.

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<sup>124</sup> Thank you to the Victorian Council of Social Service for partnering with us in this forum by providing the funding.

# 1. What Does Self-Determination Mean For You?

***Self determination is our constitutional right. Self determination is part of our constitutional rights; there should be recognition in the Constitution of the First Peoples.***

***Self determination is identity: self determination is an expression of identity/individual/family/community. There is an identity crisis without self determination.***

## Culture

- Right to practice cultural identity:
  - identity – more in depth, re clan groups;
  - empowered and autonomous clan groups;
  - bottom up, inclusive, determining vision and purpose;
  - practicing within identity and culture.
- Strong culture
- Recognition (i.e. of Traditional Owners)
- Land and land rights: sovereignty.
- Acknowledgement of being an individual.
- Gathering as a community.
- Collective approach: Collective strength
- Bringing back the conversations:
  - conversation as an individual or collective group;
  - meet and gather as a community.
- Connection.
- Utilising our own cultural rights: family, land, language, community, connection and exercising cultural practices.
- Focus on individuals, families and communities.
- Stronger individuals and communities;
- Cultural lore (i.e. law vs. lore).

- Cultural dignity:

***We have never ceded our right to have cultural dignity but it was taken away from us.***

## Human Rights

***Equitable rights, control of factors determining our lives and resources***

- Equality.
- Acceptance.
- Inclusivity/inclusion.
- Right to exist free of prejudice
- Power.
- Freedom:
  - freedom of expression and culture;
  - right to speak and express oneself.
- Voice is heard and acted on.
- Having capacity to exercise my rights:

***...having capacity individually and as a family and community to exercise rights.***

## Decision making

***Right to make decisions about ourselves by***

***ourselves***

- right to decision making:

***...right to decision making powers;  
right to have a say in decision making***

- Not just having access to decision making, but making decisions.
- Governance and determining factors that affect our lives. This relates to identity and best outcomes for individuals, families and community.
- Being able to determine our own directions.
- Right of choice:

***...right to live how I/we choose and make choices in relation to healthy education, economic housing and employment.***

- Right to our rights (i.e. control of our own affairs/being able to determine my actions.
- Being responsible for the Aboriginal community.

***Being able to use the word 'Aboriginal' rather than 'Indigenous' which is chosen by the Government (i.e. being able to be free to be ourselves)***

- Sovereignty.
- Autonomy.

***ACCOS are an expression of self-determination,***

***not entirely the solution.***

- To be able to do the work ourselves.
- Right to govern your own independence.
- Economic independence (e.g. development/land).

## 2. What is the Role of an Aboriginal Community Controlled Organisations in Self-Determination?

*Aboriginal community organizations are an expression/vehicle of self determination*

### Empowerment

*Community control is empowerment*

- ACCOS are empowered to develop scope of service from inception to delivery
- we run our own businesses – do it our way;
- It is important to use ACCOS

*Organisations are to achieve self-determination for our people*

### Culturally appropriate

*Being Aboriginal community controlled empowers you to deliver services appropriately to the Aboriginal community in a culturally appropriate, relevant safe environment (i.e. recognise difference in law laws/lore)*

#### ACCOS are:

- Walking the walk: walking with our people (not behind them or in front of them – but beside them) They are not just community controlled organizations, but Aboriginal

community controlled (i.e. not lose the word Aboriginal as language is important).

- Conducting cultural maintenance.
- Keeping everyone in the same place and help move to the future:

*...leave behind old stereotypes that keep us down and bring the community along.*

- Taking the best approach, that is a local approach.
- Recognising our own needs: we recognize our own needs and address industry needs.
- Taking a holistic approach: we recognize our own needs and address industry needs.

*Inclusivity at all levels in all areas.*

### Responsibility

*ACCOS are answerable through community control*

#### ACCOS are:

- Taking responsibility:

***...responsibility that we do not breach human rights when implementing programs/policies for our own people.***

**ACCOS have a responsibility to:**

- Incorporate human rights/Charter in practice/policy:

***...take human rights into community at a grassroots level (i.e. how does it translate).***

- Provide skills training.

## **Leadership**

***Strong role models***

- Have a voice as a leader/have leadership role in the community.
- Lead by example.
- have strong role models within them but these role models are dictated to by the Government which does not listen to them and staff can only sit and watch

## **Decision making**

***ACOSS are a form of self governance: community determine direction of organisation and own governance.***

- Independent of Government.
- Owned and managed by Aboriginal people.

- Doing it our own way.
- Assisting our people to be well.
- Working together.

## **Voice**

***ACCOS are an expression of our right to have an Indigenous voice within our organisations***

- Voice for the community/community voice.
- empowered to express strongly to Government how they should work with Aboriginal communities and individuals.
- Empower us to express ourselves to Government/how to work and finalise agreements/partnerships.
- Empowerment as a collective.
- Advocate for community aspirations.
- Advocate for human rights.

## **Resources**

- Provide and assist with resources (i.e. negotiate, ensure adequate)

## **Other**

- A two edged sword: Board controls + facilitate voice of community.

# 3. How Can These Organisations Be Strengthened?

*Aim to achieve the expectations of each individual/family/community (i.e.: self determination).*

## Responsibility

- Have broader community involvement on a regular basis and take on board feedback.
- Greater representation: (i.e. create representation).
- Active participation: the response from community needs to increase.
- Education, especially for young people (i.e. starting young):

*More awareness and education*

## Leadership

*Leading by example*

- Lead the community to the future and leave behind old stereotypes that keep us down.
- Include the Charter in policy:

*... incorporate human rights into policies/practices within our organisations – BUT we need support/resources to do this.*

- Understand human rights in order to communicate it to the community.
- Take human rights to the community at a grass roots level.

## Voice

*Set the community's agenda for the future*

- Set our own agenda: be part of the whole process from start to finish
- Have the right to be heard and to have an individual voice in your Aboriginal and Community Controlled organisations

*Walking with our people*

- More unity.
- Develop a coalition.
- Conduct own consultations.
- Determine how our information is used (i.e. intellectual property).
- Local focus is best: communities recognize their own needs and differences: local engagement – grass roots.

## Resources

### *Increased resources*

- Negotiate resources that are adequate and what is adequate should be determined by individuals/community.
- Be self sufficient: have an economic environment determination and underlines the empowerment of Aboriginal people.
- Ownership of community organizations: have more independence (i.e. independent ownership).
- Access our own natural resources.
- Have better technology.

## Other

- There is a conflict between individual's rights and rights in law relating to ACCOs (i.e. Associations Act).

***Instead of simply saying "community controlled organization" say "Aboriginal community controlled organisation".***

- Partnerships: Formalized agreements and partnerships.

## 4. What Impact Do Barriers To Achieving Self Determination Have On Aboriginal Victorians And Their Communities?

### Lack of participation

- Barriers to active participation exist.

### Disempowered

***We have to get out of the control of Government and determine our own community business***

- Disempowerment: lack of empowerment
- Lack of control.
- Lack of confidence.
- We are governed/measured by outside entities and answerable to them (i.e. local, State, Federal Governments etc).

***We experience attitudes of people who do not understand Aboriginal culture/community control, especially the Government;***

- Aboriginal Community Controlled organizations are structured in a certain way and have to follow Government guidelines;
- Peak bodies were developed to strengthen our self determination – this has been dismissed by Government in many ways – ie

by the way they structure and fund the bodies, as well as the guidelines.

- Not consulted
- Constraints on organisations as they are not able to fully explore their potential

***Fail to reach potential***

### Decision making

- Limited decision making/always follow Government agenda rather than formulating our own:

***Lack of community control – no influence in decision making.***

### Voice

- Loss of collective voice (i.e. abolition of ATSIC) and loss of collective identity.

### Tokenism

***Is Government doing it for or with us?***

- Tokenistic view of self-determination:

***... a tokenistic view is taken by Government which is a different view to us and the Government are not listening to our view (i.e.***

***difference in conception of what self determination is).***

- Negative attitude of Government/non-Aboriginal Australians towards ACCOS (i.e. not understand the point of Aboriginal community control).

## Resources

***We will never become self sustained if we don't achieve self-determination***

- Not economically viable.
- Economic disadvantage, underfunded & loss of money (because we are not a Government organisation).
- No equity (i.e. equity/access issues):

***...there is difference in pay between Government and community organisations***

- Barriers to better use of technology.
- Lack of education/knowledge (i.e. no learning of rights).

## Other

- Barriers are the expectation of organizations and individuals.
- Barriers are attitudes.
- Barriers are the lack of rights to do and say as needed.

## IMPACT OF BARRIERS

*The impact of past policies are felt today (deterioration as individuals; groups and community).*

### “Impact on our foundation”

- Confusion.
  - Frustration.
  - Apathy.
  - Anger.
  - Complacency.
  - Disillusion.
  - Hurt.
  - Mistrust/distrust.
  - Cultural theft (stolen identity).
  - Cultural dignity taken away.
  - Systemic racism/discrimination (overt/covert).
  - Loss of cultural practices; e.g. yarning in own clan groups:
- Deterioration of health and wellbeing (i.e. including spiritual, as well as economic disadvantage).
  - Still large gaps in living situation (health, education, employment).
  - Crime.
  - Substance misuse/abuse.
  - Self-esteem of unemployed.
  - Limits effective change/foundations.
  - Fractured groups:
    - isolation from community;
    - self-determination can divide community and contributes to/creates lateral violence.

***Loss of land, language, cultural practices – family/community.***

- No land rights.
- People do not go back to country.
- Identity crisis

***An impact on identity can have an impact on everything.***

- Resentment towards Government

### Other

- Brings people together:
  - strength;
  - coordination;
  - organization;
  - determination;
  - Governance.

## 4. Are Human Rights Or The Charter Of Human Rights And Responsibilities Useful?

*Yes, human rights/the Charter are useful BUT... there are qualifications about their usefulness*

### Yes

#### ***Acts as a protective mechanism***

- Human rights/the Charter are useful for a rights based approach to service delivery.
- There needs to be rights and it is good there is a protective mechanism in the Charter:

#### ***It gives direction and offers a level of protection***

- It is a useful tool: it gives direction and offers a level of protection in relation to policy.
- Useful for inclusion in decision making.
- It influences media and public opinion POSITIVELY.
- Statements of incompatibility, Courts, Parliament & exemptions are useful.
- They protect culture and influence a harmonious approach.

### Yes, but ...

#### ***What real benefit is a document that can be shelved without justification and implementation?***

- It is useful as a shame tool, but not as a legal tool.
- It is a 'change' tool, not a 'legal' tool.
- It is useful, but it doesn't prevent a lot of atrocities.
- It is useful, but not powerful.

### Yes, if ....

#### ***Unless the community knows about it, the Charter will not be useful***

- If it is used as a tool for directing decisions.
- If we know about our rights to access the Charter/human rights.
- If information is easily available/accessible to the individual:

#### ***The people who need the Charter the most do not know it***

- If it can be used collaboratively (harmonious approach).
- If it is used to educate
- If it is understood:

***There is lack of interpretation;***

***We need to better understand the sunset clause in the Charter;***

***It is only as useful as you can understand it/access it;***

***There are restrictions on our right to use the Charter;***

***We need to better understand the sunset clause in the Charter.***

- The Government control all the information/our information about the Charter/human rights.
- It is left un-interpreted.
- It is misunderstood.

### **Yes, but it depends on...**

- Depending on how many people use it/know about it.
- Depending on the provision of more information sessions and forums throughout the community.

### **No, if ....**

***The community doesn't know about it***

- People who need it the most are the people that don't know about it (i.e. this does not make the Charter powerful).

# 5. How Can Self Determination Be Achieved?

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***Self determination cannot be granted – you have it. You do not need permission to be self-determining.***

***We don't need permission to be self-determined***

## Culture

***Be carriers of our own message stick***

- Develop awareness:
  - transfer knowledge through family and community;
  - children own culture.
- Educate the community, at all community levels (wide community & mainstream) on what is available:

***Ensure our children and their children are proud to learn and know their human rights, their culture and their heritage;***

***Inform young people (schools);***

***Tell people about the Charter***

- Involve the entire community at all levels:
  - Involve youth and inform/empower them;
  - Listen to Elders

- Restoration of cultural identity. Reclamation of identity and culture.

- Perform cultural duties:

***All help with cultural practice and not just say "I'm Aboriginal" (i.e. it is expected that it is all Aboriginals cultural duty to help increase cultural practice and ways.***

- Listen to our voice as Aboriginal people – learn to respect ourselves.
- Holistic approaches.

## Participation

### ***We have to get out there and have our own business***

- Transference of powers to community such as guardianship (i.e. responsibility of community).
- Active participation.
- Get out of a determining Government and start determining our own:
  - shift from Government setting the guidelines, findings and reportings;
  - community outreach campaign that is not dictated by Government;
  - Aboriginal rights, not Government rights;
  - Government cooperation:
  - responsibility of Government to let community know of the Victorian Charter (ie: every individual has a right to know there is a Charter
- Allowing the conversation.
- Release our own shackles/release “the shackles” of our own oppression.

## Leadership

### ***Let our leaders lead***

- Leadership from the ground up.
- Determine own needs.
- Treaty.

### ***Treaty yeah!***

- Identified parliamentary positions.
- Social Justice Commissioner.
- Do things because they needed to be done.
- Address/target lateral violence.

## Voice

### ***Express ourselves***

- Be vocal, vigilant & expressive (i.e. be more vigilant).
- Being active (i.e. be more active/ politically active).
- Unity/harmony (i.e. collective, aligned views & common goals).
- Willingness to contribute by community, and mainstream.
- Activism and advocacy (i.e. use Charter).

## Resources

### ***Economic Development***

- Effective resourcing and community capacity building, (know what your rights are).
- Victorian Aboriginal community to have solid economic base & stability.
- Become economically self sufficient.

## 6. HOW DO YOU WANT TO BE CONSULTED?

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***We want collaboration not consultation. We do not just want to be consulted, instead we want involvement from the start = real investment.***

***We want to be involved in the developments from the start, negotiation not consultation, collaboration, not just consultation.***

### Culture

***Culturally appropriate, safe and comfortable environments for consultation***

- Be culturally sensitive.
- As a collective the Government/ community/ organisations work together with cultural sensitivity.
- Involve a yarn and conversation around the table (Elders, youth, old people).
- In particular talk to Elders/youth (youth our future).
- Onus on Government to get out into the community and follow protocols
- Recognise that there are different needs in different communities.
- Be via our people for our people.

### Participation

***The Government walking with Aboriginal people, not in front or behind but beside us and each other***

- Meaningful and effective engagement (i.e. two way engagement).
- Take a collective approach (i.e. both Government and community working together).
- Onus on Government to work to community needs, not the other way around.
- Take a bottom up approach (start at local level and community driven)

***True engagement at the local level***

- Leadership.
- Detailed consultation (enable community to make inform decisions, then feedback to community).
- Information sharing:

***Provide proper information sharing (i.e. copy of the Charter to be sent to all individuals and the be informed about proposals.***

- Foster informed discussion.

- Communication strategy.
- Get out to as many people as possible (i.e. drive hours to travel to people)
- More forums (for community).
- Online options.
- Be done in plain English so everyone can understand, especially Elders.
- Involvement in development/review from the start.
- All opinions matter.
- Everyone's responsibility.
- Inclusive.
- Advisory Committee through the Victorian Equal Opportunity & Human Rights Commission.
- Representation on Review Panel.
- Victorian Equal Opportunity and Human Rights Commission capture what people are saying.

## Resources

***Invest and do not try and do it on the cheap***

- Have finances available (i.e. have enough booklets).