

**Submission of the**

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

**to the**

**Victorian Human Rights Consultation  
Committee's**

**“Community Discussion Paper”**

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## **Introduction**

Since its foundation in the early 1960s, the New South Wales Council for Civil Liberties ('CCL') has been a staunch supporter of Bills of Rights. While CCL believes that Bills of Rights belong in a Constitution, CCL also acknowledges that much can be learned from the Canadian experience of first introducing a statutory Bill of Rights followed later by a constitutionally-entrenched Charter.

CCL strongly encourages the Victorian Parliament to enact a robust Charter of Human Rights that will protect the civil and political rights of its citizens and strengthen its democratic institutions. When it comes to procedural rights, CCL encourages the Victorian Parliament to look beyond the weaker models of New Zealand, the United Kingdom and the ACT. CCL recommends that the Victorian Parliament emulate the success and much of the procedure of the nation-defining Canadian Charter of Rights and Freedoms.

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### **1. Is change needed in Victoria to better protect human rights?**

1. Yes, change is needed to protect and strengthen Victoria's democratic institutions and to address disadvantage in the community. Currently almost every freedom that Victorians assume they have is not actually protected by the law. Neither the common law nor the State or Federal Constitutions guarantee such fundamental rights as, for example, freedom of speech, freedom of religion or freedom from discrimination.
2. Australia is now the only common law country without a Bill of Rights. This means that our legal system is rapidly falling behind 'international best practice' when it comes to the protection of our democratic institutions and the civil and political rights of its citizens.
3. A Charter of Human Rights will protect the rights and freedoms of all Victorians, which are currently inadequately protected by the law. It will adopt into Victorian law the rights which are now widely accepted around the world as universal and fundamental human rights. It will help to strengthen Victorian democracy and multiculturalism by promoting tolerance and understanding between Victorians.

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### **2. If change is needed how should the law be changed to achieve this?**

4. The New South Wales Council for Civil Liberties strongly encourages the Victorian Parliament to pass a *statutory* Charter of Human Rights. While CCL has long been a strong proponent of constitutionally-entrenched rights and freedoms, CCL acknowledges and commends the outstandingly successful approach of the Canadian Parliament and its nation-defining Charter of Rights and Freedoms.

5. The Canadian experience of first introducing a statutory Bill of Rights provides an excellent model for the Victorian Parliament to follow. The statutory *Canadian Bill of Rights 1960* allowed the Canadian people to overcome their scepticism about, and fear of, codified rights. It gave them time to get used to the idea of a Bill of Rights. A generation later, the Canadian people were confident enough to take the next step: entrenching those rights in their Constitution.<sup>1</sup>
6. CCL recommends that the Victorian Parliament should treat the statutory models used in New Zealand, the United Kingdom and the ACT with caution. While these models contain admirable lists of substantive rights, the procedural rights they enshrine are weak and fail to strengthen their democratic institutions to the extent that the Canadian and South African models do. This distinction between substantive and procedural rights will be expanded upon later in this submission.

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### 3. If Victoria had a Charter of Human Rights, what rights should it protect?

7. With a few alterations, CCL commends the list of rights from the *Human Rights Act 2004* (ACT). The ACT *Human Rights Act* enshrines most of the fundamental human rights from the *International Covenant on Civil and Political Rights*.
8. In the interests of clarity, CCL believes that the Victorian Parliament should pay particular attention to, and emulate, the important statements from the *Human Rights Act* that:
  - (i) the right to life only “applies to a person from the time of birth”;<sup>2</sup> and
  - (ii) “only individuals have human rights”.<sup>3</sup>
9. There are some important fundamental rights missing from the ACT’s *Human Rights Act* that CCL recommends the Victorian Parliament include in a Victorian Charter of Human Rights. These include:
  - (i) right to own property (acquisition on just terms);<sup>4</sup>
  - (ii) right to trial by jury for serious offences (by unanimous verdict);<sup>5</sup>
  - (iii) right not to be sentenced to death;<sup>6</sup>

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<sup>1</sup> *Canadian Charter of Rights and Freedoms* forms Part I of the *Constitution Act 1982* (Canada).

<sup>2</sup> *Human Rights Act 2004* (ACT) s 9(2).

<sup>3</sup> *Human Rights Act 2004* (ACT) s 6.

<sup>4</sup> see US Constitution Articles V and XIV(1); *Protocol No. 1 to European Convention for the Protection of Human Rights and Fundamental Freedoms* Article 1 (scheduled in the *Human Rights Act 1999* (UK)); *Bill of Rights* (South Africa) Article 25.

<sup>5</sup> see *Juries Act 2000* (Vic) s 46(4). Note that all verdicts for indictable offences must be unanimous at federal law: *Cheatle v R* (1993) 177 CLR 541.

- (iv) right to be secure from unreasonable search and seizure;<sup>7</sup>
- (v) right to just administration;<sup>8</sup>
- (vi) right to access one's own personal data held by others (e.g. medical records, credit ratings);<sup>9</sup>
- (vii) right to access government documents (freedom of information);<sup>10</sup> and
- (viii) right of Indigenous people to maintain and develop their cultural identities and relationship with the land, the right to be consulted on matters affecting them, and the right to determine their own priorities for cultural development.<sup>11</sup>

10. CCL believes that there are also some important rights, unique to children, that also need protection in any Charter of Human Rights. These include:

- (i) right of children to parents, education, shelter, health care and recreation;
- (ii) right of children not to be neglected or exposed to unreasonable risk; and,
- (iii) right of every child to voice an opinion about his or her life and for that opinion to be given weight.

11. The rights and freedoms in any Charter of Human Rights should be subject to reasonable limits 'where that can be demonstrably justified in a free and democratic society'.<sup>12</sup>

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#### 4. What should be the role of our institutions of government in protecting human rights?

12. CCL believes that a government has at least four duties in relation to rights protection:

- A duty to *respect* rights, meaning refraining from interfering in the way an individual or group's resources are used to protect rights;

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<sup>6</sup> see *Crimes (Capital Offences) Act 1975* (Vic) and *Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty* (which Australia has ratified).

<sup>7</sup> see US Constitution Article IV; *Canadian Charter of Rights and Freedoms* Article 8; *Bill of Rights* (South Africa) Article 14.

<sup>8</sup> this is a right to natural justice (as embodied in administrative law). See *Bill of Rights* (South Africa) Article 33; *Charter of Fundamental Rights of the European Union* (2000) Article 41.

<sup>9</sup> see *Charter of Fundamental Rights of the European Union* (2000) Article 8.

<sup>10</sup> see *Freedom of Information Act 1982* (Vic); *Bill of Rights* (South Africa) Article 32; *Charter of Fundamental Rights of the European Union* (2000) Article 42.

<sup>11</sup> see ICCPR Article 1 (right to self-determination of all peoples) and *International Convention on the Elimination of All Forms of Racial Discrimination* (1966).

<sup>12</sup> see *Human Rights Act 2004* (ACT) s 28; *Canadian Charter of Rights and Freedoms* Article 1. The formulation, a Canadian innovation, is the subject of considerable and impressive Canadian caselaw: see *R v Oakes* [1986] 1 SCR 103; *Dagenais v CBC* [1994] 3 SCR 835; and, *Thomson Newspapers v Canada (AG)* [1998] 1 SCR 877.

- A duty to *protect* beneficiaries of a right by creating and maintaining a legal framework for individuals to realise the right;
- A duty to *promote* rights, for example by raising awareness of rights;
- A duty to *fulfil* rights, subject to the condition of reasonableness, through, for example not destroying basic food supplies or allowing the violent destruction of homes.

### **The role of Parliament and the Executive**

13. CCL recommends the institution of a parliamentary legislative review committee responsible for determining whether a Bill complies with the Charter of Human Rights. This will help to reduce litigation, because non-complying legislation will be identified before it is enacted, and help to foster a human rights culture in policy makers and the bureaucracy.
14. This approach is preferable to requiring the Attorney-General to issue a certificate of compliance with the Charter, because the process is more transparent, consultative and democratic.
15. Every Bill should require a report from the committee *before* it can be introduced into Parliament. The committee should be required to consult with the community, at the very least by inviting written submissions. These simple rules are very important, if Victoria is to avoid the disastrous experience of New South Wales.
16. In 2001, after abandoning the idea of a Bill of Rights for New South Wales, the Carr government declared that rights would be best protected by Parliament, overseen only by a parliamentary legislative review committee. In New South Wales the Legislation Review Committee scrutinises every Bill brought before Parliament and reports on whether the legislation 'trespasses unduly on personal rights and liberties'.<sup>13</sup> The experiment has been an abysmal failure. Not only is the community completely excluded from the process, because there is no provision for public submissions to the committee, but Parliament simply ignores adverse decisions of the committee (often without comment). The process is farcical when one considers that legislation can receive Royal Assent even before the committee has published its report on a Bill.<sup>14</sup> Once a Bill is passed there is no way for a citizen to seek redress if the legislation breaches their fundamental rights, which is why judicial review of legislation is important. **Victoria should not demean its democratic institutions by following the undemocratic example of New South Wales.**

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<sup>13</sup> *Legislation Review Act 1987* (NSW) s 8A.

<sup>14</sup> *Legislation Review Act 1987* (NSW) s 8A(2).

### **The role of the Judiciary**

17. The Victorian Courts of Appeal and Criminal Appeal should be given the power to issue declarations of incompatibility with the Charter. That decision should be subject to appeal to the High Court, given that the Charter is simply a statute of the Victorian Parliament.
18. The role of the courts in protecting human rights is very important. While Parliament passes laws of general application, it is the unique role of a court to examine each matter brought before it on a case-by-case basis, according to the merits of that case. It is only when the courts perform this function that problems with laws of general application will be highlighted. This is why judicial review is imperative in any Charter.
19. Judicial review will also facilitate political debate and parliamentary inquiries before new laws are passed. Increased debate can only benefit the Victorian community and strengthen its democratic institutions.

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## **5. What should happen if a person's rights are breached?**

20. The leadership role that Victoria is taking in considering the introduction of the first State-based Bill of Rights in Australia could very well determine the shape of the discussion in other States. CCL strongly encourages the Victorian government to reconsider its stated position that there will be no individual cause of action in a Victorian Charter of Human Rights.
21. CCL strongly encourages the Victorian government to show a strong commitment to human rights protection by legislating for an individual cause of action when a person's rights are breached by legislation. The remedy need not be pecuniary damages, but rather a declaration of incompatibility with the Charter. Given a list of fundamental rights, justice demands that a citizen be able to ensure that these rights are upheld in a court of law. Anything less, weakens the democratic institutions of Victoria, rather than strengthening them.
22. Courts should be empowered to strike down legislation that breaches listed rights, while also enabling Parliament, under an override clause, to respond. A judicial decision finding a breach of a right will have then brought about an immediate remedy and placed the responsibility back on Parliament. A court should be required, before exercising any power to strike down legislation, to attempt to interpret the legislation in conformity with the listed Charter rights.
23. **Allowing courts to strike down laws for breaching fundamental rights does *not* undermine the sovereignty of Parliament** when Parliament can expressly insert a 'notwithstanding' declaration into any piece of legislation. Parliament retains its supremacy over the Judicature.

24. CCL highly commends to the Victorian Parliament the Canadian model, in which an express declaration remains valid for five years.<sup>15</sup> In the Canadian Charter a Parliament may, after the five year 'sunset clause' has expired, re-enact the express declaration. This 'sunset clause' mechanism is important because it recognises that in a free and democratic society fundamental rights should only be curtailed by an express act of Parliament. It also acknowledges that such curtailments of fundamental rights and freedoms should be subject to regular review by Parliament, rather than remaining forever on the statute books. If it is no longer necessary to curtail a right or freedom, then Parliament simply lets the declaration lapse and does not need to expressly repeal the curtailing legislation.

**In order to strengthen Victoria's democratic institutions and to protect the rights and freedoms of its citizens, an express notwithstanding clause subject to a five-year sunset clause should be included in any Charter of Human Rights.**

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## **6. What wider changes would be needed if Victoria brought about a Charter of Human Rights?**

25. CCL believes that an ongoing process of public education is an important complement to the introduction of a robust Charter of Human Rights. Education, however, is no substitute for the ability of a citizen to seek adjudication and remedy of any breach of their rights in a court of law.
26. In the same way, prevention and dispute mediation are appropriate and cost-effective mechanisms, but they should not be seen as substitutes for litigation in every case.

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## **7. What role could the wider community play in protecting and promoting human rights?**

27. By inviting public submissions to a parliamentary legislative review committee,<sup>16</sup> the Victorian Parliament could give individuals and community groups a means of contributing to the process of lawmaking, thereby enhancing the wider community's appreciation for and promotion of human rights.

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<sup>15</sup> *Canadian Charter of Rights and Freedoms* Article 33.

<sup>16</sup> see [13] above.

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## **8. What other strategies are needed to better protect human rights?**

28. CCL commends the New Zealand innovation of a human rights action plan that is reviewed every five years. Such a process could be useful in monitoring the effectiveness of a Charter of Human Rights and levels of public awareness of human rights issues.

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## **9. If Victoria introduced a Charter of Human Rights, what should happen next?**

29. CCL recommends a review of the operation of the Charter after one and five years of operation. Similar to the ACT *Human Rights Act*, a statutory review should include the question of whether rights other than civil and political rights should be incorporated into the Charter.

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## **10. Is there anything else you would like to tell us about how human rights should be protected in Victoria?**

30. Through the strong leadership of its present government, Victoria finds itself in a position to lead the Australian States in modernising the way civil and political rights are protected in Australia. CCL encourages the Victorian Parliament to be bold, rather than timid, in its approach to this necessary reform. Victorians should not settle for the weak procedural rights of the New Zealand, the United Kingdom and ACT models. Instead, Victorians should demand the superior rights afforded by the Canadian model, with the addition of the institution of a parliamentary legislative review committee.