

The Hon Mr Edward O'Donohue MP
Chairperson
Scrutiny of Acts and Regulations Committee

2 August 2011

By email - charter.review@parliament.vic.gov.au

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Supplementary submission to the review of the *Victorian Charter of Human Rights and Responsibilities Act (2006) (Vic)*

Dear Mr O'Donohue

On 20 July 2011 we attended before the Scrutiny of Acts and Regulations Committee (Committee) to give evidence to this review. The Committee requested us to provide a supplementary written submission regarding how a statutory human rights Charter can protect the rights of victims of crime.

Our evidence regarding victims' rights and our offer to provide this supplementary submission was made in light of concerns raised by the Police Association. Unfortunately, the Police Association provided little evidence to support its concerns. Accordingly, we have broadly addressed the potential of the Charter to better protect victims' rights.

Summary

The Charter protects a range of human rights relevant to victims. The Charter provides an overarching framework that requires public authorities to consider and apply these rights and requires courts to interpret legislation consistently with these rights.

While the Victorian Government already seeks to protect these rights through a range of familiar mechanisms such as the criminal law and law enforcement agencies, the Charter enhances the protection of the human rights of victims of crime. In particular, the experience of Europe shows the positive impact human rights protections can have for victims, particularly in relation to recognising that government agencies have a positive obligation in certain circumstances to take steps to protect individuals against violence and abuse.

The Federation has relied on human rights considerations in its policy work to enhance protection of victims of crime, particularly in the area of family violence and sexual assault.

The human rights framework established by the Charter provides a useful framework to assist government in balancing its positive obligation to protect people and families from violence and abuse without unnecessarily intruding on

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privacy through unwarranted interventions.

Content of the submission

Our submission is set out below as follows:

- Background information.
- Victims' rights protected by the Charter.
- How human rights laws in comparable jurisdictions have afforded protection to victims.
- How human rights provide a useful framework for balancing the positive obligation of public authorities to prevent violence and abuse against the rights of individuals and families to unwarranted intervention.
- How the Federation has used the Charter to promote victims' rights.

Background issues

Before considering the way the Charter enhances the protection of human rights of victims of crime, it is worth noting three issues:

The Charter only applies to public authorities

The obligations under the Charter only directly apply to public authorities. There are no enforceable Charter duties between private individuals (and we understand that the Committee is not examining whether the Charter should be extended to apply between individuals as part of this review).

Accordingly, victims of crime cannot enforce Charter rights against individuals who have committed a crime against them. The Charter only applies to public authorities in their interactions with both victims and criminals, or indirectly through the requirement that legislation be interpreted consistently with human rights.

Victims' rights and the rights of accused persons and offenders – not necessarily an either/or proposition

Protecting the human rights of victims of crime does not necessarily mean sacrificing the rights of accused persons and offenders.¹ For example, a fair trial which avoids miscarriages of justice is in the interests of both victims and offenders. Similarly promoting rehabilitation and humane treatment in prison, reduces the risk of reoffending and avoids future victims of crime.

The large majority of Charter cases have concerned civil and administrative issues, not criminal issues

As the Committee has heard, the Law Institute of Victoria undertook a case audit of decisions that have been reported, or that are otherwise available to the public, that raised or addressed the Charter.² The case audit revealed that there have been 209 Victorian tribunal or court cases where the Charter has been raised.³ The average

¹ See The Civil Liberties Trust, 'The rights of crime victims, a manifesto for better treatment of victims in the criminal justice system', (February 2003) <<http://www.liberty-human-rights.org.uk/policy/reports/rights-of-victims-of-crime-february-2003.pdf>>

² Law Institute of Victoria, Submission No 247 to the Scrutiny of Acts and Regulations Committee (Victoria), *Review of the Victorian Charter of Human Rights and Responsibilities Act 2006*, 1 July 2011, 29 [124]-[125].

³ *Ibid* [124].

57 cases a year in which Charter issues have been raised since 2006, represent less than one per cent of all cases.⁴ Claims that the Charter is a “criminals Charter” are unfounded. Of the 209 cases, 76 per cent of Charter cases related to civil or administrative matters and only 24 per cent related to criminal matters.⁵ The Human Rights Law Centre’s analysis of Charter cases revealed that there have been only nine cases in which the Charter has been substantively considered in relation to criminal proceedings.⁶

Victims’ rights protected by the Charter

A range of human rights protected in the Charter apply to victims of crime, including the:

- right to life
- protection from torture and cruel, inhuman and degrading treatment
- protection of privacy
- protection of families and children
- cultural rights
- right to liberty and security of person
- right to a fair hearing.

The protection of these human rights in Victoria is achieved by a range of familiar mechanisms including the criminal law, law enforcement and emergency services, the court system, the operation of the crimes compensation system and laws enabling victims to recover compensation directly from offenders.

For example, in a case in which a victim of crime obtained an order that an offender pay them compensation under the *Sentencing Act*, Justice Bell recently commented that:

The bedrock value is that every person without exception has a unique dignity which is the common concern of humanity and the general function of the law to respect and protect. As Brennan J said in *Marion’s Case*, “[h]uman dignity is a value common to our municipal law and to international instruments relating to human rights”, to which I would add certain pertinent legislation. It finds common law expression in the “fundamental right to personal inviolability ... which underscores the principles of assault, both criminal and civil”. It finds international law expression in the International Covenant on Civil and Political Rights which (among other things) protects “the right to ... security of the person”. It finds legislative expression in (for example) the Crimes Act 1958 and now also in the Charter of Human Rights and Responsibilities Act 2006, which gives several recognition to the human right to personal integrity. More and more it has found expression in legislation allowing criminal Courts to order offenders to pay civil compensation to victims of crime.⁷

⁴ Law Institute of Victoria, ‘Support and Strengthen Human Rights Charter’ (Media Release), 19 July 2011.

⁵ Law Institute of Victoria, above n 2, 35 [136]

⁶ Human Rights Law Centre, Submission No 263 to the Scrutiny of Acts and Regulations Committee (Victoria), *Review of the Victorian Charter of Human Rights and Responsibilities Act 2006*, 1 July 2011, 33 [76].

⁷ *R K v Mirik & Mirik* [2009] VSC 14 [5]. See *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

Accordingly, while there are a range of existing mechanisms which seek to protect the rights of victims of crime, the Charter provides an overarching framework that requires public authorities to consider and apply these rights and requires courts to interpret legislation consistently with these rights. The potential impact of this overarching protection is demonstrated by the analysis further below.

How the Charter enhances the protection of victims' rights

In this section, we look at some examples of how these rights have been relied on here and in Europe to enhance victims rights. The case studies demonstrate how a human rights framework helps to balance competing rights and interests, for example, by requiring decision makers to consider whether the proposed measures are proportionate to the issue being dealt with, and whether there is any other reasonable course of action available that is less restrictive on a person's rights.

Police protection - the right to life

The right to life imposes an obligation on government to take positive steps to protect life. In the context of victims of crime, cases from Europe have found that this duty extends in some circumstances to an obligation on police to take preventative steps to protect a person whose life is at risk from criminal acts.

In the case of *Osman v United Kingdom* [1999] EHRLR 228 the European Court of Human Rights (Court) held that:

It is common ground that the State's obligation [under the right to life]...extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted...that [the right to life]...may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.⁸

The Court outlined the difficult context in which police operate, before describing the scope of the positive duties under the right to life:

...bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.⁹

The Court defined the scope of the positive duty under the right to life in the following terms:

Where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their abovementioned duty to suppress offences against the person...it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or

⁸ *Osman v United Kingdom* [1999] EHRLR 228 [115].

⁹ *Ibid.*

individuals from the acts of a third party and that they failed to take measures with the scope of their powers which, judged reasonably, might have been expected to avoid that risk.¹⁰

...it is sufficient for an applicant to show that the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life which they have or ought to have knowledge.¹¹

The case involved an alleged failure of police to protect the right to life of two murder victims, due to failures to take preventative measures where the police were on notice that the alleged offender posed a real risk of harm to the victims. In the circumstances, the Court ultimately found that the police had not breached the positive duty imposed by the right to life, but found human rights breaches on other grounds.¹²

Child neglect - protection against cruel, inhuman and degrading treatment

Case law from Europe has found that the right to protection from cruel, inhuman and degrading treatment can in some circumstances impose an obligation on the government to take positive steps to prevent harm.

The case of *Z & Ors v United Kingdom* (2002) 34 EHRR 97 involved four children who had been subjected to horrific neglect and emotional abuse by their parent carers.¹³ All children suffered significant physical and psychological injuries as a result of the abuse.¹⁴ The evidence indicated that social services had been aware of the seriousness of the neglect and abuse, and had delayed taking appropriate action for four and a half years.¹⁵ Among other claims, the children alleged that the relevant local authority had failed to protect them from inhuman and degrading treatment.¹⁶

The Court held that:

The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation...requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals...These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.¹⁷

The Court acknowledged the difficult task of child care services in reaching its conclusion:

¹⁰ Ibid [116].

¹¹ Ibid.

¹² Ibid [115]-[122]; [139],[154].

¹³ *Z & Ors v United Kingdom* (2002) 34 EHRR 97 [40].

¹⁴ Ibid [74].

¹⁵ Ibid.

¹⁶ Ibid [69].

¹⁷ Ibid [73].

The Court acknowledges the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life. The present case, however, leaves no doubt as to the failure of the system to protect these applicant children from serious, long-term neglect and abuse.¹⁸

Indeed, the United Kingdom Government did not contest that the treatment suffered by the children reached the level of severity prohibited by right to protection against cruel, inhuman and degrading treatment, and that it failed in its positive obligation to provide the children with adequate protection against inhuman and degrading treatment.¹⁹

Protection against sexual assault - the right to privacy, family and home

Cases from Europe have found that the right to privacy extends to an obligation on government to have criminal laws which protect against sexual assault.

The case of *X and Y v The Netherlands* (1986) 8 EHRR 235, involved alleged sexual abuse of a 16 year old girl with a cognitive disability.²⁰ Under the relevant criminal law provisions, there was a gap in the law which meant that to prosecute the offender, the victim had to make the complaint herself. This was not possible due to the victim's cognitive disability.²¹

The Court noted that there was no dispute that the circumstances engaged the right to privacy:

...the facts underlying the application to the Commission concern a matter of "private life", a concept which covers the physical and moral integrity of the person, including his or her sexual life.²²

The Court recalls that although the object of [the right to privacy] is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life...These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.²³

The Court noted that under the European Convention on Human Rights, States are generally given a wide discretion as to how to best regulate relations between private individuals:

The Court... observes that the choice of the means calculated to secure compliance with [the right to privacy]...in the sphere of the relations of individuals between themselves is in principle a matter that falls within the

¹⁸ Ibid [74].

¹⁹ Ibid [72].

²⁰ *X and Y v The Netherlands* (1986) 8 EHRR 235 [7]-[8].

²¹ Ibid [14]-[16].

²² Ibid [22].

²³ Ibid [23].

Contracting States' margin of appreciation. In this connection, there are different ways of ensuring "respect for private life", and the nature of the State's obligation will depend on the particular aspect of private life that is at issue. Recourse to the criminal law is not necessarily the only answer.²⁴

The Court found that the impossibility of having criminal proceedings instituted against the alleged offender nevertheless violated the right to privacy. The Court found that:

The protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.²⁵

Victims' rights in court proceedings

The Court has found that the right to a fair trial extends to the protection of victims and vulnerable witnesses during court proceedings. The Court has stated that:

It is true that [the right to a fair trial] does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of [the right to a private life]. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.²⁶

In the Victorian County Court case of *DPP v Pottinger* [2011] VCC (26 October 2010), the Director of Public Prosecutions raised the Charter's children's rights provision when seeking an extension of time to allow a child who was the alleged victim of sexual assault to give evidence via audiovisual recording (a method designed to reduce the stress of the process). The Court took the Charter and other factors into account in agreeing to the request.

Child sexual abuse – balancing the obligation to protect against violence and abuse with freedom from unjustified intervention

The United Kingdom case *MAK and RK v United Kingdom* [2010] ECHR 363 (23 March 2010) provides a useful example of how a human rights framework can resolve difficult questions of competing rights.

Facts

A father had taken his then 9 year old daughter to receive medical treatment because he and his wife were concerned about what appeared to be bruising on her legs. Initial medical tests revealed no abnormality. Five months later, the father returned his daughter for medical treatment and requested a referral to a hospital.

²⁴ Ibid [24].

²⁵ Ibid [27].

²⁶ *Doorson v Netherlands* [1996] 22 EHRR 330 [70]

Upon admission to hospital the father had to leave his daughter to attend work. He informed the medical staff that no further tests should be carried out until his wife arrived at the hospital in approximately one hour's time. These instructions were confirmed by his wife in a telephone call to the hospital. The following then occurred:

- without obtaining parental consent as requested, the hospital conducted blood tests and took photographs of the child and the relevant local authority had been notified.
- At no point during interviews conducted by medical staff or social workers, was the daughter asked about sexual abuse. No records were made of social worker interviews.
- The mother informed staff that her daughter had complained of being 'hurt between the legs' while on her bicycle.
- When attempting to visit their daughter, the parents were misinformed that there were orders that the father should not be allowed to see their daughter. This exchange was witnessed by others and news passed through the community, reaching acquaintances in India. The following day, the father was permitted to visit his daughter under supervision.
- The paediatrician informed the mother that there was "no doubt" her daughter had been abused, and if she did not believe this, there was a risk that her other children would be taken into care.
- Social workers requested the mother to ask her husband and eldest son to move out of the family home until further investigations had taken place.
- The mother requested a second opinion on the causes of the bruising and was told by social workers that there was no point in seeking such. The father and brother were not required to leave the home but it was arranged that the mother would sleep in the room with her daughters.

Shortly after these events the mother identified bruising on her daughters hands and made an appointment with a dermatologist. The daughter was diagnosed with a rare condition of the capillaries which is manifested by purple patches of the skin. Following this diagnosis the original paediatrician wrote to the parents indicating that there was insufficient evidence to establish that their daughter had been sexually abused and that the father should no longer be considered to be implicated in the sexual or physical abuse of his daughter.

The parents made a formal complaint to the medical regulator which concluded that the paediatrician was right to admit the daughter, but had been too quick to carry out examinations, and an opinion from a dermatologist should have been sought as a matter of urgency.

Allegations of breaches of privacy rights

The father claimed that the accusations of sexual assault, being asked to leave the family home, and the public refusal of his visitation rights, lead to derogatory assumptions about his character which damaged his reputation, and the subsequent monitored visits compounded his humiliation.

The daughter claimed that the photographs and blood tests were taken against the

express wishes of her parents. The photographs included intimate photographs of her upper thighs. This constituted an unjustified interference with her moral and physical integrity protected under the right to privacy. She complained that had the correct procedures been followed, she would have been interviewed and this would have avoided the need for forensic investigation.

Court decision

The Court reiterated that:

mistaken judgments or assessments by professionals do not *per se* render childcare measures incompatible with the requirements of Article 8 (right to privacy) of the Convention. The authorities, both medical and social, have duties to protect children and cannot be held liable every time genuine and reasonably held concerns about the safety of children vis à vis members of their family are proved, retrospectively, to have been misguided.²⁷

The Court was satisfied that there were relevant and sufficient reasons for the authorities to suspect abuse at the time of hospital admission. However, the delay in consulting a dermatologist extended the interference with the father and daughter's right to respect for their family life, and was not proportionate to the legitimate aim of protecting the daughter from harm.²⁸

The Court held that, in the circumstances, carrying out the tests without parental consent constituted a breach of the daughter's privacy. The Court noted that:

In view of her parent's express instructions not to conduct tests, the only possible justification for the decision to proceed with the blood test and photographs was that they were required as a matter of urgency. In this regard, the Court does not accept the Government's submission that there was a pressing social need to treat the second applicant's symptoms...there was no reason to believe that her mother would withhold consent, and even if she had, the hospital could have applied to the Court for an order requiring the tests to be conducted. In the circumstances, the Court can find no justification for the decision to take a blood test and intimate photographs of a nine-year old girl, against the express wishes of both her parents, while she was alone in the hospital.²⁹

Child protection in Victoria – balancing the obligation to protect against freedom from unjustified intervention

The Victoria Law Reform Commission's 2010 report *Protection applications in the Children's Court* demonstrates how the Charter provides a helpful framework for improving the child protection system in Victoria and balancing the obligation to prevent abuse of children against the rights of families to unwarranted intervention.

For example, the report noted that the current system does not require that children automatically receive the status of parties in child protection court cases which affect them. The Commission's report (at page 317) noted that this "appears to be

²⁷ Ibid [69] citing *R.K. and A.K. v the United Kingdom*, no. /05, § 36, 30 September 2008

²⁸ Ibid [64]-[74].

²⁹ Ibid [79].

an historical anomaly which might not be consistent with contemporary human rights protections” and specifically referred to the rights to recognition and equality before the law in the Charter. The Commission recommended that every child who is subject to a child protection application should be a party to the proceedings.

Elsewhere in the report at page 294, the Commission noted that human rights considerations require that the emergency removal of children from their families must not extend beyond what is needed to protect the child from harm, and there must not be any less restrictive means reasonably available.

Examining the current system, the Commission noted that 75% of child protection applications in Melbourne start by the involuntary removal of children from their families, as opposed to applications by notice, and there is “a very low threshold for the involuntary removal of a child without judicial approval” (page 290). Yet, many children are subsequently returned home when the matter first comes before the court (page 292).

The Commission recommended changes to the system designed to be more consistent with human rights considerations, including promoting the use of family group conferencing, requiring that most protection applications are commenced on notice and ensuring that a workable mechanism exists for the removal of children in genuine emergencies.

How the Federation has used the Charter to promote victims’ rights

Family Violence - Protection from violence in carer relationships

In 2007, the Department of Justice sought comment on draft family violence legislation. The Federation, together with the Human Rights Law Centre and Mallesons Human Rights Law Group, welcomed many of the provisions in the draft legislation but raised concerns that the legislation arguably breached the Charter by providing many people with disabilities who were experiencing abuse from their carers, with a lesser level of protection than other victims of family violence.

We submitted that the issue engaged the Charter rights of equal protection of the law and protection from cruel, inhuman or degrading treatment or punishment.

In response to our concerns, the draft legislation was amended to provide greater protection against violence by carers and the amendments were incorporated in the legislation passed by Parliament: see the *Family Violence Protection Act 2008* (Vic) s 8(3).

Family violence – home detention

During 2010 the Victorian Government was undertaking an expansion of the home detention program (which has since been abolished by the current Victorian Government). The Federation and family violence agencies held serious concerns about home detention and the risks of violence against co-residents by the offender subject to the home detention order.

The Federation, in partnership with family violence agencies, provided Corrections

Victoria with a memorandum setting out the human rights relevant to the home detention program, emphasising the legal obligations to protect family members and offenders from family violence.

Access to justice for sexual assault victims with a cognitive impairment

The existence of the Charter also supports efforts by the Federation to achieve access to justice for victims of sexual assault with a cognitive impairment (acquired brain injury, intellectual disability, dementia and/or mental health issues) or communication difficulties.

The Sentencing Advisory Council has reported that only 12.6% of all of the sex offences reported in victim surveys across Australia are recorded by police and less than 1% result in a finding of guilt by a court of a criminal offence.³⁰

The vulnerability of people with a cognitive impairment or communication difficulties makes them more likely to be victims of sexual assault, and less likely to report the crimes against them to police or to see those crimes prosecuted.

The Charter rights to equality and recognition before the law, the right to privacy, the right to liberty and security of person and the right to a fair hearing are relevant in this regard. Human rights case law suggests that these rights require the Victorian Government to take adequate steps to protect people with a cognitive impairment against sexual assault.

The Federation has collaborated with expert legal and advocacy organisations to develop a pilot specialist advocacy support service for victims of sexual assault with a cognitive impairment. The service will provide advocacy and support during investigation, prosecution and court processes as well as advice on criminal justice processes, crimes and civil compensation and access to disability support services.

The service seeks to fulfil these Charter rights and article 13(1) of the Convention on the Rights of Persons with Disabilities which provides that:

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

³⁰ Sentencing Advisory Council, *Recidivism of Sex Offenders Research Paper*, (2007), 4.
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Thank you for the opportunity to participate in the review to date. Please let us know if you require any further information.

Sincerely

Handwritten signatures of Hugh de Kretser and Jacqui Bell. The signature on the left is a stylized 'H' and 'K' for Hugh de Kretser. The signature on the right is 'Jacqui Bell' written in a cursive script.

Hugh de Kretser and Jacqui Bell

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