

Charting the Right Course

Using human rights to address disadvantage – the Victorian context

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Introduction

As the only Australian State with human rights legislation, Victoria is in a good position to assess the question of whether formal protection of human rights actually makes any difference to the day-to-day community.

Gary Johns of the Institute of Public Affairs framed this question for us in an article last year. Disability Discrimination Commissioner, Graeme Innes, had said, "homelessness is a human rights issue" and, further, that "human rights provide us with a language and a framework that can help shift the debate from one of welfare and pity to one of rights and empowerment. We all know the difference it makes to be viewed as an equal with an entitlement rather than as a recipient seeking benevolence."¹

Mr Johns identified this sentiment as "complete bollocks" and went on to say, "[a] distressed youth, or any other homeless person with mental health or substance abuse problems, needs guidance, not rights and especially not a place that he or she can 'afford'".

So, the question that's ripe for discussion in the final stages of Victoria's four year review of its Human Rights Charter is: human rights protection in Victoria – is it an effective tool in the fight against poverty or, as Mr Johns would have it, "complete bollocks"?

The Charter and the Charter Review

By way of very brief background, here is a snap-shot of the Charter and the Charter Review process to date:

- The Charter came into effect in 2007 – it places obligations on Parliament, the courts and "public authorities."
- Parliament is required to consider human rights when drafting or amending legislation.
- The courts are required to give the most human rights consistent approach to legislation when interpreting it.
- Most relevantly for many of us working in the community sector, "public authorities" must act compatibly with human rights and must give proper consideration to human rights in decision-making. Importantly, public authorities include the obvious contenders such as Victoria Police and the Office of Housing; as well as non-government organisations that are carrying out a public

¹ See Gary Johns, 'We must help mentally ill' (originally titled 'Only helping the mentally ill will halve homelessness') *The Australian* (24 June 2010). See response, Lucy Adams, 'Human Rights and Homelessness' *ABC Online*, *The Drum Opinion* (7 July 2010) (available at: <http://www.abc.net.au/unleashed/35306.html>).

function on behalf of government – this category includes many social and transitional housing providers.

- The aim of this three-tiered approach is to make sure that human rights are considered at each level of government and each stage of decision-making.
- Importantly, the Charter doesn't protect all rights – particularly relevant to today's discussion is the fact that the Charter doesn't expressly protect economic and social rights, such as the right to adequate housing, health care or education.
- Some of the rights it does protect, which are relevant to our client group, include: the right to family and protection of children and the right not to have your home or privacy arbitrarily or unlawfully interfered with. There are also protections of liberty and security and the right to life, all of which can be in jeopardy for people living in poverty.
- The Charter has an inbuilt review mechanism, which requires it to be reviewed in 2011 and 2015. The idea here is that we're in a better place to assess what works and what doesn't once we've seen it in operation.
- So, in April this year, Attorney-General Robert Clark, announced that the Scrutiny of Acts and Regulations Committee (SARC) would be conducting the review – SARC's an existing parliamentary committee made up of three Labor MPs, three Liberal MPs and one National MP, traditionally their role is to review legislation, including for compatibility with the Charter.
- By July 2011, 3834 submissions had been made to the Review – 95% of these submissions supported retaining or strengthening the Charter.
- SARC's report, all 220 pages, was released in September. Disappointingly, the SARC report ignored the abundance of evidence that the committee had before it and the SARC majority (it was split down party lines) recommended removing the role of the courts and the obligations on public authorities under the Charter (i.e. two of the three limbs I mentioned earlier).
- On the same day as the SARC report was released, the Premier's Office issued a press release which distanced it from the SARC report, hearteningly ruled out repeal of the Charter and announced that the Department of Premier and Cabinet would consider the submissions that were made to SARC (i.e. it would not automatically adopt SARC's recommendations).
- The Government now has about five months to respond to SARC's report to determine the fate of the Charter.

The evidence base

So, with that backdrop, what has the Charter done to alleviate disadvantage in Victoria? Has it done anything and is there any tangible reason to keep it?

To the third of those questions my answer would be a resounding yes, the Charter needs to stay. It has made slow but very steady progress toward alleviating disadvantage in Victoria, and, based on the work we've done with Victorians experiencing or at risk of homelessness, we can unequivocally say that the Charter has led to better protection of our most vulnerable members and that it's a vital instrument in both preventing and addressing poverty and disadvantage.

What's the basis for these conclusions?

Case work

As part of the Charter review, we took a step back and looked at the matters where we'd used the Charter in our work.

We pulled together 20 case studies where we'd used the Charter to negotiate and advocate on behalf of our clients.

From these 20 matters, we found that **the Charter had played a crucial role in preventing the eviction of 42 people, including 21 children and seven families, from social housing into homelessness.** This meant that these people were caught before they slipped through the cracks and that they were able to avoid the personal, financial and social pain that homelessness brings with it.

To put some of this in context, Ben was a client of ours.

Case study – young man given a second chance at housing

Ben had lived in public housing with his mother for 18 years. After she passed away in 2005, when he was 29, things got off track and he was evicted for rental arrears.

As a result of undiagnosed depression resulting from the grief of losing his mother and his home, Ben's business as a tradesman fell behind.

He entered a period of ongoing homelessness, during which he stayed for a time in a caravan park and did various stints in private rental which he could not afford.

He lived with his partner on and off from 2005 until her sudden death in mid-2010. He had lived with her permanently since mid-2009 but was not listed as a resident. The Office of Housing told him he would have to move out or they would apply for possession. Ben applied for the tenancy to be transferred into his name.

This application was rejected because he couldn't show he'd been living there for 12 months by paying rent. Ben recognised that he should have been paying rent, but said he never meant to stay – he wanted to find his feet and get his own place, but time just passed really quickly. Before he knew it, he's been living there over 15 months and his partner was dead and he was facing eviction.

We helped him appeal the decision to reject the transfer application. In that appeal, we set out his circumstances and hardship and emphasised the obligation to consider these things before evicting him. We pointed out that he had no savings and no assets and would inevitably be homeless.

While the appeal was on foot, as a result of the stress and grief, Ben had a breakdown and was hospitalised involuntarily. Fortunately, he recovered from this and was discharged under a voluntary Mental Health Care Plan.

This matter was resolved without going to VCAT. The relevant Housing Office indicated that they did not want to evict Ben into homelessness, but could not leave him in the three bedroom property he was in because he was just a single guy. Ben accepted this, saying "I'm not greedy; I just don't want to be on the streets," and willingly relocated to a one bedroom unit.

This example shows how the Charter works in practice:

- it opens the doors to negotiation;
- it reminds decision-makers to look at individual hardships, rather than making blanket, one-size-fits all decisions;
- ultimately, it leads to better outcomes; and
- it doesn't mandate or prescribe outcomes or stop the Office of Housing from managing its waiting list – in this case, it simply required someone to think about whether there was a better option than making this struggling guy homeless. As it turned out, there was.

Policy work

On a broader level, we've also used the Charter to help shape policy and law reform in a way that avoids laws and policies having a disproportionate or discriminatory impact on our most vulnerable community members.

One example of this was the work we did to avoid a local law which would have inadvertently criminalised sleeping in cars.

Avoiding the criminalisation of sleeping in cars

In January this year, the Yarra Ranges Shire proposed a by-law that prohibited camping or occupying a caravan, vehicle, tent on a road or council land or in a public place.

The intention of the by-law was to target backpackers who had been using local parks and amenities without permits, but the unintended effect of the by-law would have been to criminalise poverty and homelessness by penalising people who were sleeping in their cars due to lack of alternative accommodation (the maximum fine was almost \$2,400).

With the proposed by-law scheduled to be voted on in two-weeks, the HPLC, together with the Council to Homeless Persons, commenced a short campaign to stop the introduction of the by-law and to encourage the Shire to address the causes and effects of homelessness, rather than taking a punitive approach to this problem.

We explained that Victorian support services had identified a sharp increase in homeless clients living in their cars because of lack of affordable housing and we identified that it was these people who would be targeted by the proposed law.

We referred to the Charter to identify that imposing penalties on car-dwellers criminalises what is ultimately a human rights issue. Under the Charter, the Shire is a public authority and it's obliged to give proper consideration to human rights when making its decisions. We referred specifically to the rights to life, security and freedom of movement and questioned whether councillors had been provided with advice regarding human rights in considering the proposed by-law.

The result was that the councillors deferred consideration of the local law until the law was redrafted and implementation guidelines were developed. The HPLC and a number of local homelessness and community service providers were consulted in the process of preparing the guidelines.

The guidelines aim to make sure that people experiencing homelessness are not penalised by this by-law and require that, when an officer assesses a person to be homeless, they are under an obligation to, with that person's consent, contact a relevant community agency to link the person with appropriate supports.

More broadly, the issue received media attention, educated Shire staff and councillors about issues of homelessness and attracted interest from other local councils eager to know more about best practice homelessness policies.

So, in this example, the human rights framework and specific Charter-based obligations were used to highlight the flaws in the proposed by-law and, combined with local evidence-based arguments, this approach led to a positive outcome, not just for people based in the Yarra Shire but more broadly in relation to local councils dealing with homelessness.

Conclusion

These are just two of the examples contained in the HPLC's submission to the Charter review. There are many more real life, practical examples in our submission; and there were hundreds more communicated to SARC by various individuals and organisations that have experienced the Charter's impact in its four year lifetime.

At the end of the day, we're of the view that these stories of how the Charter works in practice, on the ground, would draw most people away from the suggestion that human rights protection is "complete bollocks" and toward the notion that formal legal protection of human rights is a crucial part of the framework for protecting our most vulnerable members.

Based on the evidence that the Government has before it, it's unequivocal that the Charter has had a positive impact on the policies, practices and decision-making in Victorian public authorities and, therefore, on the outcomes that have been achieved for Victoria's most disadvantaged members.

I'm going to borrow the words of one of our consumers to finish up. She said:

"Our human rights don't exist. We are homeless and it [is] looked upon as our fault. Sometimes it is, other times not; but if someone keeps falling should we pick them up or walk straight over them ..."

Legislative protection of human rights in Victoria has made it more likely that Victoria will be a fair and equal society where people are "picked up" rather than "walked straight over". This is something we should be proud of; it makes Victoria a better place and it builds the kind of community that we'd all like to be part of.

More information about the Charter and the Charter review is available at: <http://www.pilch.org.au/charterreview/>