

Overview of the Victorian Government's Human Rights Community Consultation 2005

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The first task the Human Rights Consultation Committee (Committee) was to consult with the community and groups. A discussion paper was published and the Committee then set out to meet as many people and attract as many submissions as possible. So far, the Committee has received 1800 submissions from individuals and organisations, and is delighted with the quality and number of submissions.

The Committee is now at the stage where consultation is almost at an end. A report informed by the consultation process has to be prepared by 30 November with final conclusions and then presented to government.

Issues that the Committee has grappled with include:

- (1) What are human rights? Which rights should a Charter cover?
- (2) What sort of models are there for human rights protection around the world?
- (3) Who should be bound by the legislation?
- (4) Remedies

What are human rights? Which rights should a Charter cover?

Human rights have different meanings for different people. The government has directed the attention of the Committee to the International Covenant on Civil and Political Rights (ICCPR), and indicated that it is most interested in considering these rights in a Charter.

The Committee acknowledges that there is an International Covenant on Economic Social and Cultural Rights (ICESCR) and that many people who have made submissions have said that the government should be looking at economic and social rights just as much as civil and political rights. That is something that will have to be addressed in the report.

Civil and political rights are generally covered by models in other parts of the world. Civil and political rights normally refer to personal attributes and having rights including the right to vote, freedom of speech and freedom of association.

Economic and social rights refer to concepts including the right to housing and education. These are very important issues that generally require resource allocation from government. Governments like to make their own allocation rather than having it directed through a piece of legislation.

Which rights should a Charter cover? In considering this question, the report will need to stress that human rights are not absolute. We live in a society where many people have different needs and desires and rights that apply to them and sometimes the rights of one person affect the rights of another. In the end it becomes a question of finding the proper balance that the community expects.

What sort of models are there for human rights protection around the world?

One extreme is to do nothing, which is happening in Victoria at the moment. We have human rights protected in individual ways. We have Equal Opportunity legislation in Victoria, some parts of our Australian Constitution protect rights, there is legislation about voting and various aspects of human rights are covered by our existing laws. We do not, however, have any comprehensive check to protect human rights.

Another model, at the other end of the extreme, is the United States Bill of Rights. Entrenched in their constitution, it cannot be altered by the legislature. Generally its scope is determined by decisions of the courts and therefore, is a court directed application of human rights.

The model the government has suggested in its Statement of Intent is one shared by the UK, NZ, Canada and the ACT. This model is more directed towards Parliament deciding the rights to be protected, rather than courts. There is a dialogue with the courts but essentially human rights are to be protected through legislation passed by the Parliament, which can be amended by the Parliament and therefore can respond to the community through elected representatives, parliamentarians.

This sort of model is one where courts are given an ability to declare that some legislation is incompatible with human rights legislation. If the courts make such a declaration, this does not render the Act invalid. It also does not affect the rights of parties to litigation before courts. It does, however, require that a declaration of incompatibility be placed before Parliament. This provides an opportunity for Parliament to reconsider the legislation that the court has said is incompatible.

There is a role for the courts to express a view but it is up to Parliament to decide whether the legislation should be amended to bring it into accordance with human rights legislation.

Under this sort of model, there is usually a requirement that the Attorney General should have a statement that accompanies any legislation being introduced, certifying that the proposed legislation is compatible with the human rights legislation. This would not stop the government proceeding to pass legislation which is incompatible with human rights legislation. The government, however, would have to do so openly because it would have to explain why it is necessary to depart from human rights legislation.

This model applies in other jurisdictions. It provides a role for Parliament, the courts and the Executive to consider if laws are compatible.

Who should be bound by the legislation?

The US Bill of Rights applies to everyone in the community. Anyone can bring litigation.

The model that is preferred for Victoria is one that applies to the public sector, government departments and public authorities.

This question about how a public authority should be defined arises in this context. People have made submissions that public authorities should include non government bodies and not for profit organisations that are performing services for government, for example, the department of health entering into a service agreement with a not for profit organisation. It is argued that the not for profit body could also be covered by the legislation.

There is an argument regarding whether the Charter should apply to corporations. One view is human rights attach only to humans, and that it is not logical to apply human rights principles to corporations.

Remedies

Another issue that the Committee is considering is remedies. The ACT has a system where there are no remedies. In other models, people can claim damages for breach of the human rights legislation or there is a complaints mechanism. Alternatively, some models provide for reviews or audits of the performance of public departments regarding whether they are complying with human rights legislation. In its Statement of Intent, the government expressed the view that it did not favour a right of damages being created. Many submissions have suggested that such a remedy should be available to people who suffer a human rights breach.

Many people have argued that if it “ain’t broke don’t fix it”. Whereas others say that there are gaps in our law, that we do not have any comprehensive statement of human rights and we do not have a benchmark to inform the community and the public service regarding the way people should operate. Some people consider that even if there were no remedies available, a Charter would still serve a useful purpose.

The Committee is now assessing the arguments. The Committee considers that the consultation has been an exciting and fascinating task and is very pleased with the submissions that it has received.