Legal Affairs and Community Safety Committee, Queensland Parliament - Human Rights Inquiry
Submission by the Centre for Innovative Justice, RMIT University, Melbourne.

Introduction and background

The Centre for Innovative Justice at RMIT University ('the CIJ') welcomes the opportunity to make a submission to this important inquiry. Led by a former Attorney-General who championed the Bracks Labor Government's introduction of Victoria's Charter of Rights and Responsibilities, the CIJ applauds the Inquiry's readiness to explore ways to give better protection to the human rights of Queenslanders.

In doing so, the CIJ encourages the Committee to consider this chance for valuable reform in the context of the nation's history. As the Committee will be aware, Australia has a proud record of advocating for the recognition of human rights on the international stage, with Australians taking a prominent role in the development of the global community's most significant rights mechanisms.

Inexplicably, however, the nation has been more reluctant to advocate for formal recognition of those same rights at home. Australia is one of the last developed nations in the world to have adopted any formal mechanism which articulates and protects the rights of its citizens. Repeated opportunities to do so at the national level have, regrettably, not been seized - the most recent endeavor resulting only in a policy framework that, while commendable, does little to hold government to account.

At a national level, this leaves Australians with only the narrow protections of a highly pragmatic Constitution; with piecemeal legislation and the common law. As this Committee will be aware, this combination has often proved inadequate, particularly for some of the most vulnerable members of the population. Administrations of good intent come and go, meanwhile, with positive reforms often rolled back or dependent on the individuals overseeing them.

This means that jurisdictions need a formal instrument which not only reigns in executive excess, but which holds all administrations consistently to account. In fact, the imperative for states and territories to set such an instrument in place is just as great - or even greater – than it is at a national level. This is because, despite perceptions of human rights as manifesting only in circumstances of extremity, the majority of rights violations that Australian citizens experience occur in the context of the every day.

Health, education, public transport, housing, public safety and law and order - these are some of the areas that matter most to Australians, and are also the areas in which state and territory governments have the greatest control. It is essential, therefore, that these governments are adequately equipped to offer citizens protection – with a mechanism that entrenches human rights as core government business.

This is a cultural challenge as much as a legislative one. Few governments voluntarily pursue constraints on their power, while many in the broader community perceive the recognition of rights as limitations on, rather than protections of, their own entitlements. Given that the Committee will be well aware of the mechanisms which exist in the ACT and Victoria, and the various reviews of these in recent years, this submission therefore outlines some of the steps necessary for reviewers to consider when contemplating the adoption of a human rights instrument, as well as the benefits gleaned in jurisdictions which have taken this step.

Myths and misconceptions

Objections to the introduction of human rights mechanisms are reasonably consistent in every jurisdiction that attempts it. On the one hand, many in the political realm fear that such a mechanism would encroach on the power of the parliament – handing ultimate decision making capacity to an unelected judiciary which, as with the US Bill of Rights, can have significant impacts on legislative terrain. On the other, many in the legal sphere have at times expressed concern that a legislated rights instrument – by its very nature unable to be exhaustive – will curtail the flexibility of the judicial process, limiting the considerations that can be currently brought to bear in the ongoing evolution of the common law.

In the broader community, meanwhile, rights mechanisms have variously been portrayed as a lawyers' or criminals' picnic and sometimes both at the same time - a vehicle for the creation of a litigious society from which lawyers will reap the rewards, and/or a 'get out of jail free' card for offenders who will cry violation of their rights at every turn and flood the courts with spurious claims. Further, mainstream perceptions of human rights attaching only to vulnerable populations fuel the notion that rights instruments are about 'trumping' the rights of the minority over the majority – that in the act of asserting the entitlements of the most disadvantaged, the entitlements of the advantaged will somehow be curtailed.

These are all myths and misconceptions with which the Bracks Government needed to grapple when first contemplating the introduction of Victoria's Charter of Rights and Responsibilities. It was for this reason that the government first commissioned a widespread community consultation, a process which – like this current Inquiry – enabled individuals and groups to express any concerns and, in doing so, to create the opportunity for conversation about how a legislative mechanism should function.

What Victorians said

Despite the above concerns being articulated in the wider media, however, the vast majority of submissions to the consultation process indicated strong support for a rights mechanism. In particular, submissions called for better protection of civil and political rights, with overwhelming support for immediate recognition of social, economic and cultural rights as well. On this point submissions acknowledged the greater impact on the public purse that recognition of these particular rights may potentially create, as well as the challenge in balancing them with competing imperatives.

Almost without exception, submissions rejected an approach based on the litigious approach of the United States' Bill of Rights. As the Committee will be aware, the US model is in fact the exception amongst the human rights instruments of common law nations, with others preferring the 'dialogue' model in which the judiciary can interpret the application of the instrument in the context of different circumstances and seek explanation from government where legislation is inconsistent with these entitlements.

Rather than remedy breaches once they occur, the 'dialogue' model is intended to build consideration of human rights into the process before policies are developed or decisions are made. In other words, it is intended to 'get things right the first time', meaning that fewer violations of people's rights – inadvertent or otherwise – will occur, rather than simply trying to address those violations after they occur.

The Victorian model also made it clear that with each human right set out in the Charter came the responsibility to respect those rights as they applied to others, and that no right was absolute.

It was this model that was ultimately adopted in Victoria, with a decision made to take a staged approach in terms of the kinds of rights that this instrument would protect. Opting to enshrine civil and political rights as a first step, the Bracks Government then committed to a periodic review process in which the question of extending the Charter to other rights, as well as including specific remedies, could be considered.

Given the political cycle, this review was ultimately conducted by a subsequent administration, initially with the very existence of the Charter on the line. However, though opponents of the Charter when in Opposition, the process of conducting the review allowed members of the subsequent government to see significant value in its operation, with the bulk of its provisions retained. A further review conducted under the current Labor Government has, as the Committee will be aware, seen a number of improvements occur and provisions strengthened – an indication that, ten years on from its initial introduction, the Charter has now become accepted as a fundamental part of Victorian civic and public life.

Recommendation #1:
That the Committee recommend the introduction of a 'dialogue' model of rights recognition based on the Charter of Rights and Responsibilities in Victoria, with a built in review process designed to consider amendments or extensions after appropriate periods of operation.

The early stages

This does not mean, of course, that the process of introducing the Charter ten years ago was a fast or easy one. The experience of the Bracks Government in the period prior to and immediately after the Victorian Charter's introduction demonstrated that the 'front end' approach of the dialogue model required considerable and careful ground work. Many Cabinet and cross-government processes needed additional steps built in, with some Ministers and Departmental personnel resistant to change which seemed to slow reform or place additional burdens on staff. This was particularly the case in departmental areas which were not accustomed to considering the indirect impact of policy or funding decisions on individuals or particular communities.

Adequate resourcing – including extensive training – was therefore essential to support these 'front end' processes to be put in place. So too was an adequate timeframe in which this training could occur, in order that decision and policy makers could 'hit the ground running' once the instrument comes into operation, rather than learning – and making mistakes – on the job.

As the experience in Victoria has shown, however, this training needs to be ongoing. Though staff across the public sector received training at the outset, this allocation was not renewed under the subsequent administration. This meant that knowledge became outdated, or lost through natural attrition when staff who had previously received training were replaced by staff who had not. The recent review conducted under the current administration recognised this and recommended ongoing training for the public sector, also extending its reach to areas that had not benefited from it before. The CIJ welcomes the recognition of the importance of ongoing training and urges the Committee to give this subject similar recognition in its own recommendations.

A thorough review was also conducted of all legislation on the Statute books to ascertain whether it was compatible with the new Charter. This gave Government Departments the opportunity to update legislation and, in many cases, repeal redundant laws.

Recommendation #2:
That the Committee recommends that adequate resourcing be allocated for the purposes of ongoing training concerning any legislative mechanism introduced to protect human rights in Queensland. Phased introduction should also occur so that public sector staff are appropriately skilled at the commencement of operation. A review of all Queensland legislation should be undertaken to ensure it is compatible with any incoming human rights instrument.

The operation

Once the model had been chosen; specific rights identified; legislation drafted and passed; and public sector staff adequately trained, the Charter came into operation. To the surprise of some skeptics, the courts were not flooded with litigation. This was in part because the legislation had been designed so that a Charter claim must be attached to another claim in any litigation, rather than being brought on its own. While some offenders did invoke a Charter claim to other matters before the courts, as the Committee will be aware, the courts interpreted this extremely narrowly and the few claims that were brought in this context did not succeed.

In fact, as far as dramatic change as a result of the Charter, very little happened at all. Rather, the value of the mechanism lay exactly where it had been targeted – in actions and decisions by policy makers and service providers which made a difference to individual lives. As Eleanor Roosevelt, champion of the original Universal Declaration of Human Rights explained, human rights lie:

> *'…in small places, close to home - the neighborhood [we] live in; the school or college [we] attend; the factory, farm, or office where [we] work. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination….'* [1]

In just some examples of the range of ways in which this recognition of human rights has manifested in small places in Victoria, it has meant:

- Better accessibility on public transport
- The right to a fair hearing more effectively enforced

[1] Eleanor Roosevelt, 'In Our Hands', Speech delivered to the United Nations on the tenth anniversary of the Universal Declaration of Human Rights, 1958.

- Better access to local Council hearings for ratepayers with limited mobility
- Prevention of eviction for single mothers, elderly people, refugee children living without their parents and people with disabilities
- Access to mental health services
- Access to their own mail and privacy when showering for residents in residential care

Preventing homelessness, the provision of a shower curtain - none of these things on their own will change the world. There is no doubt, however, that they would have changed the world of the individuals affected. Just as importantly on a pragmatic level, these things will have indirectly contributed to significant savings to the taxpayer – as impacts on housing security, personal dignity and mental health have impacts on the public purse downstream. 'Getting it right the first time', therefore, benefits more than the individuals involved, with many in local government, in particular, recognising the budgetary savings to be had by taking a proactive approach to recognition of the rights of their ratepayers on a day to day basis.

In fact, much of the Charter's impact has been felt at the local government level, with many LGAs being the most proactive in terms of publicising the existence of the Charter to local residents. For the most vulnerable, decisions made at the local and state level often have the most immediate impact, as do decisions made in the context of state funded service provision, such as residential care facilities, mental health services, or public housing.

While questions of human rights are often perceived in terms of the 'big picture' therefore, the Victorian experience has demonstrated that it is in the detail, or at the 'micro' level, that the value of the Charter often lies. Presented with clients facing eviction or denied access to certain services or agency over aspects of their own lives, community legal or service sector workers have approached relevant agencies and explained the provisions of the Charter that mean that their client's rights are not necessarily being recognised. Changes have been negotiated and agreed, without the need to proceed to litigation. These individual changes have, in turn, led not only to change in the treatment of the next individual or family in line, but the way in which broader policies and decisions are made.

In other words, the Charter has achieved a shift in the way that public institutions work, making consideration of rights an essential and unremarkable aspect of the business of doing government. This cultural shift is not a perfect one, but it does mean that those quiet, everyday things are addressed at the outset, rather than asserted only if and when a wrong has occurred.

Recommendation #3
That the Committee recommend that, in the adoption of any human rights instrument in Queensland, government ensure that training is provided to local government and statutory authorities, as well as all public sector service providers to ensure that violations of human rights are prevented at the earliest possible opportunity.

Culture

As valuable as the enactment of a Victorian Charter of Rights and Responsibilities has been, of course, it is vital to remember that many nations have a formal rights instrument, yet shameful records of respecting rights on the ground. This is used by some as an argument against having an instrument at all, for fear that its existence will disguise violations.

It is used by others, however – including former President of the Australian Human Rights Commission, Catherine Branson[2] - to suggest that a human rights culture should pre-exist any legislative recognition in order for the law to take full effect. In the CIJ's view, however, it is a reminder not only that the relevant legislation has to be sound, with adequate protections in place, but also that it should lay the foundation for cultural change. Certainly, that is what the Victorian Charter of Rights and Responsibilities was intended to be about – changing the culture of government and public life so that human rights are brought from the periphery to the core.

This means that any government considering the introduction of a human rights mechanism must ensure that it is supported by an appropriate and robust communications campaign – one which conveys clearly that human rights are not just about certain sectors of the community but about everyone - about our everyday hopes for ourselves and for our families; about how we expect to be treated when interacting with the world.

In other words, governments advocating for reform must convey its value to the public, with this value found in the quiet, everyday things described above. These examples need to be articulated. As the Committee will no doubt hear from other submissions, many Australians do not have their fundamental dignity or human rights respected as they go about their daily lives yet, for those who do not experience disadvantage, this is not always well understood.

When it is described in a more relatable and individual way, however, few Australians would suggest that a woman in residential care should be denied the right to some sort of privacy when showering. Equally, few would welcome the eviction of a man with a profound disability from public housing – particularly when the economic impact of any subsequent demands on service provision are explained.

Tangible examples like these, therefore, need to be catalogued and articulated – examples which, in lay terms, represent the 'fair go' that the vast majority of Australians would expect to be observed. What's more, Australians need to hear that, where the rights of those on the margins of society are protected, the rights of the rest of the population are more likely to be observed as well.

Recommendation # 4

That the Committee recommend that the introduction of any human rights instrument in Queensland be accompanied by an adequately resourced education campaign, including tangible examples of what recognition of human rights might mean for Queenslanders on a day to day basis.

[2] 'Rights, hearts and minds: Towards a national culture of Human Rights', Delivered by the Hon Catherine Branson, Bob Hawke Prime Ministerial Centre/Graham F Smith Peace Trust, 14 June 2012. At www.humanrights.gov.au/news/speeches/

Supporting mechanisms and infrastructure

As the recent review of the Victorian Charter identified, public awareness and appreciation of the Charter alone is not enough. Members of the community and the public sector alike must also be better informed of the mechanisms and infrastructure which support any Charter's operation. Accordingly, while the review found that the role of the Ombudsman and the Victorian Human Rights and Equal Opportunity Commission needed to be strengthened in terms of the redress that the operation of the Charter could offer, what also emerged was the lack of awareness on the part of the broader community about the role that these agencies already played.

Infrastructure and regulatory frameworks that are designed to enshrine the rights, dignity and wellbeing of the community should not operate in silos. Nor should they operate at a theoretical level without any enforcement mechanisms to back them up. This means that the introduction of any human rights mechanism in Queensland should also carefully consider the role of supporting public sector or independent statutory authorities in effectively upholding the intent and integrity of that mechanism. It also means that any public information campaign should include strategies to raise public awareness of the availability of existing bodies charged with government oversight, and their relationship to any rights mechanism introduced.

> **Recommendation #5**
> That the Committee recommend careful consideration and strengthening of the role of existing statutory authorities or public sector agencies and their relationship to any human rights mechanism introduced in Queensland, as well as inclusion of the role of these agencies in any public campaign.

Conclusion

Ten years on from the introduction of Victoria's Charter of Rights and Responsibilities, human rights recognition has been built into the 'DNA' of government business. This does not mean, of course, that mistakes and oversights do not occur, nor that, on occasion, decisions are not taken to prioritise other considerations over individual rights from time to time. What it does mean, however, is that these decisions are more transparent, that they are made overtly and after serious consideration, rather than just by omission. It also means that there are more avenues for dialogue about the role of rights recognition – at the most senior levels, between the different arms of government, and at the grassroots level of service delivery and administrative decision.

A more tangible language also now exists in which reform in other areas may be explored. The CIJ's objective is to improve access to justice, and find innovative ways in which justice mechanisms may function as a positive intervention in the lives of their users. The existence of the Charter underpins this work and enables discussion and debate to occur at a more developed and productive level, the focus having moved beyond 'whether' these rights should be recognised, to 'how' this recognition may best

occur. The financial benefits of this approach flow to the broader community, and the individual benefits flow to those who need them most. The CIJ strongly commends the operation of the Victorian Charter to the Committee and looks forward to the introduction of a robust and dynamic mechanism in the Queensland context – one which can draw on the lessons of other jurisdictions and which establishes a strong foundation on which current and subsequent governments may stand.