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***AFUW-Vic: serving and empowering women
through education and advocacy***

**Review of the Charter of Human
Rights and Responsibilities Act
2006 (Vic)**

**WRITTEN SUBMISSION OF THE
AUSTRALIAN FEDERATION OF
UNIVERSITY WOMEN (VICTORIA)
(AFUW-VIC)**

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INTRODUCTION

This document comprises the written submissions of the Australian Federation of University Women (Vic) (**AFUW-Vic**) in response to the Scrutiny of Acts and Regulations Committee's (the **Committee's**) inquiry into the Terms of Reference established for the review of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the **Charter**).

AFUW-Vic is grateful for the opportunity to contribute towards the Committee's inquiry and would be pleased to give evidence at the Committee's hearings in late July and early August this year.

ABOUT AFUW-Vic

1. AFUW-Vic has developed from the Victorian Women Graduates Association (**VWGA**), which was founded in 1920 as an association of women graduates who were inspired by the foundation of the International Federation of University Women (**IFUW**) earlier that year.
2. In 1922, VWGA joined associations of women graduates in other States and Territories of Australia to form the Australian Federation of University Women, now known as the Australian Federation of Graduate Women (**AFGW**).
3. All State and Territory chapters of AFGW share the common goal of promoting understanding and friendship amongst university women all over the world regardless of race, nationality, religion or political opinion.
4. AFGW strives nationally to encourage women to apply their knowledge and skills to the problems which arise at all levels of public life and to encourage participation in the solving of such problems.
5. AFGW's aims are to promote:
 - the right of women and girls to education in order to reach their full potential;
 - education as a means of influencing and benefitting society;
 - peace, justice and equality;
 - the development of international understanding, cooperation and friendship; and
 - the recognition and protection of human rights.
6. AFGW and its constituent Associations such as AFUW-Vic are affiliated with and have representation at the international level through the IFUW which has United Nations (**UN**) consultative status.

SUMMARY OF KEY RECOMMENDATIONS

AFUW-Vic makes the following overarching recommendations in relation to the Committee's review of the Charter.

- That the Charter should include additional rights as codified by the:
 - International Covenant on Economic, Social and Cultural Rights (**ICESCR**);
 - Convention the Rights of the Child (**CRoC**);
 - Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**);

- UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**),
and be guided by the terms of UN Declaration of Human Rights (**UDHR**);
- That the Charter should include the right to self determination;
- That the Charter should require mandatory, independent and regular auditing and reporting of public authorities to assess and reveal compliance with human rights;
- That the Charter should provide additional provisions relating to proceedings which may be brought or remedies that may be awarded where acts or decisions of public authorities are found to be have made unlawfully, in breach of internationally recognised human rights;
- That the Charter has had a notable positive effect:
 - on the development and drafting of statutory provisions;
 - on the consideration of statutory provisions by parliament;
 - on the provision of public services;
 - on the performance of functions by public authorities; and
 - on litigation and the roles and functioning of Victoria's courts and tribunals; and
- That the provisions of the Charter should be further developed and strengthened in order to afford true availability to Victorians of accessible, just and timely remedies for infringements of their human rights.

SUBMISSIONS

7. In response to the Terms of Reference, AFUW-Vic submits as follows:

(a) Term of Reference 1: Additional Rights Should Be Included as Human Rights Under the Charter including, but not limited to, rights under the ICESCR, CRoC, and CEDAW.

- The Charter in its present form does not expressly refer to the economic or social rights recognised as “human rights” under international law. It is submitted that all human rights recognised under international law should be included in the Charter as they enable all members of society to live with dignity and to participate fully as members of the community.
- Of course, the Charter is not the only means of realising the above rights and it is not submitted that the Charter should be the only means of realising them. Rather, including the above rights in the Charter can assist with their practical realisation by, amongst other things, encouraging an awareness by the community and by public authorities of the full extent of human rights recognised under international law (recognising that Australia does not exist in a vacuum), and by fostering a culture, routine or habit of recognition and respect for human rights in contemporary society.
- As to the argument that human rights are adequately protected by particular legislation, common law principles, presumptions, and political conventions, it is submitted that the need for a wide-ranging Charter is exemplified by the fact that specific laws serve a disparate purpose and perform a separate function. Accordingly, they do not encourage the making of laws or the delivery of services with human rights considerations in mind. Further, specific legislation can fail to address particular problems, issues or concerns which may arise in future. AFUW-Vic’s concerns in this respect are summarised by the following words of the UK’s former Attorney General, Lord Peter Goldsmith:

One problem is that you don’t create a culture of awareness of rights (and indeed responsibilities) if all you do is have a series of specific pieces of legislation which deal with specific problems. ... The second issue is that specific laws can’t necessarily cover all of the circumstances which arise. You can’t necessarily predict them all at the time that you are passing that legislation and as social conditions change, as problems arise, if you don’t have some broader document which protects people’s rights then you may find that they get lost.¹

- As to how ICESCR, CRoC and CEDAW rights can be expressed in the Charter so that they are practically appropriate and adapted to Victoria, it is submitted that the following additional human rights, as stated, are reasonably appropriate and adapted to modern Victoria and should be included:
 - Education - the right to education, including equal access to higher education based on ability and to human rights education.
 - Article 26 of the UDHR states that “everyone has the right to education”.
 - Article 26(2) of the UDHR and Article 13(1) of the ICESCR further provide that:

[e]ducation shall be directed to the full development of the human personality and to strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

¹ ABC, 7.30 Report Victoria on 27 May 2011. See www.abc.net.au/news/video/2011/05/27/3229370.htm.

- The right to education in the terms described above is core to the aims of AFUW-Vic, the AFGW and the IFUW. And AFUW-Vic submits that the key to securing the universality of human rights lies in the right to education.²
 - By way of example, satisfactory completion of a prescribed education program is essential, in many cases for employment opportunities, and education is often viewed as a gateway to success.³ Further, strong parallels can be drawn between the right to education and the development of respect for human dignity.⁴ This is true because a lack of education can prevent enjoyment of other fundamental rights including the rights relating to political participation, freedom of expression, the right to equal treatment at work, and various cultural rights.⁵
 - There should be no discrimination in the provision of or access to education between boys and girls, and education should not be looked at solely as the prerogative of the young. Rather, international human rights law demands a basic level of education for all and obliges States to extend educational facilities to adults who seek to obtain basic literacy and numeracy skills.⁶
 - Having regard to the foregoing, it is submitted that the Charter should expressly include a reference to the ICESCR and UDHR right to education (including equal access to higher education based on ability), and that any reference to education should include a reference to human rights education. The latter is submitted on the basis that knowledge of human rights is a sine qua non of the understanding, appreciation and exercise of those rights.⁷ (In other words, human rights education is essential to founding an attitude and culture of recognition, respect and protection for human rights in any contemporary society).
- Freedom to work and employment rights - including the right to:
- freedom to work (including to free choice of employment), to just and favourable conditions of work, and to protection against unemployment⁸;
 - equal pay for equal work⁹ (stated in express terms¹⁰); and
 - just and favourable remuneration ensuring for persons and their families an existence worthy of human dignity and supplemented, if necessary, by other means of social protection¹¹.

² Rhona Smith, *Textbook on International Human Rights* (3rd ed, 2007) 290.

³ Rhona Smith, *Textbook on International Human Rights* (3rd ed, 2007) 291.

⁴ Rhona Smith, *Textbook on International Human Rights* (3rd ed, 2007) 291.

⁵ Rhona Smith, *Textbook on International Human Rights* (3rd ed, 2007) 291.

⁶ Rhona Smith, *Textbook on International Human Rights* (3rd ed, 2007) 291.

⁷ Rhona Smith, *Textbook on International Human Rights* (3rd ed, 2007) 291.

⁸ Articles 23 (1 - 3) Universal Declaration of Human Rights (**UDHR**); see also Articles 6 - 7 ICESCR; Articles 6 - 7 American Convention on Human Rights (**ACHR**); Article 15 African Charter on Human and People's Rights (**ACHPR**); Article 14 Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (**CIS**); Article 34 Arab Charter on Human Rights (**AL**); European Social Charter (**ESC**).

⁹ Articles 23 (1 - 3) UDHR; see also Articles 6 - 7 ICESCR; Articles 6 - 7 ACHR; Article 15 ACHPR; Article 14 CIS; Article 34 AL; ESC.

¹⁰ Cf section 14(a) of the *Equal Opportunity Act 1995* (Vic) which states that an "employer should not discriminate against an employee - by denying or limiting access by the employee to opportunities for promotion, transfer or training or to any other benefits connected with employment". AFUW-Vic submits that the "right to equal pay for equal work" should be expressly included or referred to in the Charter as to do so would put beyond any doubt the obligation on employers to recognise and respect the right to equal pay for equal work, as well as create symbolic and substantive equity for women workers.

- Whilst AFUW-Vic understands that international human rights law does not provide any guarantee of employment¹², the above work and employment rights provide individuals with an element of human dignity and the remuneration so important to securing an adequate standard of living.
- Access to services, including the right to equal access to:
 - services which assist persons to acquire adequate food, clothing and housing; and
 - health services to assist persons to achieve a reasonable standard of physical and mental health.
- The right of persons with disability, including to:
 - receive respect for their physical and mental integrity on an equal basis with others;
 - exercise the full extent of their legal capacity in all aspects of life; and
 - live independently and to be involved in the community.
 - The rights of persons with disability are fundamental to the universal respect, promotion and respect of human rights, and to achieving real and substantive equality.
- Group rights - including the:
 - right for consultation of Indigenous persons in relation to land access and use for proposed projects, including free, prior and informed consent (which is a right codified at international law by the UN Declaration on the Rights of Indigenous Peoples, to which Australia is a party)¹³;
 - right to live in a sustainably managed environment;
 - rights to protection of the family, a family life, and to marry¹⁴;
 - right of aliens to due process when facing expulsion¹⁵; and
 - right of asylum seekers to seek asylum from persecution¹⁶.
- Minority rights - including the:
 - right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits¹⁷;

¹¹ Articles 23 (1 - 3) UDHR: see also Articles 6 - 7 ICESCR; Articles 6 - 7 ACHR; Article 15 ACHPR; Article 14 CIS; Article 34 AL; ESC.

¹² Rhona Smith, *Textbook on International Human Rights* (3rd ed, 2007) 279.

¹³ UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**); International Labour Organisation Convention Concerning Indigenous and Tribal Peoples (No. 169).

¹⁴ Article 23 ICCPR; Articles 16 and 22 UDHR; Article 10 ICESCR.

¹⁵ Article 13 ICCPR.

¹⁶ Article 14 UDHR.

¹⁷ Article 27(1) UDHR: see also Article 27 ICCPR; Article 14 ACHR ESCR Protocol; Article 17(2) ACHPR; Article 21 CIS; Article 41 AL.

- right of ethnic, religious or linguistic minorities to enjoy their own culture, profess and practice their own religion, and to use their own language¹⁸.

8. Further, to improve the practical attainment of substantive justice, AFUW-Vic recommends the following amendments to the existing terms of the Charter:

- Discrimination - that the definition of discrimination adopted by the Charter by way of the *Equal Opportunity Act 1995* (Vic) be not only retained, but expanded to include: 'appearance', 'genetic features', 'education', 'national or social origin', 'property';
- Life - that the Charter explicitly state that persons to whom the Charter applies:
 - must take all reasonable steps to ensure that the right to life is protected within the jurisdiction;
 - should take steps to ensure that any deprivation of life is fully investigated in an open and transparent manner;
 - have a positive obligation to provide appropriate health care and access thereto in order to facilitate the right to life;
- Families and Children - that section 17 regarding the protection of families and children be expanded to include reference to the right to marry and to found a family;
- Rights in Criminal Proceedings - that section 25 regarding rights in criminal proceedings include an express reference to the right to compensation for wrongful conviction (which is included in the ACT Charter); and
- Freedom of expression - that section 15 of the Charter which relates to freedom of expression be extended to include the right to freedom from war propaganda, and freedom from incitement to racial, religious or national hatred¹⁹.

(b) Term of Reference 2: Inclusion of the Right to Self Determination.

- Article 1 of the ICCPR and ICESCR states that all peoples "have the right to self-determination" and by that right "freely determine their political status and freely pursue their economic, social and cultural development".
- The Articles further provide:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based on the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

- Although the Charter is progressive in recognising the importance of the "diverse, spiritual, cultural and economic relationship" that Indigenous Victorians have with their traditional waters and lands by way of existing section 19, AFUW submits that it should take the respect and recognition of Indigenous Australians a step further by expressly including a reference to the right of self determination.

¹⁸ Article 27 ICCPR.

¹⁹ Article 20 ICCPR.

- AFUW-Vic notes, in particular, the Report on Australia by the UN Special Rapporteur published in 2010 which reported on the situation relating to the human rights and fundamental freedoms of Indigenous Australians (the **Report**).²⁰
- In the Report, Professor James Anaya applauded the Australian Government for its efforts towards “resetting” the relationship with Indigenous Australians and working together “in close collaboration and partnership” with Indigenous communities “within a context of mutual respect and understanding”. Professor Anaya also stressed the importance of self-determination for Australia’s Aboriginal and Torres Strait Islander people within our federal system and made the following notable recommendations:
 - at 74: that the Commonwealth and State Government review all legislation, policies and programs which affect Aboriginal and Torres Strait Islander people in light of the Declaration on the Rights of Indigenous Peoples;
 - at 77: that the Commonwealth Government ensure that state, territory and local governments are aware of their obligations to promote and protect the rights of Indigenous persons;
 - at 79: that all efforts be made to increase the number of Indigenous representatives at all levels of the legislature, executive and judiciary;
 - at 81: that the Commonwealth and State governments cooperate with Indigenous persons to enhance efforts to strengthen the governance structures and increase the capacity for leadership for Aboriginal and Torres Strait Islander people; and
 - at 82: that any government decision that has the effect of limiting or removing Indigenous decision-making authority be reconsidered and evaluated in light of Australia’s human rights obligations.
- There is overwhelming authority to suggest that the actual realisation of cultural, social and economic internal self-determination alone would be gratefully received by many Indigenous groups.²¹ And there is no reason why at least internal self determination should not or cannot be included in the Charter as internal self determination is recognised as posing little threat to the territorial integrity of the state (whether viewed from a national or purely Victorian perspective).²²
- Self determination represents a freedom of choice²³ and there is clearly support for the inclusion of the right to self determination in the Charter by Victorian Indigenous communities. Evidence of such support can, for instance (and by way of illustration only), be seen from the results of the 2010 Aboriginal Community Controlled Organisations sponsored forum, the calls for inclusion of the right to self determination in the Charter by Victorian Indigenous advocacy group “Australians for Native Title and Reconciliation (Vic)”, and the consultation conducted by Aboriginal owned and operated group, SED Consulting (whose results were published by the Victorian Equal and Opportunity & Human Rights Commission (**VEOHRC**) in its 2011 paper titled “Talking rights - Consulting with Victoria’s Indigenous community about the right to self-determination and the Charter”).
- Having regard to the foregoing, AFUW-Vic submits that the right to self determination should be expressly included in the Charter (with reference to UNDRIP) as such reference will assist with attaining autonomy and the realisation of the right to cultural, social and economic internal self-determination for Indigenous Victorians.

²⁰ “The Situation of Indigenous Peoples in Australia” (A/HRC/15/4 March 2010).

²¹ Rhona Smith, *Textbook on International Human Rights* (3rd ed, 2007) 263.

²² Rhona Smith, *Textbook on International Human Rights* (3rd ed, 2007) 263.

²³ Rhona Smith, *Textbook on International Human Rights* (3rd ed, 2007) 263.

- Further, AFUW-Vic submits that the VEOHRC should be empowered to establish within its mandate an “Office of Aboriginal Human Rights and Social Justice Commissioner” to assist the VEOHRC to work with Indigenous Victorians in determining the precise application and scope of the right to self determination (recognising that it may be difficult to come up with a single definition or description of self determination “because it covers a range of rights and aspirations”²⁴), and to oversee, educate and ensure compliance with the right.

(c) Term of Reference 3: Whether there should be mandatory regular auditing of public authorities to assess compliance with human rights.

- AFUW-Vic is in favour of the mandatory, independent, regular auditing of public authorities to assess compliance with human rights.
- AFUW-Vic is of the view that such mandatory, independent, regular auditing (and public reporting in relation to the same) will not only promote compliance with human rights obligations at the state level, but also assist with identifying systemic concerns, issues and problems associated with meeting compliance and reporting obligations. Further, such a process will help to identify and bring to the surface certain issues relating to human rights reporting or compliance which might otherwise go unnoticed.
- In the same sense that consumers of private services look at corporate social responsibility performance as an indicator as to whether or not to do business with a particular organisation, the public should be endowed with information which indicates precisely which public authorities are meeting their performance standards in the context of human rights.
- Further, the government should be aware of precisely which authorities are on top of their obligations to act compatibly with human rights, and which could do with additional, targeted human rights training.
- A system of mandatory, independent, regular auditing and reporting will not only assist the government to work more closely with its audited bodies and independent third parties to develop mechanisms to improve human rights compliance, but will also assist with traversing the perception of lack of transparency held by some persons regarding the government and its instrumentalities.

(d) Term of Reference 4: Whether further provision should be made in the Charter with respect to proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful because of the Charter.

- Both international and domestic law have long recognised the essentiality of a person’s right to a remedy where rights are breached.
- By way of example, Article 2(3)(a) of the ICCPR provides that the State must ensure that “any person whose rights or freedoms herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”.
- Further, our common law tradition provides that “where there is no remedy, there is no right”.²⁵

²⁴ Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**), *Occasional Paper: Indigenous self-determination and the Charter of Human Rights and Responsibilities - A framework for discussion* (2010) 21.

²⁵ *Spurgeon v Collier* (1758) 1 Eden 55, 61.

- AFUW-Vic submits that the Charter in its present form does not provide adequate access to remedies where the human rights contained in it are violated. By way of example, the Charter in its present form does not:
 - enable persons to raise Charter rights and arguments unless there is a pre-existing cause of action before a court or tribunal;
 - empower the court or tribunal to make orders which are appropriately adapted to protecting human rights where actions have been taken or decisions have been made by public authorities which adversely affect the human rights of Victorians; or
 - enable persons to challenge the decisions of public authorities which are found to have been made unlawfully by virtue of section 38 of the Charter.
- Further, the Charter fails to provide for the right to compensation where there has been the wrongful conviction of a person (a protection which is provided for in the ACT Charter of rights and responsibilities), fails to clearly state what remedies are available where Charter rights have been violated.
- AFUW-Vic submits that providing for relief which is both proportionate to the extent of the human rights violation and appropriate to the circumstances, and a clear, simple and effective set of remedies where Charter rights have been violated, would afford legal officers, public officials and individuals with greater certainty when it comes to resolving concerns which expressly or indirectly involve a breach or alleged breach of a Charter right.

(c) Term of Reference 5: What have been the effects of the Charter Act on -

(a) the development and drafting of statutory provisions;

(b) the consideration of statutory provisions by parliament;

(c) the provision of services, and the performance of other functions, by public authorities;

(d) litigation and the roles and functioning of courts and tribunals; and

(e) the availability to Victorians of accessible, just and timely remedies for infringements of rights?

(a) and (b) - Effects of the Charter on Development and Drafting of Statutory Provisions, and the Consideration of Statutory Provisions by Parliament

- Since the introduction of the Charter, all new Bills introduced into parliament have had to be accompanied by a statement of compatibility which explains whether the proposed new laws are compatible or incompatible with the human rights set out by the Charter. This has encouraged a healthy dialogue and rational debate amongst parliamentarians as to the necessity and effect of certain laws on our fundamental human rights and freedoms. It has also invoked a conversation regarding what reasonable limits are demonstrably justifiable in a free and democratic society. This, AFUW-Vic submits, has been one of the positive effects of the Charter on the development and drafting of statutory provisions, and on the consideration of statutory provisions by parliaments.
- It is true of any situation that the early identification and discussion of relevant issues mitigates the risk of harmful acts and misunderstandings occurring at first instance (after all, prevention is always better than cure). Having said this, AFUW-Vic submits that the parliamentary

scrutiny of laws and regulations for human rights compatibility has had the effect of providing some form of institutional safeguard against the making of new laws which might otherwise abrogate or neglect to consider our fundamental human rights and freedoms in all the circumstances. Further, AFUW-Vic submits that this effect has been created without the creation of any additional burden on parliament, or awkwardness between parliament and the courts. For example, in 2010, Commissioner Dr Helen Szoke reported on behalf of the VEOHRC that during 2009 there had not been any "override declarations passed by the Victorian Parliament, nor were there any declarations of inconsistent interpretation made by the Supreme Court", and that she was therefore not required to report on matters under sections 41(a)(ii) or (iii) of the Charter which relate to the VEOHRC's functions.²⁶

- Further, it is anticipated that there will soon be Federal legislation which requires the drafting of Commonwealth statutory provisions and the consideration of statutory provisions by Federal parliament having regard to Australia's international human rights obligations. The fact of this imminent change to the federal legislative system means that Victoria will be well placed by virtue of the Charter with regards to its capacity to keep up with advancements in national (and international) legal developments, thus avoiding undesirable inconsistencies between state and federal laws.

(c) Effects of the Charter on the Provision of Services, and the Performance of Other Functions, by Public Authorities

- AFUW-Vic submits that the Charter has had a positive effect on the provision of services and the performance of other functions by public authorities.
- By way of example, according to the VEOHRC's 2010 report on the Charter, "there is a cultural change taking place within government and ... for many agencies, taking human rights considerations into account in their work is becoming business as usual."²⁷
- Further, in 2009, VEOHRC reported that:

[i]n the three years since the Charter has been in operation, [the resultant] dialogue model has led to a number positive outcomes and developments, including significant policy changes and practical improvements in the way public authorities deliver services and meet their human rights obligations.²⁸
- Importantly, VEOHRC has found that the Charter has prevented potential breaches of human rights by ensuring that human rights are taken into account by government agencies when applying laws, delivering services, and making day-to-day decisions which affect everyday society.²⁹
- As to the argument that the Charter has been a waste or misuse of tax payer's money, or otherwise resulted in delays in the delivery of public resources and services, AFUW-Vic submits that this is a fallacy having regard to the fact that there are very few areas of public or private administration or business practice where inefficiencies do not occur. Amongst other things:

²⁶ VEOHRC, *Making progress - The 2009 report on the operation of the Charter of Human Rights and Responsibilities* (2010) per Letter to the Attorney-General.

²⁷ VEOHRC, *Talking Rights: 2010 Report on the Operation of the Charter of Human Rights and Responsibilities* (2011) 9.

²⁸ VEOHRC, *Making progress - The 2009 report on the operation of the Charter of Human Rights and Responsibilities* (2010) 8.

²⁹ VEOHRC, *Talking Rights - 2010 Report on the Operation of the Charter of Human Rights and Responsibilities* (2011) 8.

- It is expected that “teething” issues will be encountered in any business, industry or sector where there has been an introduction of new precedents, performance standards or practices. Such hurdles are usually overcome with time and efficiencies regained as people become accustomed to the new methods of operation and a new culture is born. It is submitted that the same is and will be true of the Charter.
- Given that the Charter has only been in operation for some four (4) or so years, it is expected that areas for improvement and inefficiencies will be identified. (Hence, the purpose of this review). And identifying and addressing aspects of inefficiency and areas of concern will only improve the efficiency and functioning of government operations moving forward.
- Compliance with inalienable human rights (particularly within a society as relatively affluent and well-resourced as ours) should not be avoided or considered an option on the basis of imposing additional “costs” or “burdens” on the public sector. For those who work in the public sector the Charter has had the positive effect of creating additional jobs where specific “human rights” jobs or roles did not previously exist. For the rest of society, the recognition, respect and protection of human rights are critical to what it means to be living in a free and democratic society and is essential to the maintenance of human dignity and wellbeing.
- Australia lags behind the rest of the world when it comes to providing any constitutional or general statutory human rights protections. This, AFUW-Vic submits, poses an even greater economic detriment to the ones described immediately above having regard to the impact of international human rights laws and standards on Australian businesses. In particular, having regard to the recent “UN Guiding Principles for Business and Human Rights” and to the 2008 UN “Protect Respect and Remedy” Framework on Business and Human Rights (which will be voted on by the UN Human Rights Council in June 2011), Australian corporations which operate locally and / or overseas have clear obligations to protect and respect human rights at each level of their business’ operations. They also have obligations to remedy breaches of human rights where such violations occur. The fact of the Victorian government and its departments being abreast of human rights responsibilities and obligations can therefore assist to ensure the compliance of Victorian-based corporations who are doing business overseas with meeting their human rights obligations internationally (including by encouraging appropriate due diligence) and with avoiding the undesirable consequences of breaching human rights. Two case examples which illustrate the relevance of international human rights obligations on international business practice are as follows:
 - *Consequence of breach of right to self determination in international energy and mining sector.*

USA company Freeport McMoRan Copper and Gold (**FCX**) through its Indonesian mining affiliate, PT Freeport Indonesia, has a majority shareholding in the Grasberg mine in West Papua, one of the world’s largest gold and copper mines. The Grasberg mine concession was said to have been granted by the Indonesian government without the consultation of local peoples and without compensation to Indigenous landowners. FCX has since faced allegations of complicity in a breach of the Indigenous peoples’ right of self determination (namely, their right to dispose of their natural resources). Further, it is alleged that extraction of the mine’s resources has resulted in an additional breach of the Indigenous peoples’ right to self-determination by way of degradation of the surrounding environment through the dumping of untreated tailings into the Aghawaghon River system where they live. In 2006, the government of Norway excluded FCX from its government pension fund on the advice of its Council of Ethics on the basis of “severe environmental damage”. Despite FCX denying the allegations against it, the Council’s conclusion is that FCX has not provided sufficient data or

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scientific evidence to show that its mining operations did not cause "severe and long-term environmental damage".³⁰

▪ Consequence of breach of right to life in international beverage sector:

Violence against trade unionists (which concerns the right to life) remains an issue in a number of overseas jurisdictions (including Cambodia, Columbia and the Philippines) where foreign businesses (including Australian businesses) operate.³¹ By way of example, in the USA case of *Sinaltrainal v The Coca-Cola Company* (2001), the claimants alleged that The Coca-Cola Company and two independent Latin American bottlers knew about and benefitted from the killing of a trade union official at a bottling plant in Columbia. Accusations of collusion with a right-wing paramilitary group accused of such violence were also made. Although the claim against The Coca-Cola Company was dismissed, the claim against the bottlers proceeded. The incident prompted The Coca-Cola Company to issue a "Workplace Rights Policy" in 2007 which included a commitment towards "a workplace that is free from violence, harassment, intimidation and other unsafe or disruptive conditions due to internal and external threats". The Castan Centre for Human Rights Law reports that according to The Coca-Cola Company, the policy (which is being implemented in all of its operations worldwide) "reflects the company's practice of respecting the rights of its employees to workplace security."³²

(d) Litigation and the Roles and Functioning of Courts and Tribunals, and (e) Availability to Victorians of Accessible, Just and Timely Remedies for Infringements of Rights

- As to the effect of the Charter on Victorian courts and tribunals, AFUW-Vic endorses the submission of Australian Lawyers for Human Rights that, contrary to the myth espoused by some politicians and the media³³, the Charter has "not resulted in excessive "judicial activism" nor resulted in a spectre of non-elected judges and members treading abrogating the powers or role of Victorian parliament."³⁴
- Rather, the Charter has had the effect of requiring Victorian courts and tribunals to interpret and to apply legislation consistently with human rights, which AFUW-Vic understands has had a notable positive impact in the context of housing and homelessness.³⁵ By way of example, the Public Interest Law Clearing House Homeless Persons' Legal Clinic's Charter-related work has prevented some 42 vulnerable individuals (including 21 children) from being evicted from social housing into homeless.³⁶ The Charter has also avoided the addition of some 42 individuals to what has been described by Victorian homelessness and housing advocates as an already "overstretched" emergency accommodation system.³⁷
- Other areas in which AFUW-Vic understands that the operation of the Charter has resulted in positive outcomes include the areas of disability, mental health, guardianship, consumer

³⁰ Monash University Castan Centre for Human Rights Law, *Human Rights Translated - A Business Reference Guide* (2008) 4.

³¹ Monash University Castan Centre for Human Rights Law, *Human Rights Translated - A Business Reference Guide* (2008) 10; International Labour Organisation Committee of Experts report for governments (2007).

³² Monash University Castan Centre for Human Rights Law, *Human Rights Translated - A Business Reference Guide* (2008) 10.

³³ The Hon Michael Kirby AC CMG, *An Australian Charter of Rights - Answering Some of the Critics* (Based on an address to the President's Luncheon at the Law Institute of Victoria, Melbourne 21 August 2008 and for the inaugural Michael D. Kirby Annual Human Rights Forum at Murdoch University on 21 October 2009).

³⁴ Australian Lawyers for Human Rights, *Submissions to Review of the Charter of Human Rights and Responsibilities Act 2006 (Vic)* (2011).

³⁵ See, for example, Australian Lawyers for Human Rights, *Submissions to Review of the Charter of Human Rights and Responsibilities Act 2006 (Vic)* (2011).

³⁶ Human Rights Law Centre, Bulletin Volume 63, July (2011).

³⁷ Human Rights Law Centre, Bulletin Volume 63, July (2011).

protection, and (to the extent possible, having regard only to civil and political rights contained in the Charter), education.³⁸ By way of illustration, in the context of mental health and guardianship, the Charter has provided the impetus for much needed legislative reform. And, in the words of one individual: "*Disadvantaged groups who are discriminated against are using [the Charter] to make government think about how they deliver services and how to treat people with dignity and respect.*"³⁹

- This is not to say that the rights of Victoria's homeless, disabled, mentally ill, wards and consumer are adequately protected by the Charter, and that the Charter should not be strengthened by the addition of new (namely, ICESC, CRoC and CEDAW) rights.
 - In so far as ICESC rights are concerned, AFUW-Vic adopts the UN's official position that ICESC and ICCP rights are interdependent and indivisible and that one set of rights cannot be enjoyed meaningfully if the other set of rights are not also enjoyed.⁴⁰ Indeed, it is clear that a lack of adequate access to health care and housing will naturally comprise one's ability to experience or enjoy any right to freedom from inhuman and degrading treatment.
 - Further, whilst the Charter has made some difference to the way in which government agencies deliver services and programs and resulted in increased government-community engagement and consultation, gaps continue to remain in the government's performance and many of the reported positive impacts do not appear to have related specifically to Indigenous persons or issues.⁴¹
- It is undeniable that whenever new laws are introduced, it will take some time for courts, tribunals and legal officers to become familiar with and to adjust to their operation. The fact that Charter arguments may at times be raised without any success is no different to any other legal argument put before a court.
- Further, AFUW-Vic consider that the fact of having the Charter in place is more likely than not to have resulted in parties being able to resolve human rights concerns well before the need to enter into stressful, expensive, time consuming and complicated litigation arises.
- As to the availability to Victorians of accessible, just and timely remedies for human rights infringements by way of the Charter, AFUW-Vic certainly does not call for the introduction of any "code". However, AFUW-Vic does submit that access to remedies could be improved by way of a clearly articulated set of remedies for those whose human rights have been breached. Further, AFUW-Vic submits that such remedies should include an ability for Victorian courts and tribunals to make appropriate orders which bind public authorities, and which are appropriately adapted to protecting those individuals whose rights have been adversely affected by act or decision concerned.
- The Charter should also be amended to clearly articulate that:
 - the relief provided for by the Charter is discrete and not the only means of relief; and
 - courts or tribunals do not require a pre-existing cause of action before relief for breach of a human right can be granted.
- Acts or decisions of public authorities which have been made unlawful by virtue of section 38 of the Charter should also be open to challenge in an appropriate court or tribunal.

³⁸ See, for instance, Australian Lawyers for Human Rights, *Submissions to Review of the Charter of Human Rights and Responsibilities Act 2006 (Vic)* (2011).

³⁹ Per Dr Natalie Tomas, Adjunct Research Associate, School of Philosophical, Historical and International Studies, Monash University, Victoria, Australia.

⁴⁰ VEOHRC, *Occasional Paper - Economic, Social and Cultural Rights and the Charter of Human Rights and Responsibilities - A Framework for Discussion* (2010) 4.

⁴¹ VEOHRC, *Occasional Paper - Advancing women's rights - exploring the relationship between the Charter of Human Rights and Responsibilities and the Convention on the Elimination of All Forms of Discrimination Against Women* (2010) 20.

CLOSING

AFUW-Vic submits that the Charter should remain in force as good law in Victoria.

The Charter has made an invaluable positive contribution towards our society by encouraging a positive cultural change and making state instrumentalities, private organisations and individuals reflect on how internationally recognised human rights laws and practices apply in the context of everyday "Victorian" practice.

The Charter review provides an opportunity to improve the efficiency of the Charter and to strengthen its efficacy and operation by introducing additional rights which have been long been recognised at international law as essential for the respect, promotion and protection of human dignity and the human spirit.

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