

1 June 2015

Charter Review Secretariat  
*Submitted online*

Dear Sir/Madam,

***Charter of Human Rights and Responsibilities Act 2006 Review 2015: Consultation paper***

Thank you for the opportunity to make a submission to this review.

Environmental Justice Australia (EJA) is a not for profit legal practice. EJA (formally Environment Defenders Office Victoria) has been operating in Victoria for 23 years. We provide legal advice and support to the community on public interest environmental issues, advocate for better environmental laws, and provide legal education to the community on environment matters. Particularly relevant to this review, we facilitate community participation in environmental decision-making processes, to empower individuals and communities to protect the environment.

This submission will discuss term of reference 2 – *Any desirable amendments to improve the operation of the Charter* – particularly in relation to the recognition and protection of rights related to the environment.

EJA supports continued and strengthened legal protection of all fundamental human rights in Victoria under the *Charter of Human Rights and Responsibilities Act 2006* ('Charter').

**Environmental Justice and human rights**

EJA witnesses and deals with the human rights implications of many environmental issues in our day to day work. These issues range from the exclusion of individuals and communities from participating in decision-making processes, to the detrimental environmental, health and cultural impacts resulting from development and industry on individuals and communities, in particular those individuals and communities most disadvantaged and disempowered.

A number of these human rights issues are encompassed in the concept of "environmental justice". The concept of environmental justice is continually evolving, but at its heart has two main questions: how environmental risk is distributed (*distributive justice*), and to what extent the public can participate in decisions about the environment (*procedural or participatory justice*).

The US EPA's definition of environmental justice in 2001 was:

'[T]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, an enforcement of environment laws, regulations, and policies. ... It will be achieved when everyone enjoys the same degree of protection

from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn and work.<sup>1</sup>

Further discussion of the history and scope of environmental justice can be found in our Environmental Justice Project report.<sup>2</sup>

The Victorian Government has recently stated:

*The Victorian Government is strongly committed to environmental justice, including ensuring that the environment is protected for the benefit of the community, that the community is meaningfully involved in decision making, that there is fair treatment through environmental regulation and that impacts and opportunities are fairly and proportionately shared.*<sup>3</sup>

We welcome the government's moves towards recognising and addressing the environmental justice issues that exist in Victoria<sup>4</sup>. From our 23 years of work with Victorian communities we know that environmental injustice is experienced throughout Victoria, and in some cases significantly impacts on the human rights of individuals in those communities affected. The most obvious recent example is the Hazelwood mine fire in the Latrobe Valley, where residents were subjected to extremely high levels of toxic pollution for up to 45 days, with an ongoing inadequate response from government agencies. The Latrobe Valley community, which is already disadvantaged in a number of ways, bore - and continues to bear - a disproportionate burden of the harms that result from electricity generation that all Victorians benefit from. There are numerous other examples throughout Victoria.<sup>5</sup>

One clear way of achieving the government's commitment to environmental justice is to recognise environmental rights in the Charter. In most cases, environmental injustice occurs as result of government decision-making and Parliamentary law-making, and therefore incorporating environmental rights in the Charter would ensure that issues that form the basis of environmental justice are considered by government agencies and the Parliament in policy and decision-making. This would make a significant contribution to achieving the government's commitment to environmental justice.

Specifically we believe the effectiveness of the Charter could be enhanced to reduce environmental injustice in Victoria by:

- 1. Protecting the specific right to a clean and healthy environment (to address the distributive justice element)<sup>6</sup>.**
- 2. Protecting the specific right to access to information, public participation in decision making and access to justice in environmental matters (to address the procedural justice element)<sup>7</sup>.**

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<sup>1</sup> Quoted in Environment Defender's Office *Environmental Justice Project Final Report*, 26 July 2012, p11.

<https://envirojustice.org.au/major-reports/environmental-justice-in-australia>

<sup>2</sup> Found at - <https://envirojustice.org.au/major-reports/environmental-justice-in-australia>.

<sup>3</sup> 2015 Victorian Government Response to the State of the Environment Report 2013, 26 May 2015, p9.

<http://www.delwp.vic.gov.au/environment-and-wildlife/victorian-governments-response-to-the-state-of-the-environment-report-2013>.

<sup>4</sup> For example via EPA and Sustainability Victoria's environmental justice and environmental citizenship policies, and the Government's review of the EPA.

<sup>5</sup> See for example the case studies in our Environmental Justice Project report.

<sup>6</sup> For further discussion of the nature of this right and the need for it to be properly protected see part 2.2.5 of our submission to the 2011 Charter review available here - <http://www.parliament.vic.gov.au/sarc/article/1447> (sub #271).

3. **Recognising the principle that all human rights are indivisible, interdependent and interrelated, and therefore extending protection under the Charter to all economic and social rights outlined in the *International Covenant on Economic, Social and Cultural Rights*, including those rights that would directly or indirectly protect and promote environmental rights:**
- **the right to an adequate standard of living;**
  - **the right to the highest attainable standard of health;**
  - **the right to water;**
  - **the right to food.<sup>8</sup>**

Each of these rights directly addresses environmental justice issues, and would help to ensure government agencies are committed to and properly implementing environmental justice principles for the benefit of all Victorians.

### **Climate Change and human rights**

We also welcome the Victorian Government's commitment to addressing climate change. The Government has stated:

*Climate change is one of the most critical issues facing Victoria, and Labor believes the State Government must play a role to help us mitigate the risks and adopt adaptation strategies to respond to the threat. We want to restore Victoria's status as a model for every other state.<sup>9</sup>*

Most recently the Government has stated that "the Victorian Government will reposition Victoria as a climate change leader"<sup>10</sup>

The linkages between climate change and human rights have been well established in recent years.<sup>11</sup> The most recent report from the United Nations Committee on Economic, Social and Cultural Rights ('CESCR') on Australia urged Australia to take urgent action on the human rights implications of climate change.<sup>12</sup>

Including rights in relation to climate change in the Charter would ensure that the Parliament and government agencies were properly considering the impacts their actions in mitigating or failing to mitigate climate change have on Victorian citizens. It would assist the Victorian public service to focus on and increase the priority of

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<sup>7</sup> For further discussion of the nature of this right and the need for it to be properly protected see part 2.3 of our submission to the 2011 Charter review available here - <http://www.parliament.vic.gov.au/sarc/article/1447> (sub #271).

<sup>8</sup> For more information on the linkages between these rights and the environment see our submission to the 2011 Charter review available here - <http://www.parliament.vic.gov.au/sarc/article/1447> (sub #271).

<sup>9</sup> Victorian Labor Party, *Our Environment Our Future* November 2014, p3.

<sup>10</sup> 2015 Victorian Government Response to the State of the Environment Report 2013, 26 May 2015, p5 <http://www.delwp.vic.gov.au/environment-and-wildlife/victorian-governments-response-to-the-state-of-the-environment-report-2013>.

<sup>11</sup> See for example United Nations Office Of The United Nations High Commissioner For Human Rights, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment Focus report on human rights and climate change*, June 2014

<http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx>

<sup>12</sup> CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights on Australia*, 28 June 2009, paragraph 27. [http://www.unhcr.org/refworld/publisher/CESCR\\_CONCOBSERVATIONS\\_AUS\\_4af181b00.0.html](http://www.unhcr.org/refworld/publisher/CESCR_CONCOBSERVATIONS_AUS_4af181b00.0.html)

climate change in their decision-making. It would therefore be an appropriate and effective way the Victorian Government could fulfil its commitment to making Victoria a climate change leader.

Climate change considerations could be incorporated into the Charter via adoption in the Charter of the rights advocated for above, namely the right to a clean and healthy environment; the right to an adequate standard of living; the right to the highest attainable standard of health; the right to water; and the right to food. Each of these rights has been considered, internationally, to incorporate climate change obligations and recognition.<sup>13</sup>

### **Provisions regarding legal proceedings and remedies against public authorities**

It is widely recognised that there is little point in having a right if there is no corresponding enforceable duty to uphold it.

We are strongly of the view that the Charter should include a separate, stand-alone cause of action for violation of human rights, rather than requiring human rights issues to be coupled with another action. Victims of human rights breaches should not have to rely on a separate cause of action in order to seek relief or remedy. The current approach may unduly restrict those experiencing breaches of their human rights from seeking relief or remedy.

The Charter should also provide accessible, appropriate and effective remedies for violations of human rights arising under the Act. This is critical to holding public authorities accountable for their decisions and actions and ensuring observance of human rights.

EJA believes that a full range of both judicial and non-judicial remedies should be available under the Charter, including all such remedies as are just and appropriate.

Human rights treaties, including the ICCPR and ICESCR, either explicitly or implicitly require that a person have access to effective remedies, including judicial remedies, if their rights are breached.<sup>14</sup> According to the UN Human Rights Committee, an 'effective remedy' requires reparation to the person whose rights have been violated. Reparations include:

*restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes to relevant laws and practices.*<sup>15</sup>

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<sup>13</sup> See United Nations Office Of The United Nations High Commissioner For Human Rights, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment Focus report on human rights and climate change*, June 2014

<http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx>

<sup>14</sup> *International Covenant on Civil and Political Rights (ICCPR)*, 1966, art 2(3); *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, art 6. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984, art 14; *Convention on the Elimination of All Forms of Discrimination against Women*, 1979, art 2(c); *International Covenant on Economic, Social and Cultural Rights*, 1966, art 2(1); *Convention on the Rights of the Child*, 1989, art 4; *Convention on the Rights of Persons with Disabilities*, 2006, art 4. See also UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The nature of States parties obligations (Art. 2, para. 1 of the Covenant)*, UN Doc E/1991/23, annex III at 86 (1991), para 5.

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument)

<sup>15</sup> UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 16

<http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument>

In summary the following amendments should be considered:

- **Including a provision in the Charter to create an independent cause of action and entitlement to both judicial and non-judicial remedies in relation to acts or decisions of public authorities that are incompatible with human rights:**
  - **The Charter should empower courts and tribunals to grant such relief or remedy or make such order, within its powers, as is 'just and appropriate', including an award of damages where appropriate.**
  - **The Charter should empower the Victorian Equal Opportunity and Human Rights Commission to receive and conciliate human rights complaints.**

Yours sincerely,

A handwritten signature in black ink, appearing to read 'NR' followed by a stylized flourish.

Nicola Rivers  
Director of Advocacy and Research  
Lawyer