

A Charter of Rights to serve all Victorians?

A Comment on the Proposed Charter of Human Rights and Responsibilities

by Katie Mitchell

In December last year the Victorian Attorney-General launched the report of the Human Rights Consultative Committee and announced that Victoria is positioned to become the first state in Australia to enact a Charter of Human Rights and Responsibilities. The Committee's report contains recommendations for this new Charter and is based upon seven months of consultation and discussion between the Committee and the wider community regarding human rights. Victorians can be proud to be leading the way in human rights amongst Australian states however it is disappointing to see that the Committee did not also seek to pioneer the way in relation to Indigenous rights in Victoria. While the Committee has recommended that Indigenous rights should be acknowledged in the preamble and that specific cultural rights for Indigenous people be included, the Committee failed to recognise the importance and need for recommending the fundamental right to self-determination in the Charter.

Self-determination has been defined by the United Nations as the right of Indigenous people to freely determine their political status and freely pursue their economic, social and cultural development. The Yorta Yorta nation suggests that self-determination involves Indigenous communities taking control of their future and deciding how they will deal with issues facing them. The right of self-determination is widely acknowledged in international law, forming Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights. It is also included as Article 3 of the Draft Declaration for Indigenous Peoples and commentators, such as James Anaya, suggest it is a widely acknowledged principle of customary international law.

While the Committee acknowledged the status of self-determination in international law and noted that Indigenous peak bodies strongly advocated for the inclusion of self-determination in the Charter, the Committee chose not to include it as a recommendation in their report. In explaining their decision the Committee suggested that 'in the absence of settled precedent about the content of the right as it pertains to Indigenous people, the inclusion of the right to self-determination may have unintended consequences.' This approach appears to overlook the fact that self-determination is a right owed to Indigenous people under international law and further that it has a strong grounding in natural law. Thus for the Committee to exclude a right which is inherent to its citizens and which reflects accepted international obligations is a backward step which denies the true position of Indigenous people within the state. Greg Marks suggests that 'The future of Indigenous affairs in Australia must be understood within the context of international law...it would be far more sensible to recognise this...and seek a domestic reconciliation which accords with international principles...which stretch back to the origins of international law.'

Although capturing the precise meaning of self-determination, as well as defining its practical scope, may be difficult the right does not remain merely a phrase. Indeed numerous organisations and individuals have put forth visions and frameworks giving substance to the right of self-determination. The Victorian Equal Opportunity Commission, in its submission to the Committee, outlined entitlements arising under self-determination and Indigenous groups have also put forward clear and articulated statements of what self-determination may mean. These include The Eva Valley Statement and The Barunga Statement. While it is essential to acknowledge that the diversity within the Indigenous population means there is no single Indigenous voice, Larissa Behrendt reminds us that 'there is much common ground in answer to the question, what do you want?'

In its report, the Committee suggests that the Charter should focus on 'democratic rights that apply equally to everyone.' However, as expressed by John Tobin, this fails to acknowledge that 'the international community has long recognised that the principle of equality does not provide sufficient protection for all persons within a society' as 'the equality principle tends to be interpreted through the lens and experience of the dominant groups...rendering marginalised and disempowered groups invisible.' Without the fundamental right of self-determination other rights in the Charter continue to exist within a dominant white framework and within institutions produced by that framework, which do not have the ability to address issues of systemic racism or ensure equal enjoyment of rights for Indigenous people. To fail to address these issues in a Human Rights Charter is to undermine the Charter's credibility and strength. If it cannot protect those within the community whose rights have been most consistently and abhorrently denied it cannot help but appear somewhat hollow in its claim to protect human rights.

This Charter can also be envisaged as a stepping stone to creating a national Bill of Rights. With this goal in mind it is essential that Victoria set a standard at a state level which will influence and inform the creation of a progressive national bill which would be aligned with our obligations under international law and create the possibility for true progress in the protection of Indigenous rights. Including the right to self-determination signals that the days of imposing policies and practices, formed within a non Indigenous framework, upon Indigenous people are over. It acknowledges that the way in which the dominant community has tried to 'manage' Indigenous people and issues has not worked, reflected in the fact that Indigenous people still remain the most statistically disadvantaged group in Australia. It would act as a statement that Victorians, in line with the international community, acknowledge colonial structures as oppressive to Indigenous people and seek to carve out a new pathway for relations between Indigenous and non Indigenous Australians which will empower all those within the community.

A referenced version of this article is available on request.