From Commitment to Culture

The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006

MICHAEL BRETT YOUNG

Authorised and published by Michael Brett Young, Level 24, 121 Exhibition Street, Melbourne. September 2015.

From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006

© State of Victoria

This report is protected by copyright. Apart from any use permitted under the *Copyright Act 1968*, and those explicitly granted below, all other rights are reserved.

Unless indicated otherwise, this work is made available under the terms of the Creative Commons Attribution 3.0 Australia licence.

To view a copy of this licence, visit creativecommons.org/licenses/by/3.0/au

It is a condition of this Creative Commons Attribution 3.0 Licence that you must give credit to the original author who is Michael Brett Young.

Accessibility

If you would like to receive this publication in an accessible format, telephone (03) 8684 7512 or email charter.review@justice.vic.gov.au

This document is also available in PDF and Word format at www.justice.vic.gov.au.

Cover by The Designery

Printed by On Demand, Port Melbourne

Printed on Sovereign Silk

Ordered to be published

Victorian Government Printer
September 2015

PP No 77, Session 2014-2015

ISBN 978-0-9943638-6-2 (Print)
ISBN 978-0-9943638-7-9 (pdf)

From commitment to culture

The 2015 Review of the Victorian *Charter of Human Rights and Responsibilities Act 2006*

Michael Brett Young

CHARTER REVIEW 2015

Human rights

1 September 2015

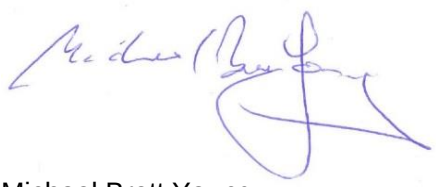
The Hon Martin Pakula MP
Attorney-General
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Attorney-General

In accordance with the terms of reference that you set on 2 March 2015, I conducted the eight-year review of the Victorian *Charter of Human Rights and Responsibilities Act 2006*.

I have the pleasure of presenting for your consideration my report with recommendations to make the Charter more effective to achieve its statutory aim of promoting and protecting human rights for everyone in Victoria.

Yours sincerely



Michael Brett Young

Contents

Foreword ... **iii**

Terms of reference ... **iv**

Recommendations ... **v**

Glossary of terms and abbreviations ... **xiii**

Introduction and overview ... **3**

About the Charter of Human Rights and Responsibilities ... 3
Overview of the Report ... 8

Chapter 1 Building our human rights culture ... **19**

Term of reference 1(d): Ways to enhance the effectiveness of the Charter, including the development of a human rights culture in Victoria, particularly within the Victorian public sector ... 19

Chapter 2 Clarifying responsibilities for human rights—acts and decisions of public authorities ... **55**

Terms of reference: 2(a): Clarifying the provisions regarding public authorities, including the identification of public authorities and the content of their human rights obligations; and 1(e): Application of the Charter to non-State entities when providing State-funded services ... 55

Term of reference 2(e): Clarifying the obligations of courts, including under sections 4(1)(j) and 6(2)(b) ... 74

Chapter 3 Facilitating good practice and dispute resolution—the role of statutory authorities ... **83**

Term of reference 1(b): The functions of the Victorian Equal Opportunity and Human Rights Commission under the Charter and the Victorian Ombudsman under the *Ombudsman Act 1973,* particularly in relation to complaint-handling ... 88

Chapter 4 Remedies and oversight—the role of the courts ... **117**

Term of reference 2(b): Clarifying the provisions regarding legal proceedings and remedies against public authorities ... 117

Chapter 5 Interpreting and applying the law 137

Term of reference 2(c): Clarifying the role of human rights in statutory construction 137

Term of reference 2(d): Clarifying the role of the proportionality test in section 7(2), in particular as it relates to statutory construction and the obligations of public authorities 149

Term of reference 2(g): The effectiveness of the declaration of inconsistent interpretation provision under section 36 159

Term of reference 2(h): The usefulness of the notification provision 163

Chapter 6 Firming the foundations—more effective Parliamentary scrutiny 173

Term of reference 1(c): The effectiveness of the scrutiny role of the Scrutiny of Acts and Regulations Committee 173

Term of reference 2(f): The need for the provision for an override declaration by Parliament under section 31 196

Chapter 7 Emerging issues 203

Term of reference 2(i): Any other desirable amendments to improve the operation of the Charter 203

National schemes 203

Additional rights 210

The right to self-determination of Aboriginal Victorians 210

Other rights raised during the Review 219

Clarifying the meaning of discrimination 226

Chapter 8 The need for a further review 231

Term of reference 3: A recommendation under section 45(2) as to whether any further review of the Charter is necessary 231

Appendix: Consultation and submissions 237

Submissions 246

Foreword

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) was introduced as a commitment between the Parliament and the people of Victoria. The Charter is designed to improve the lives of individuals and the life of the community as a whole. It performs an integral role in our democratic society by protecting fundamental rights and freedoms.

The Charter required a review of the legislation to be undertaken after a period of four years and again after eight years of operation. The Parliament recognised that the community conversation about the Charter was continuing. It also wanted there to be regular reflection points on how the Charter was operating and whether it was continuing to meet the needs of the community.

In 2011, the four year review was undertaken by the Scrutiny of Acts and Regulation Committee of the Victoria Parliament. In March 2015, I was appointed by the Attorney-General, the Hon Martin Pakula MP, as the independent reviewer to conduct the eight-year review. This review is an important opportunity for the community and public bodies to provide input into the next stage of human rights in Victoria. In setting the terms of reference, the Government gave a commitment to refresh the Charter.

In conducting this review, I have been fortunate to receive expert and tireless support from a small secretariat within the Department of Justice & Regulation. In particular, I wish to acknowledge the project manager, Kerin Leonard, whose dedication to the review and knowledge of Charter was invaluable. She was greatly supported by Mia Hollick, Legal Policy Officer, who worked long hours to make sure our report was provided by the deadline. I am also grateful to assistance and input as various times from members of the Human Rights Unit and Civil Law Policy team within the Department: Matthew Downey, Jacinta Morphett, Colin Wolfe, Nicola Caon and Megan Taylor, and to William Ng who has assisted with the administrative arrangements for the review.

I have also been greatly assisted by expert advice from Melinda Richards SC, Crown Counsel, and from Chris Humphreys, Director, Civil Law Policy in the Department, whose knowledge of the process undertaken by the original Charter consultation committee in 2005 was most useful. I thank them for their guidance.

As part of the consultation process, I received assistance from the Victorian Equal Opportunity and Human Rights Commission. In particular, I am grateful to Cath Sedunary, Jane Lewis, and Kenton Penley Miller who helped to facilitate the community forums.

The review team travelled in excess of 3,000 kilometres across Victoria in the effort to meet with as many interested parties face to face. I extend my appreciation to the members of the public who gave up their time to attend the public meetings, together with the 109 individuals and organisations who addressed the review via written submissions. I am also appreciative of the people from community groups, the legal profession, the public sector, and members of the judiciary who met with me individually – they generously gave up their time and provided me with valuable insights on the application of the Charter.

Having conducted this review, it is clear to me that the Charter has helped to promote and protect human rights in Victoria. However, there is more work to be done in making the Charter as practical as it could be, in demystifying it and bringing it with the reach of all Victorians. I outline in this report key ways the Charter could be made more effective to achieve this.

Michael Brett Young

Terms of reference

Pursuant to section 45 of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter), to inquire into and report by 1 September 2015 on the operation of the Charter, including:

1. Ways to enhance the effectiveness of the Charter, including, but not limited to:

a. reviewing the submissions from the 2011 Scrutiny of Acts and Regulations Committee review and the Committee's report

b. the functions of the Victorian Equal Opportunity and Human Rights Commission under the Charter and the Victorian Ombudsman under the *Ombudsman Act 1973*, especially with respect to human rights complaints

c. the effectiveness of the scrutiny role of the Scrutiny of Acts and Regulations Committee

d. the development of a human rights culture in Victoria, particularly within the Victorian public sector

e. the application of the Charter to non-State entities when they provide State-funded services.

2. Any desirable amendments to improve the operation of the Charter, including, but not limited to:

a. clarifying the provisions regarding public authorities, including the identification of public authorities and the content of their human rights obligations

b. clarifying the provision(s) regarding legal proceedings and remedies against public authorities

c. clarifying the role of human rights in statutory construction

d. clarifying the role of the proportionality test in section 7(2), in particular as it relates to statutory construction and the obligations of public authorities

e. clarifying the obligations of courts including under sections 4(1)(j) and 6(2)(b)

f. the need for the provision for an override declaration by Parliament under section 31

g. the effectiveness of the declaration of inconsistent interpretation provision under section 36

h. the usefulness of the notification provision(s) including under section 35

i. any other desirable amendments.

3. A recommendation under section 45(2) as to whether any further review of the Charter is necessary.

Recommendations

Chapter 1 Building our human rights culture

1. The Victorian Government make a public statement of commitment to human rights and Ministers reinforce in their dealings with departments and agencies their expectation that they should act compatibly with human rights. 26

2. The Victorian Secretaries Board include the development of a human rights culture as part of its work in setting values and standards across the Victorian public sector. An inter-departmental committee should support this work by providing leadership and coordination for departments and agencies at the state government level. 26

3. The Victorian Government encourage public sector entities to promote a human rights culture in their organisations, including by:

   (a) ensuring their organisational vision, plans, policies and procedures support good human rights practice

   (b) building relevant human rights capabilities into staff position descriptions and ongoing professional development. 37

4. The Victorian Government review the structure and placement of the Human Rights Unit so that it can provide centralised expertise on human rights within government. The Unit's role should include providing advice, developing and maintaining human rights resources for use within the Victorian government, and providing specialist training (such as training on how to develop human rights compatible policy and legislation, and how to draft statements of compatibility).....40

5. The Human Rights Unit update the Charter Guidelines for Legislation and Policy Officers. The Unit should also work with departments and agencies to continue to develop specialist guidance and promotional materials in key areas of policy and service delivery, such as policing, corrections, health services, disability services, child protection and education. 40

6. The Victorian Equal Opportunity and Human Rights Commission be given responsibility to provide human rights education within the public sector to:

   (a) leaders across the Victorian public sector, to ensure that they can influence a positive culture of human rights

   (b) local government councillors. As a priority, materials should be available to support the induction of new councillors after the October 2016 local government elections

   (c) staff of Victorian public sector departments, agencies and local government. Where possible, the training should be tailored to the needs of particular work areas and be delivered in consultation with front line staff who understand the operational aspects of the work area

   (d) private entities that perform functions of a public nature and have obligations under the Charter.....43

7. The Victorian Equal Opportunity and Human Rights Commission facilitate opportunities for public and community sector workers to share experience and expertise on the Charter. Such opportunities could include Human Rights Network events, the production of resources, the establishment of communities of practice sponsored by a senior executive, and the use of existing networks. 44

8. The Victorian Equal Opportunity and Human Rights Commission provide further human rights education to the community and community advocates. 46

9. Public authorities make relevant human rights information available when providing services to the community and provide a way for people to have a say about issues that affect them. 47

10. The Victorian Equal Opportunity and Human Rights Commission look for ways to engage with the private sector to build a broader human rights culture in Victoria. Such engagement could include establishing a Corporate Charter Champions group, partnering with businesses on activities, or working with business networks to build understanding of the Charter. 48

11. The Judicial College of Victoria be responsible for educating judicial officers and tribunal members regularly on how the Charter operates. Where appropriate, this education could be done in conjunction with professional development for the legal profession. 51

Chapter 2 Clarifying responsibilities for human rights—acts and decisions of public authorities

12. Section 4 of the Charter be amended to set out a non-exhaustive list of functions of a public nature under section 4(1)(c), including:

    (a) the operation of prisons and other correctional facilities

    (b) the provision of public health services

    (c) the provision of public education, including public tertiary education

    (d) the provision of public housing, including by registered housing providers

    (e) the provision of public disability services

    (f) the provision of public transport

    (g) the provision of emergency services

    (h) the provision of water supply. 62

13. The Victorian Government use the *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* (Vic) to prescribe entities to be or not be public authorities—including entities that provide services under national schemes—where necessary to resolve doubt. 63

14. A whole-of-government policy be developed for relevant State contracts to include terms that contracted service providers will have public authority obligations when performing particular functions under the contract, and a provision be included in the Charter to authorise this. 64

15. The Charter provide for any entity to 'opt in' to public authority obligations by requesting the Attorney-General declare them to be a public authority, as in section 40D of the *Human Rights Act 2004* (ACT). 65

16. The Victorian Government review and clarify how the Charter applies to public sector employees who are not employed under the *Public Administration Act 2004* (Vic) (such as teachers). 66

17. The Charter be amended to clarify that decisions of public authorities must be substantively compatible with human rights, whether by defining 'to act' as including 'to make a decision' or by specifying in section 38(1) that it is unlawful for a public authority to make a decision that is incompatible with a human right. 72

18. The Victorian Government consider the exception from public authority obligations in section 38(4) of the Charter (an exception relating to the religious doctrines, beliefs and principles of a religious body), as part of its current examination of religious exceptions and equality measures in other Victorian laws, so it can apply a consistent approach. 74

19. The second sentence in the note to section 4(1)(j) of the Charter be removed or amended, because listing cases and adopting practices and procedures may sometimes involve acting in a judicial capacity rather than in an administrative capacity. 79

Chapter 3 Facilitating good practice and dispute resolution—the role of statutory authorities

20. The Victorian Equal Opportunity and Human Rights Commission be given the power to request information to assist with its statutory functions under the Charter and public authorities be given a duty to assist, as exists under the *Privacy and Data Protection Act 2014* (Vic). 92

21. The Victorian Equal Opportunity and Human Rights Commission be given the discretion to charge for the reasonable costs of voluntary compliance reviews, and education and training services. 94

22. The Victorian Ombudsman, the Independent Broad-based Anti-corruption Commission, and other relevant oversight bodies be given the power to request the Victorian Equal Opportunity and Human Rights Commission to help them when they exercise their statutory powers in relation to human rights issues. 96

23. The Victorian Equal Opportunity and Human Rights Commission be given the statutory function and resources to offer dispute resolution for disputes under the Charter. 105

24. The *Ombudsman Act 1973* (Vic) make clear that the Ombudsman can consider human rights issues relating to the administrative actions of all public authorities under the Charter, except police and protective services officers. The Charter should note this jurisdiction. 106

25. All relevant public sector oversight bodies should have the ability to consider human rights issues that arise within their jurisdiction, for example, the Mental Health Complaints Commissioner should continue to be able to consider human rights issues that relate to public mental health service providers. Mechanisms should be established to enable referral and appropriate information sharing between complaint-handling and oversight bodies. The Charter should note these roles. 110

26. The Victorian Government ensure the Independent Broad-based Anti-corruption Commission has capacity to investigate allegations of serious human rights abuses by police and protective services officers.....112

Chapter 4 Remedies and oversight—the role of the courts

27. The provisions and process for obtaining a remedy under the Charter be clarified and improved by:

(a) amending the Charter to enable a person who claims a public authority has acted incompatibly with their human rights, in breach of section 38 of the Charter, to either apply to the Victorian Civil and Administrative Tribunal for a remedy, or rely on the Charter in any legal proceedings. The amendment should be modelled on section 40C of the *Human Rights Act 2004* (ACT).

The Tribunal's jurisdiction to determine whether a public authority has breached section 38 of the Charter should be similar to its jurisdiction in relation to unlawful discrimination under the *Equal Opportunity Act 2010* (Vic). If the Tribunal finds that a public authority has acted incompatibly with a Charter right, it should have power to grant any relief or remedy that it considers just and appropriate, excluding the power to award damages.

(b) if the Charter is raised in another legal proceeding, the court or tribunal should retain the ability to make any order, or grant any relief or remedy, within its powers in relation to that proceeding. It should remain the case that a person is not entitled to be awarded any damages because of a breach of the Charter, in accordance with existing section 39(3) of the Charter.

(c) amending the Charter to make it clear that a person who claims that a decision of a public authority is incompatible with human rights, or was made without proper consideration of relevant human rights, can seek judicial review of that decision on the ground that the decision is unlawful under the Charter, without having to seek review on any other ground.....133

Chapter 5 Interpreting and applying the law

28. Section 32 of the Charter be amended to:

(a) require statutory provisions to be interpreted, so far as it is possible to do so consistently with their purpose, in the way that is most compatible with human rights

(b) require, where a choice must be made between possible meanings that are incompatible with human rights, that the provision be interpreted in the way that is least incompatible with human rights

(c) make it clear that section 7(2) applies to the assessment of the interpretation of what is most compatible, or least incompatible, with human rights

(d) set out the steps for interpreting statutory provisions compatibly with human rights, to ensure clarity and accessibility.....148

29. The Charter define the concepts of ‘compatibility’ and ‘incompatibility’ to make it clear that an act, decision or statutory provision is compatible with human rights when it places no limit on a human right, or it limits human rights in a way that is reasonable and demonstrably justifiable in terms of section 7(2). The Charter should use the two terms consistently, in relation to scrutiny of legislation (sections 28 and 30), the interpretation of legislation (sections 32, 36 and 37) and the obligations of public authorities (section 38). 155

30. Section 7, containing the general limitations clause, be excluded from the Charter’s definition of ‘human rights’ and the definition of ‘human rights’ refer to all the rights in Part 2, not only the civil and political rights. 155

31. The internal limitation on freedom of expression in section 15(3) be repealed, so the general limitation provision in section 7(2) can be applied as the Charter’s common test to balance competing rights and interests.....158

32. Sections 36 and 37 of the Charter be amended to use the words ‘declaration of incompatible interpretation’ and ‘cannot be interpreted compatibly with a human right’, for consistency with terminology used in related sections, including section 32. 162

33. Section 35 of the Charter be amended to remove the notice requirement for proceedings in the County Court and to give a judicial officer or tribunal member power to require a notice to be issued for a Charter issue of general importance or when otherwise in the interests of justice (at their discretion). Further, an explanatory note should be added to section 35 to make clear that proceedings do not have to be adjourned while notice is issued and responded to. The Attorney-General and the Commission should retain their right to intervene in all proceedings. 170

34. Sections 34 and 40 of the Charter be amended to explicitly give a judicial officer or tribunal member power to place conditions on interventions to support case management. Conditions may include, for example, timetabling, setting how the interveners may participate in proceedings, and confining the matters that submissions may address. 170

35. The Attorney-General and the Victorian Equal Opportunity and Human Rights Commission publish guidance on how they will consider and process Charter notifications and their cost policies as an intervener (when they do not already do so). The Attorney-General and the Commission should make this guidance available to the public and promote it in the legal sector.....170

Chapter 6 Firming the foundations—more effective parliamentary scrutiny

36. The secretariat of the Scrutiny of Acts and Regulations Committee arrange for human rights induction training for members of the Committee and the Victorian Equal Opportunity and Human Rights Commission offer a human rights briefing to all new parliamentarians. 179

37. The process for human rights scrutiny of Bills by the Scrutiny of Acts and Regulations Committee be improved and public engagement in the process be enhanced by:

(a) the Victorian Government considering how best to ensure that the Committee has sufficient time to scrutinise Bills that raise significant human rights issues

(b) the Committee establishing an electronic mailing list to notify individuals and organisations of Bills that it is considering and to invite submissions

(c) the Committee referring to the content of submissions made to it in its Alert Digests on Bills. 185

38. The Victorian Government refer amendments to non-Victorian laws that apply in Victoria under a national scheme, and to Regulations under those laws, to the Scrutiny of Acts and Regulations Committee for consideration. 185

39. Section 29 of the Charter be amended to specify the Scrutiny of Acts and Regulations Committee's failure to report on the human rights compatibility of any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or any other statutory provision.....186

40. To ensure that House Amendments can be subject to human rights scrutiny and to make the Charter and the *Parliamentary Committees Act 2003* (Vic) consistent, the Scrutiny of Acts and Regulations Committee should be given clear power to consider and report on provisions of Acts that it did not consider when a Bill was before Parliament (within a limited time).....186

41. The human rights analysis in statements of compatibility be improved by:

(a) amending section 30 of the Charter to clarify that the Scrutiny of Acts and Regulations Committee may report to Parliament on statements of compatibility

(b) the Victorian Government publishing draft statements of compatibility when exposure drafts of Bills are released for public comment. 188

42. The Victorian Government facilitate the identification of human rights impacts of legislative proposals and options for addressing them by consulting the Human Rights Unit in the Department of Justice & Regulation at an early stage of developing legislation and drafting statements of compatibility. 189

43. Members of Parliament are encouraged to provide a short statement on the human rights compatibility of their proposed House Amendments to Parliament, when time permits..... 190

44. Human rights scrutiny of statutory rules and legislative instruments be made more transparent and effective by:

(a) publishing all human rights certificates in an online repository maintained by the Scrutiny of Acts and Regulations Committee

(b) amending section 30 of the Charter to require the Scrutiny of Acts and Regulations Committee to consider all statutory rules and legislative instruments and report to Parliament if it corresponds with a Minister about the human rights impact of any statutory rule or legislative instrument or considers the statutory rule or legislative instrument limits human rights.....193

45. Local laws be made subject to the Charter by amending item 2(f) of Schedule 8 to the *Local Government Act 1989* (Vic) to refer to the human rights in the Charter, making incompatibility with the human rights in the Charter a factor for the Minister's consideration when deciding whether to recommend revocation of a local law. 195

46. The provision for override declarations in section 31 of the Charter be repealed. The explanatory materials for the amending statute should note that Parliament has continuing authority to enact any statute (including statutes that are incompatible with human rights), and the statement of compatibility is the mechanism for noting this incompatibility. If legislation is passed that is incompatible with human rights, the responsible Minister should report to Parliament on its operation every five years. 200

Chapter 7 Emerging issues

47. The Victorian Government adopt a whole-of-government policy that, in developing a national scheme, the Charter should apply to the scheme in Victoria to the fullest extent possible. Alternatively, the national scheme should incorporate human rights protections equivalent to, or stronger than, the Charter. In developing a national scheme, the Government should consider separately the questions of protection and promotion of human rights through scrutiny of legislation, the interpretation of legislation, whether regulators and others involved in administering a national scheme in Victoria are public authorities, and oversight and compliance mechanisms. 209

48. The principles in the Preamble to the Charter be amended to:

    (a) recognise the need for public authorities to take steps to respect, protect and promote human rights

    (b) recognise the importance of individuals and communities being able to have a say about policies, practices and decisions that affect their lives

    (c) refer to self-determination having special importance for the Aboriginal people of Victoria, as descendants of Australia's first peoples..... 216

49. The Victorian Government work with Victorian Aboriginal communities to promote, protect and respect self-determination and the empowerment of Aboriginal people. This work could be pursued through existing forums, such as the Premier's meetings with members of the Aboriginal communities. 218

50. Section 17 of the Charter include a new provision that every person born in Victoria has the right to a name and to be registered as soon as practicable after birth. 222

51. 'Discrimination' in the Charter be defined as 'direct and indirect discrimination' on the basis of a protected attribute in the *Equal Opportunity Act 2010* (Vic). 227

Chapter 8 The need for a further review

52. The Charter be amended to require the Attorney-General to cause there to be a further review of the Charter four years after the commencement of the proposed complaints and remedies provision. The review should consider the operation of the Charter and how it could be improved, including the application of economic, social and cultural rights and the range of remedies available when human rights are interfered with. 234

Glossary of terms and abbreviations

ACT	Australian Capital Territory
Charter	*Charter of Human Rights and Responsibilities Act 2006* (Vic)
the Commission	The Victorian Equal Opportunity and Human Rights Commission, unless otherwise specified
damages	A sum of money granted to someone who makes complaint, to compensate them for damage caused
declaration of inconsistent interpretation	Declaration by the Supreme Court under section 36 of the Charter that a provision of an Act cannot be interpreted consistently with a Charter right
Federal Committee	Parliamentary Joint Committee on Human Rights of the Australian Parliament
FTE	Full Time Equivalent (staffing levels)
held	That a court decided when giving its ruling on a legal claim
human rights	The 20 rights set out in Part 2 of the Charter, unless otherwise indicated
human rights certificate	Certificate that must be provided by a Minister on a statutory rule or legislative instrument under sections 12A and 12D of the *Subordinate Legislation Act 1994* (Vic)
IBAC	Independent Broad-based Anti-corruption Commission
IBAC Act	*Independent Broad-based Anti-corruption Commission Act 2011* (Vic)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
interpretive obligation	The duty in section 32 of the Charter to interpret laws consistently with human rights, so far as it is possible to do so
intervention	When the Attorney-General or the Victorian Equal Opportunity and Human Rights Commission becomes involved in legal proceedings under sections 34 or 40 of the Charter to make submissions about their views on the law
LGBTI	Lesbian, gay, bisexual, transgender and intersex
override declaration	Declaration by Parliament under section 31 of the Charter that a provision of an Act has effect despite being incompatible with a Charter right

principle of legality	A principle of statutory interpretation that assumes that Parliament did not intend for the legislation to limit fundamental rights and freedoms unless it uses clear words to the contrary
public authority	A public official, body or entity within the meaning of section 4 of the Charter
RRTA	*Racial and Religious Tolerance Act 2001* (Vic)
SARC	Scrutiny of Acts and Regulations Committee of the Parliament of Victoria
section 35 notice	Notice issued under section 35 of the Charter to notify the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission that a Charter issue has been raised in the Supreme Court or the County Court
statement of compatibility	A statement that a member introducing a Bill in the Parliament must prepare to address the Bill's compatibility with human rights under section 28 of the Charter
the Tribunal	The Victorian Civil and Administrative Tribunal, unless otherwise specified
UK	United Kingdom
VCAT	Victorian Civil and Administrative Tribunal. See also **the Tribunal**
VEOHRC	Victorian Equal Opportunity and Human Rights Commission. See also **the Commission**
Human Rights Consultation Committee	The Committee that undertook the original community consultation on the creation of a Charter in Victoria and that reported in 2005

Introduction and overview

Introduction and overview

In 2005 at the request of the Victorian Government, a four-person committee comprised of Rhonda Galbally AO, Andrew Gaze, the Hon Professor Haddon Storey QC and Professor George Williams AO (Chair) undertook and reported on community consultations on how to best promote and protect human rights in Victoria. The Committee recommended the creation of a Victorian Charter.

In 2006 the Victorian Parliament passed the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) to enhance the promotion and protection of human rights in State and local government.

The legislation required two statutory reviews: one at the four-year mark in 2011 and one at the eight-year mark in 2015 (sections 44 and 45). This is the Report of the eight-year Review.

About the Charter of Human Rights and Responsibilities

Human rights are the basic rights that belong to everyone, regardless of age, race, sex or disability, income or education. They are about treating people fairly and with dignity, and ensuring individual rights are respected.

In Victoria, the Charter sets out 20 key human rights. Focused on the work of Parliament, the government and the courts, it obliges public authorities to respect the human rights of all people in Victoria.

The Charter is an ordinary Act of Parliament that sets out the rights, freedoms and responsibilities shared by everyone in Victoria and protected by law. It aims to promote a culture that ensures government service delivery, policy and legislation considers everyone's human rights. As a parliamentary model of human rights protection, the Charter gives the final say to the Parliament. That is, it is not a constitutionally entrenched bill of rights (like that in the United States of America) that allows courts to strike down laws that are incompatible with those rights.

The Charter is founded on the following principles set out in its Preamble:

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social and cultural and economic relationship with their traditional lands and waters.

The Charter protects human rights in Victoria in three main ways:

- public authorities in state and local government must act in ways that are compatible with human rights
- government and Parliament must consider human rights when developing new laws
- people and public institutions, including the courts, must interpret and apply all laws in a way that is compatible with human rights, as far as possible.

These mechanisms ensure Parliament is informed about human rights issues in its work. They also ensure human rights play an important role in government policy, in the preparation of legislation, in the way courts and tribunals interpret laws, and how public officials treat Victorians in their day-to-day work in the community.

The Charter applies to state and local government, but not federal government agencies operating in Victoria. It puts obligations on private entities only if they are performing public functions (such as under a contract to provide government services) but not in their non-governmental activities.

The courts must interpret laws in a way that is compatible with human rights, as far as possible. If they cannot, the Supreme Court can issue a declaration of inconsistent interpretation to say a law cannot be interpreted consistently with the human rights in the Charter. This declaration is sent to the Victorian Government, which then reports to Parliament about it. Such a declaration from the Supreme Court does not make the law invalid; rather, it is a flag for the Government and Parliament so they can review and change the law if they choose.

The Charter does not currently create any new cause of action or right to go to court, and the courts cannot award damages for a breach of Charter rights. People can make complaints about human rights issues to the Victorian Ombudsman and the Independent Broad-based Anti-corruption Commission (IBAC) where those bodies have jurisdiction. The Victorian Equal Opportunity and Human Rights Commission cannot take human rights complaints and offer dispute resolution under the Charter.

The rights in the Charter are not absolute. That is, they can be subject to reasonable and proportionate limitations when those limitations can be justified as part of living in a free and democratic society. In this way, the Government and Parliament may continue make decisions on behalf of the community about how best to balance rights, how to protect Victorians from crime, and how to use limited government funds for competing demands.

The concepts that underpin the Charter have a much longer history than the legislation in Victoria. The Charter rights were largely adapted from the Universal Declaration on Human Rights that the United Nations General Assembly adopted in 1948, and from the International Covenant on Civil and Political Rights (ICCPR), to which Australia became a party in 1980. Many of the Charter rights also reflect the traditional rights and freedoms that the common law protects, including the freedom of speech, religion, movement and association, property rights, the right to a fair trial, the presumption of innocence and access to the courts.

The Charter is part of a broader framework of human rights protections, along with other Victorian laws that protect people's rights, such as the *Privacy and Data Protection Act 2014* (Vic), the *Equal Opportunity Act 2010* (Vic) and the *Racial and Religious Tolerance Act 2001* (Vic). At a federal level, the *Australian Human Rights Commission Act 1986* (Cth), allows people to make complaints to the Australian Human Rights Commission if Commonwealth Government authorities breach human rights. The Charter provides protections in Victoria when people are dealing with State and local government.

Rights that are protected in the Charter

The right to recognition and equality before the law (section 8)

Everyone is entitled to equal and effective protection against discrimination, and to enjoy their human rights without discrimination.

The right to life (section 9)

Every person has the right to life and to not have their life taken. The right to life includes a duty on government to take appropriate steps to protect the right to life.

The right to protection from torture and cruel, inhuman or degrading treatment (section 10)

People must not be tortured or treated or punished in a cruel, inhuman or degrading way. This right includes protection from treatment that humiliates a person. People must not be subjected to medical treatment or experiments without their full and informed consent.

The right to freedom from forced work (section 11)

A person must not be forced to work or be made a slave. A person is a slave when someone else has complete control over them.

The right to freedom of movement (section 12)

People can stay in or leave Victoria whenever they want to, as long as they are here lawfully. They can move around freely within Victoria and choose where they live.

The right to privacy and reputation (section 13)

Everyone has the right to keep their lives private. A person's family, home or personal information cannot be interfered with, unless the law allows it.

The right to freedom of thought, conscience, religion and belief (section 14)

People have the freedom to think and believe what they want (for example, the right to hold religious beliefs). They can do this in public or private, as part of a group or alone.

The right to freedom of expression (section 15)

People are free to say what they think and want to say. They have the right to find, receive and share information and ideas. In general, this right might be limited to respect the rights and reputation of other people, or to protect public safety and order.

The right to peaceful assembly and freedom of association (section 16)

People have the right to join or not join groups or unions, and to meet peacefully.

The right to protection of families and children (section 17)

Families are entitled to protection. Children have the same rights as adults with added protection according to their best interests.

The right to taking part in public life (section 18)

Every person has the right to take part in public life, such as the right to vote or run for public office.

Cultural rights (section 19)

People can have different family, religious or cultural backgrounds. They can enjoy their culture, declare and practise their religion, and use their languages. Aboriginal persons hold distinct cultural rights.

Property rights (section 20)

People are protected from having their property taken, unless the law says it can be taken.

The right to liberty and security of person (section 21)

Everyone has the right to freedom and safety. The right to liberty includes the right to not be arrested or detained except in accordance with the law. The right to security means that reasonable steps must be taken to ensure the physical safety of people in danger of harm.

The right to humane treatment when deprived of liberty (section 22)

People have the right to be treated with humanity if they are accused of breaking the law and detained.

The rights of children in the criminal process (section 23)

A child charged with committing a crime or detained without charge must not be held with adults. They must also be brought to trial as quickly as possible and treated appropriately for their age. Children are entitled to opportunities for education and rehabilitation in detention.

The right to a fair hearing (section 24)

A person has a right to a fair hearing. This means the right to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Rights in criminal proceedings (section 25)

A person has minimum guarantees that a person has when charged with a criminal offence. They include the right to be told the charges against them in a language that they can understand; the right to an interpreter if they need one; the right to have time and the facilities (such as a computer) to prepare their own case or to talk to their lawyer; the right to have their trial heard without too much delay; the right to be told about Legal Aid if they don't already have a lawyer; the presumption of their innocence until they are proven guilty; and the right to not testify against themselves or confess their guilt unless they choose to do so.

The right not to be tried or punished more than once (section 26)

A person will go to court and be tried only once for a crime. If the person is found guilty, they will be punished only once. If they are found to be innocent, they will not be punished.

The right to protection from retrospective criminal laws (section 27)

A person has the right not to be prosecuted or punished for things that were not criminal offences at the time they were committed.

The 2011 Charter review

In 2011 the then Attorney-General, the Hon Robert Clark MP, asked the Victorian Parliament's Scrutiny of Acts and Regulations Committee (SARC) to carry out the first review scheduled in the legislation for the Charter.

The statutory requirements for the four-year review were broad. But the review was specifically required to consider whether the Charter should include additional human rights, including (but not limited to) economic, social and cultural rights, women's rights and the rights of children, as they are set out in the relevant United Nations Conventions.

The review also had to consider whether to include the right to Indigenous self-determination, whether regular auditing of public authorities should be mandatory and whether a direct remedies provision should be added.

The SARC report was completed on 14 September 2011, and the then Government's response was tabled on 14 March 2012. The report and the Government response are available on SARC's website: http://www.parliament.vic.gov.au/sarc/article/1446. Parliament did not make any legislative amendments to the Charter as a result of the 2011 review.

The 2015 Charter Review

On 2 March 2015 the Attorney-General, the Hon Martin Pakula MP, issued the terms of reference for the eight-year Review of the Charter. They focus on ways to enhance the effectiveness and operation of the Charter. Under the terms of reference, I was required to give this Report of the Review to the Attorney-General by 1 September 2015.

To conduct the Review, I undertook research, conducted face-to-face meetings with a wide range of people and organisations, held community forums and called for public submissions.

I began my research by reviewing the submissions to SARC's review and SARC's report, as required by term of reference 1(a) for this Review. I thank the submitters and the Committee for documenting their perspectives on the Charter at the four-year mark. These reflections were incredibly valuable as a starting point for my Review.

To inform the Review, I wanted to hear from as many people and as many different perspectives as possible. I had more than 60 face-to-face meetings with individuals and organisations in the community sector, legal sector and government over the past four months and I received 109 written submissions. **Appendix A** details the consultation process.

Overview of the Report

The terms of reference for this Review asked me to consider ways to enhance the effectiveness of the Charter. So, my recommendations are guided by the key goal of making the Charter more effective in achieving its statutory purpose: **to protect and promote human rights.**

I've looked for ways to improve the Charter to make it more:

1. **accessible**—How could the Charter be simpler, clearer and easier to work with?
2. **effective**—What would support better decision making and human rights outcomes?
3. **practical**—What would help the Charter to achieve results?

I structured the Report around:

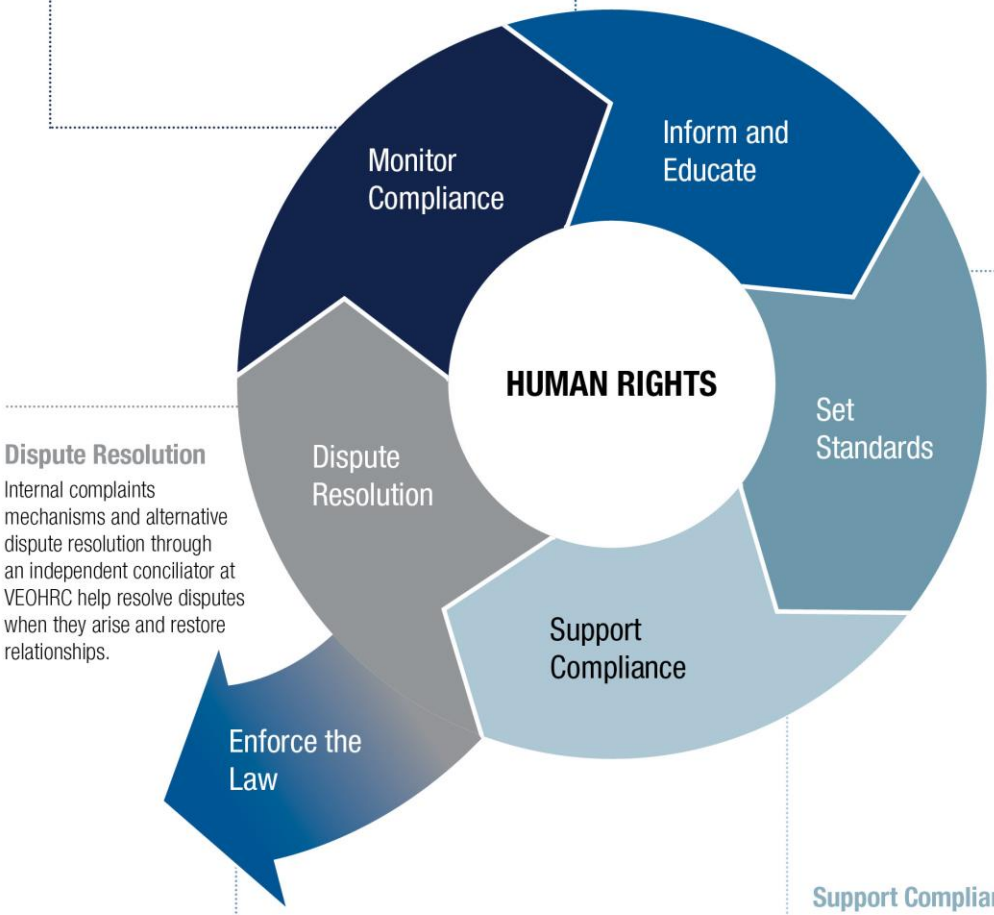
- key areas in which the Charter does its work
- the need to build a strong human rights culture and for public authorities to give life to human rights in their everyday work
- the role of oversight bodies
- Parliament's foundational role in human rights scrutiny of new laws.

Many of the Review's terms of reference raised technical legal issues with the Charter's operation and related debates in the courts. As a result, some of the following discussion is quite technical. However, my recommendations are designed to clarify these issues and make the Charter easier to work with.

Proposed Regulatory Approach for the Charter

Monitor Compliance
VEOHRC reporting, Ombudsman and IBAC investigations determine level of compliance; identify areas of risk and promote good practice.

Inform and Educate
VEOHRC and others raise awareness about human rights law and what it requires in practice.



Dispute Resolution
Internal complaints mechanisms and alternative dispute resolution through an independent conciliator at VEOHRC help resolve disputes when they arise and restore relationships.

Set Standards
The law makes clear the obligation to take human rights into account. At the organisational level there is guidance on goals and how to put this into action in operation policies.

Support Compliance
VEOHRC and other statutory agencies, Human Rights Unit etc provide advice, voluntary compliance reviews, research and reporting.

Enforce the Law
Courts and tribunals decide on whether there has been a breach of the law and an appropriate remedy to address the issue.

*Adapted from the EPA regulatory approach: *EPA Victoria Compliance and Enforcement Policy* (2011), 8

Chapter 1 Building our human rights culture

In Chapter 1, I look at building our human rights culture and address term of reference 1(d) on an effective human rights culture.

For the Charter to be effective, the Victorian Government must prioritise work to build a stronger human rights culture, particularly in the Victorian public sector. A strong human rights culture facilitates better government decision making. Having the law is not enough to achieve human rights protection: Victoria also needs a culture that makes human rights real in people's everyday interaction with government. For this reason, the Government's primary focus should be on this front end of the system.

There is no 'one size fits all' approach to building an effective human rights culture, but I outline three influences that require attention:

1. **Senior leadership and organisational vision**, including from Ministers and senior public servants
2. **Operational capacity**, including the role of supervisors and team behaviour, and the need to build the knowledge and capacity of staff
3. **External input and oversight**, including community attitudes and expectations, capacity in the legal sector, and the role of external accountability and oversight.

I make recommendations to re-engage each of these influences to support the development of an effective human rights culture and build on work that is already being done by public authorities. This re-engagement will require government commitment to support human rights education in particular.

Chapter 2 Clarifying responsibilities for human rights—acts and decisions of public authorities

Chapter 2 covers what is needed to clarify responsibilities for human rights. It addresses terms of reference 2(a) on clarifying the provisions regarding public authorities, 1(e) on applying the Charter to non-State entities, and 2(e) on clarifying the obligations of courts and when they have public authority obligations.

I make recommendations to ensure greater certainty about who is a public authority, so individuals are aware of their rights and entities are aware of their obligations. This awareness is a particular issue for private entities delivering public services. These entities already have public authority obligations under the Charter when they are performing functions of a public nature on behalf of the State. I propose improvements to the current definition of 'public authority' to make this clearer, while allowing for future changes in how government operates. I recommend, for example, adding a non-exhaustive list of public functions to the Charter, providing a mechanism for private entities to voluntarily 'opt in' to public authority obligations, and encouraging government to make the Charter's application clearer in its contracts with the private sector.

Despite uncertainty about when the Charter may apply to the courts as public authorities, I conclude that case law now provides guidance on this matter. For this reason, I do not make any recommendations to change the balance struck by the courts. I make a recommendation to clarify the note that appears in the Charter about when a court may be acting in an administrative capacity.

Chapter 3 Facilitating good practice and dispute resolution—the role of statutory authorities

In Chapter 3, I look at the roles of relevant statutory authorities under the Charter and address term of reference 1(b) on the functions of the Victorian Equal Opportunity and Human Rights Commission and the Victorian Ombudsman. I consider the Charter as a limb of the new administrative law, being part of the system that guides, informs and legitimises public administration. Putting the Charter in this context, I consider what is needed to build an effective regulatory framework.

I make recommendations to better facilitate compliance with the Charter, support the resolution of issues when a member of the community is concerned government has not complied with the law, and clarify oversight roles.

Drawing on the Ayers and Braithwaite model of the enforcement pyramid (a regulatory model), I found the Charter is missing key elements of an effective regulatory system. To address this issue, the Charter should be enhanced to enable the Victorian Equal Opportunity and Human Rights Commission to offer dispute resolution under the Charter (as it does under the Equal Opportunity Act and the Racial and Religious Tolerance Act). This enhancement would support the Commission's facilitative role in the compliance pyramid and provide a clear path for people to raise concerns with government if they feel their human rights are not being respected. Flexible alternative dispute resolution can be particularly effective in delivering access to justice when disputes arise between government and the community it serves.

An effective regulatory framework also needs agencies with authority to investigate serious or systemic issues. The Victorian Ombudsman already has this jurisdiction for most public authorities, and IBAC has this jurisdiction for police and protective services officers. These roles sit largely in the oversight section of the pyramid for the Charter, although their functions also have an educative and facilitative role and can lead to enforcement activities.

The Ombudsman's jurisdiction over private entities performing work on behalf of government could be more clearly stated to ensure that she can consider the human rights compliance of all functional public authorities under the Charter. At the moment, people have to look through multiple definitions in several different Acts to work this out. I also recommend the Victorian Government ensure IBAC has capacity to investigate allegations of serious human rights abuses by police and protective services officers.

Finally, I make recommendations to facilitate the Charter's consideration by all relevant government complaint-handling and oversight bodies when Charter issues arise within their jurisdiction. This will support the original approach to implementation of the Charter by integrating it across the Victorian public sector. The Charter is everyone's business in the public sector. Public sector entities, including complaint-handling bodies, should have capacity to deal with human rights issues when they arise in their work. I do not recommend that all human rights related complaints should shift to the Victorian Equal Opportunity and Human Rights Commission. Specialist complaint-handling bodies like the Mental Health Complaints Commission, for example, should continue to be able to consider human rights issues that are raised in relation to public mental health service providers. I also make recommendations to facilitate communication between complaint-handling and oversight bodies. This would allow, for example, the Ombudsman to advise the Commission about systemic issues where the Commission may want to target education.

Chapter 4 Remedies and oversight—the role of the courts

In Chapter 4, I examine the role of the courts in determining whether a person's human rights have been breached and deciding what should happen. This Chapter addresses term of reference 2(b) on clarifying the provisions regarding legal proceedings and remedies.

In a few cases at the pointy end of the regulatory pyramid, the Charter needs to provide for someone to decide whether there has been a breach of a person's human rights and whether to order an appropriate remedy. I propose a remedies provision modelled on section 40C of the *Human Rights Act 2004* (ACT) would provide a clear framework to achieve these outcomes.

The proposed model would give community members access to dispute resolution at the Victorian Equal Opportunity and Human Rights Commission, and an avenue to have the Victorian Civil and Administrative Tribunal decide whether their rights have been breached. People could continue to raise the Charter in other legal proceedings where relevant. Government oversight bodies could continue to look at Charter issues that are relevant to their jurisdiction.

If not changed, the current system will continue to present four key problems:

1. **Lack of consequence.** Without a clear way to remedy a breach of someone's human rights, the regulatory model for the Charter will continue to be flawed. The likelihood of consequences drives change in behaviour, as in occupational health and safety, privacy and discrimination law.
2. **A focus on government administration and not on a remedy for the individual.** From a community perspective, people do not always have a clear place to raise a human rights concern with government and get a response. Sometimes, no available process focuses on a remedy for the individual for a potential breach of their rights. An investigation about police misconduct by IBAC, for example, can be a confidential process that focuses on a government employee's duties to the State. These types of processes focus on public administration and governance questions, and do not directly address the relationship between government and the community member with the concern.
3. **Accessibility.** In some cases, the only way for a person to have their human rights considered by an independent person is to raise the matter with a superior court. Access to justice, therefore, can be out of reach for many Victorians and involves a more expensive jurisdiction. This restriction is both a barrier to the Charter's use and an inefficient use of government resources (when other areas of law deal with such issues as a matter of course in the Human Rights List at the Victorian Civil and Administrative Tribunal).
4. **Convoluted litigation.** As the case law stands, people can bring Charter issues before a court or tribunal only if they can 'piggy-back' it onto another claim such as a discrimination claim. The Charter question has to relate to the same conduct as the other claim, but the other claim does not have to be successful. As a result, people can only argue human rights issues in convoluted ways that raise difficult jurisdictional questions. These issues are also likely to end up in the Supreme Court.

My proposal addresses these issues by:

- promoting a culture of human rights as a legal obligation that people take seriously. This culture will support **better decision making**.
- giving community members a clear pathway to raise their human rights concerns with government. This pathway will deliver **access to justice**.
- facilitating alternative dispute resolution to give people an opportunity to resolve issues at an early opportunity. This approach will support **the relationship between government and the community and the efficient use of resources**.

- providing an independent forum to determine whether human rights have been breached and how to address this breach for the individual concerned. This independent forum will promote **transparency and confidence in government.**

Chapter 5 Interpreting and applying the law

In Chapter 5, I consider other issues that have arisen with the Charter's operation, including some of the more technical legal debates about its operation. I address terms of reference: 2(c) on clarifying the role of human rights in statutory construction; 2(d) on clarifying the role of the proportionality test in section 7(2) (particularly as the test relates to statutory construction and the obligations of public authorities); 2(g) on the effectiveness of the declaration of inconsistent interpretation by the Supreme Court; and 2(h) on the usefulness of the notification provision that lets the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission know when Charter issues are raised in superior courts.

First, there was overwhelming agreement from my consultations that the legislation needs to clarify the role of human rights in statutory construction. I recommend the Charter require statutory provisions to be interpreted, as far as possible, in the way that is most compatible with human rights. When a choice must be made between possible meanings that are incompatible with human rights, the provision should be interpreted in the way that is least incompatible with human rights. The amendment should require the use of section 7(2) to assess which interpretation is most compatible, or least incompatible, with human rights. The Charter should also set out the steps for interpreting statutory provisions compatibly with human rights.

I also recommend the Charter define 'compatibility' and 'incompatibility' to make clear that an action that does not limit a human right, or a limit on a human right that is reasonable and demonstrably justified in the terms of section 7(2), is compatible with human rights. Further, I recommend the terms 'compatibility' and 'incompatibility' with human rights be used consistently in the Charter, and the internal limitation on the freedom of expression (section 15(3)) be removed to ensure the general limitations clause in section 7 can be applied consistently across the Charter. I am satisfied that the general limitations clause can do the same work that the internal limitation in section 15(3) was intended to cover.

When the Supreme Court is unable to find a human rights compatible interpretation of a statutory provision, it can issue a declaration of inconsistent interpretation. I recommend renaming this declaration as a declaration of incompatible interpretation, to ensure consistent language and clarity of use. This declaration initiates communication between the Executive Government and Parliament about the provision. It does not make the provision invalid or change the rights of the parties in the proceedings. I do not recommend changing the substantive operation of this provision.

Finally, I consider the usefulness of the provision requiring notice to interveners when Charter issues are raised in superior courts. The Attorney-General and the Victorian Equal Opportunity and Human Rights Commission play useful roles as interveners. They provide their institutional views on key questions of law to assist the court or tribunal. I recommend retaining the right to intervene, but removing the automatic requirement to notify in County Court matters. I note the County Court does not create law, and this is also the case with lower courts and the Victorian Civil and Administrative Tribunal, where notice is not currently required. Removing the notice requirement in the County Court helps address perceived barriers to raising the Charter, particularly in criminal trials. I recommend all judicial officers and tribunal members have discretion to require notification when the matter is of general importance or otherwise in the interests of justice, to ensure the Attorney-General and the Commission are still aware of significant matters. I encourage active case management of interveners, and propose interveners publish information about how they respond to notices and their positions on costs.

Chapter 6 Firming the foundations—more effective parliamentary scrutiny

In Chapter 6, I consider the role of human rights scrutiny in law making. I address terms of reference 1(c) on the effectiveness of the scrutiny role of SARC, and 2(f) on the need for a provision permitting override declarations by Parliament.

Parliamentary human rights scrutiny has had a positive impact on the human rights compatibility of new laws, but some small changes are needed to increase the robustness and transparency of the human rights scrutiny process for it to be as effective as it could be.

The main criticism of the scrutiny process raised in consultation and submissions to this Review was the short timeframes within which SARC must consider and report on Bills. This means that the public has little opportunity to make submissions on the human rights impacts of proposed legislation, and SARC lacks the time and capacity to consider in detail any submissions. I recommend that the Government consider how best to ensure SARC has sufficient time to scrutinise Bills that raise significant human rights issues. Human rights training for SARC members would assist them to fulfil their human rights scrutiny role under these time pressures.

I also make recommendations to ensure local laws made by councils can be considered for compatibility with human rights by the responsible Minister, and that House Amendments to Bills can be subjected to retrospective human rights scrutiny by SARC (within a limited time of an Act receiving Royal Assent). Additionally, I recommend SARC's human rights scrutiny functions under the under the *Parliamentary Committees Act 2003* (Vic) and the Charter be made consistent.

Finally, I also consider the use of, and need for, the provision for override declarations by Parliament in section 31 of the Charter. This provision allows Parliament to expressly declare that an Act or a provision has effect despite being incompatible with one or more of the human rights in the Charter. I recommend repealing section 31. In the statutory human rights model adopted for the Charter, Parliament retains its supremacy and does not need (in an emergency or at any time) a provision to allow it to pass legislation that is incompatible with human rights. I conclude the use of the provision has been inappropriate and confusing to the public. When the Government intends to pass legislation that is incompatible with human rights, I encourage it to be clear in the text of the Bill and in its statement of compatibility.

Chapter 7 Emerging issues

In Chapter 7, I examine other issues that arose during my Review. I address term of reference 2(i) on any other desirable amendments to improve the operation of the Charter. I identified three main areas for attention.

(a) The application of the Charter to national schemes. Victoria has engaged with the Charter inconsistently when entering into national schemes. I recommend the Victorian Government adopt a whole-of-government policy that either the Charter should apply to national schemes to the fullest extent possible, or the scheme should include equivalent human rights protections. I also recognise the Charter's application to national schemes does not have to be all or nothing: the Victorian Government should separately consider scrutiny of legislation, interpretation of legislation, public authority obligations, and monitoring and compliance mechanisms.

(b) Additional rights. While the human rights in the Charter are primarily drawn from the ICCPR, the Charter does not include all aspects of the ICCPR. It excludes some rights because they relate to federal responsibilities, do not resonate in the Victorian context, or are unclear in a domestic law context. In my Review, I have re-examined this balance where issues were raised with me by members of the community.

I recommend the Charter be amended to include self-determination of Aboriginal Victorians and participation of people in decisions that affect them as principles in the Preamble. I also recommend section 17 of the Charter on the protection of families and children include a new provision recognising the right of every person born in Victoria to have a name and to be registered as soon as practicable after birth.

(c) Defining discrimination. Uncertainty about the scope of the term 'discrimination' in the Charter has been compounded by amendments to the Equal Opportunity Act. I recommend the Charter's definition of discrimination be clarified by defining it as 'direct and indirect discrimination' on the basis of a protected attribute in the Equal Opportunity Act.

Chapter 8 The need for a further review

In Chapter 8, I address term of reference 3, on whether further review of the Charter is necessary. Two statutory reviews were initially built into the Charter (one after four years (2011) and one after eight years (2015)), so the Government and community could reflect on how the Act is working and whether it continues to reflect the values and aspirations of the Victorian community.

The four-year review had a destabilising effect on the Charter. However, through this Review, I found the Charter is foundational to the work of government and its relationship with the community. Victoria should continue to reflect on its human rights practice and ensure the legislation meets the ongoing needs of the community. For these reasons, I recommend a further review four years after the commencement of the proposed complaints and remedies provision.

Where to from here?

The Charter requires the Attorney-General to table this Report in Parliament on or before 1 October 2015. The Parliament will then decide whether to make any legislative changes to the Charter, and the Government will decide whether to change any policy or practice as a result of the Review. I commend this Report and its recommendations to the Government and the Parliament for consideration.

Chapter 1

Building our human rights culture

Chapter 1 Building our human rights culture

Overview

The terms of reference asked me to consider ways to enhance the effectiveness of the Charter. One way to achieve this is to further embed and improve the human rights culture in Victoria. In Chapter 1, I consider what a good human rights culture looks like, and the practices and processes that promote a human rights culture in the public sector.

A strong human rights culture facilitates better government decision making. Having the law is not enough to achieve human rights protection. Victoria also needs a culture that makes human rights real in everyday interactions with government. The best human rights outcomes are achieved if people's rights are considered in the everyday business of government and its interactions with the community. For this reason, I recommend the Victorian Government prioritise its focus on human rights at this front-end.

There is no one-size fits all approach to building a human rights culture, but three important influences must be addressed: senior leadership and vision; operational capacity; and external input and oversight. An effective approach to building a human rights culture will draw on each of these elements. I recommend:

- the Victoria Government make a clear public commitment to human rights, and the Victorian Secretaries Board put building a human rights culture on its agenda, supported by an inter-departmental committee
- Victorian public sector entities ensure their organisational vision, plans, policies and procedures support good human rights practice
- Victorian public sector entities build relevant human rights related capabilities into position descriptions and ongoing professional development
- the Human Rights Unit (within Government) be given responsibility to develop guidance materials, and provide advice and specialist training
- the Victorian Equal Opportunity and Human Rights Commission further educate the community, state and local government, and look for opportunities to engage with the private sector about human rights
- public authorities make information about the Charter available to community members and provide opportunities for people to have a say about issues that affect them
- the Judicial College of Victoria deliver regular judicial education on the Charter.

Term of reference 1(d): Ways to enhance the effectiveness of the Charter, including the development of a human rights culture in Victoria, particularly within the Victorian public sector

The link between the Charter and our community's values and culture

The values and culture of the Victorian community have underpinned the development of a Charter of Human Rights and Responsibilities from the beginning. As participants in the community consultations for the Review commented:

> *The Charter and our culture are strongly linked. We created the Charter in Victoria because of our existing culture and values.*
>
> **Melbourne CBD community forum participant, 13 May 2015**

The Charter reflects our culture in this state, but we also want the Charter to strengthen that culture and to support a fair and equitable society. As the Victorian Council of Social Service noted, '[u]ltimately, human rights can only be protected if everyone has a basic recognition and respect for the decent treatment of people'.[1]

The Charter is a strong statement of the importance of the values of freedom, dignity, equality and respect in our society; it is one mechanism by which we set out our expectations of how these values will be recognised and protected.

Getting to the end goal—better decision making

The terms of reference focus on the Victorian public sector because the Charter seeks to regulate and influence the actions of the public sector.

The Charter provides the public sector with a framework, or fairness radar, through which it can look at legislation, policies, practices and service delivery, and consider the impact on individuals.

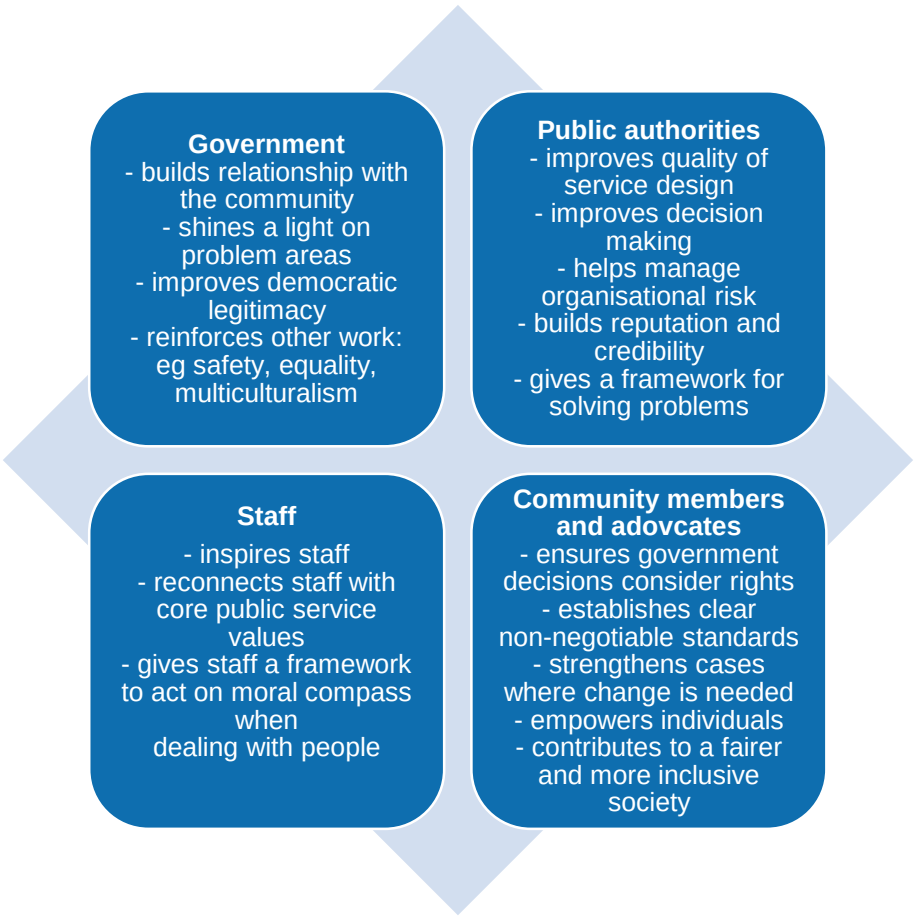
In a good culture, accounting for human rights becomes second nature or common sense. As one senior police officer described to me: 'when you're dealing with an emergency situation, you don't have time to think through each of the Charter rights, but if it's engrained in your values, you'll naturally take them into account in your decision'.

> The Hon Gavin Jennings, Special Minister of State, recently observed:
>
> *… rules need to be articulated … clearly expressed, but beyond that, it's actually … how we relate to one another … And if we can have a virtuous relationship between those values and the rules, then in fact the rules start to become less and less important … by and large, I would … hope that 99.9 per cent of our engagement with the citizenry, our engagement with one another, we will successfully pass that test, on the basis of what is our shared values and the way in which we live them.*[2]

When looking at this issue, I kept in mind that a strong human rights culture is not an end in itself. Success is not measured simply by counting how many people know or care about the Charter. Rather, a human rights culture is a means to better government decision making. The best human rights outcomes will be achieved if people's rights are considered in the everyday business of government and its interactions with the community. The ultimate goal, as set out in Charter, is the promotion and protection of human rights in Victoria.

[1] Submission 64, Victorian Council of Social Service, 5.
[2] The Hon Gavin Jennings MLC, Special Minister of State, 'Are We There Yet? A High Performing, High Integrity Victorian Public Service' (Paper presented at the ANZSOG/VPSC Victoria Series, 3 June 2015), video recording accessed at https://www.anzsog.edu.au/events/events-calendar/2015/06/24/vpsc-victoria-partnership-program-event/608/hon-gavin-jennings-are-we-there-yet-a-high-performing-high-integrity-victorian-public-service.

Figure 1: Key benefits of building a human rights culture[3]



This term of reference recognises that having the law is not enough to achieve human rights protection. Victoria must also have a culture that makes human rights real in everyday decision making. For this reason, I recommend the Government put its primary focus on the Charter in this front-end work.

This recommendation is supported by international experience. The Equality and Human Rights Commission of the United Kingdom, for example, noted in 2009 that key benefits of public authorities engaging with human rights had included:

> *… establishing some non-negotiable service standards that apply to everyone; providing a framework for making better decisions; strengthening advocacy; helping to re-energise staff and re-connect them with core public service values; managing organisational risk; and enhancing organisational reputation and distinctiveness.*[4]

[3] Adapted from Equality and Human Rights Commission, *The Impact of a Human Rights Culture on Public Sector Organisations: Lessons from Practice* (2009) 87.
[4] Equality and Human Rights Commission, *The Impact of a Human Rights Culture on Public Sector Organisations: Lessons from Practice* (2009) 8.

A good human rights culture—the Victorian experience

At its heart, culture is the basic assumptions, beliefs and values of an organisation, sector or community.

Improving people's understanding of human rights, how they are protected and what they mean for individual and collective responsibilities is vital to developing a good human rights culture.

> The former UN High Commissioner for Human Rights, the late Sergio Vieira de Mello, summarised the importance of a good human rights culture:
>
> *The culture of human rights derives its greatest strength from the informed expectations of each individual. Responsibility for the protection of human rights lies with states. But the understanding, respect and expectation of human rights by each individual person is what gives human rights its daily texture, its day-to-day resilience*.[5]

The introduction of the Charter has been a clear part of building a human rights culture in Victoria, particularly in the Victorian public sector. Over time, implementation of the Charter has helped to build a greater consideration of and adherence to human rights principles by the public sector, Parliament and the courts in key areas. But this progress has stalled.

In its submission on this point, the Victorian Council of Social Service observed:

> *Since the introduction of the Charter, we have observed an increased understanding and awareness of human rights within government and public authorities. This has included incorporating the Charter into government policies and departmental plans and increased discussion of the human rights impacts of decisions on Victorians.*[6]

In its latest annual report on the Charter, the Victorian Equal Opportunity and Human Rights Commission noted:

> *… after eight years of operation, the use of the Charter has matured beyond simple compliance with the law. The Charter is not only part of 'everyday business' for many public authorities, but drives important human rights initiatives to address systemic issues.*[7]

However, more work is needed to spread this beneficial impact. The Victorian Council of Social Service noted:

> *… knowledge and application of the Charter remains inconsistent. VCOSS members provided examples where they had attempted to use the Charter to raise an issue or advocate on behalf of clients but these were not treated as serious considerations by government departments. Community organisations also reported that some staff in public authorities appear to have little knowledge of the Charter, do not recognise its relevance to their work or do not incorporate it in their policies or decision making.*[8]

---

[5] Sergio Vieira de Mello, *Statement to the Opening of the 59th Session of the Commission on Human Rights*, Geneva, 17 March 2003.
[6] Submission 64, Victorian Council of Social Service, 5-6.
[7] Victorian Equal Opportunity and Human Rights Commission, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities* (2015) 1.
[8] Submission 64, Victorian Council of Social Service, 6.

> *With little investment by the State Government over the last eight years, Darebin Council has worked hard to maintain its compliance with the Charter but has struggled to establish a systemic human rights culture within the organisation. Council recognises that culture change requires a long-term process. While implementing the Charter has been worthwhile and informative to date with many gains for the organisation and the community, in order to consolidate and build on the work, a redoubling of effort and investment by both levels of Government is required.*
>
> **City of Darebin, Submission 52**

The first four years of active implementation of the Charter was not enough to embed a human rights culture. My consultations highlighted a deprioritisation of the Charter in recent years, which has set back the development of a human rights culture in Victoria. In many ways, the Government needs to look afresh at its Charter implementation strategy. This Chapter highlights key areas that should be a priority.

> *Unless we make a long term commitment to the journey … we're not going to get there.*
>
> **Wayne Muir, Chief Executive Officer, Victorian Aboriginal Legal Service May 2015**

Building a more effective human rights culture

In looking at how to make a human rights culture more effective in Victoria, and particularly in the Victorian public sector, I've considered how cultures and organisations change. As one commentator observed:

> *Culture change in an organisation is the sum of changes made by each individual. To create meaningful cultural change, the change agent has to change individual behaviours and values one person at a time. Thus, to be effective, we need to focus on the ways in which individuals change. The challenge is to change sufficient numbers of people and completely enough to transform the culture of the organisation.*[9]

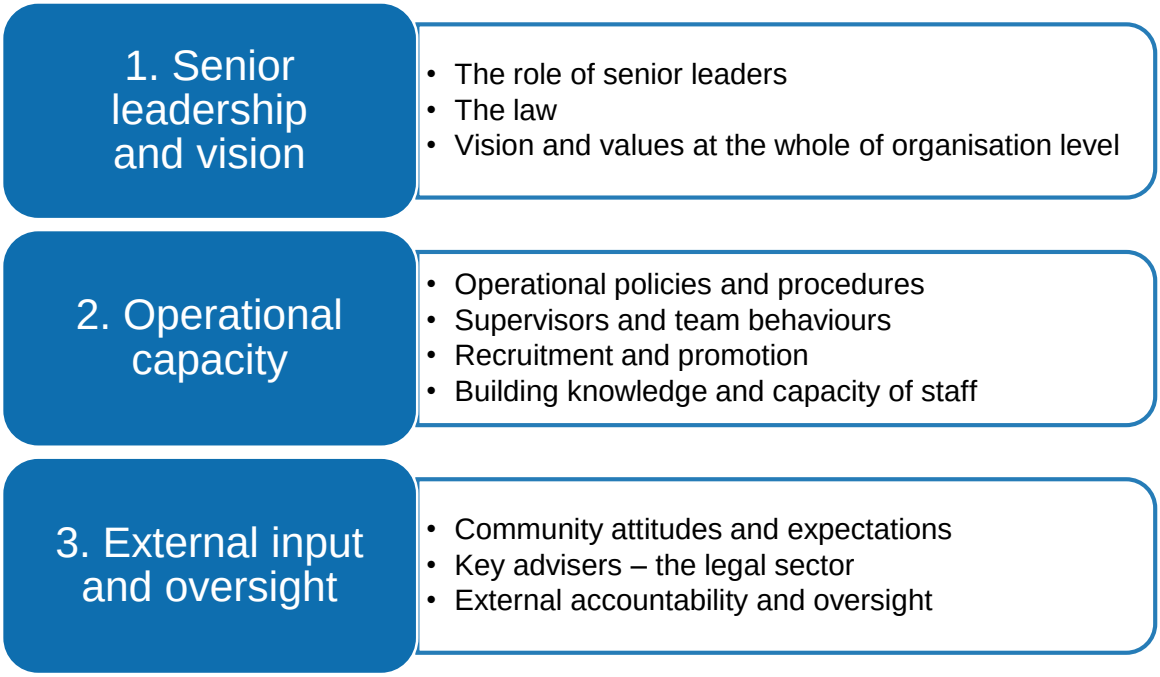
Human rights organisational change has been described as 'the process of moving an organisation to be more inclusive, and to fully respect and accommodate the dignity, worth and rights of all people'.[10] Importantly, this process involves not only making practices more compliant with human rights standards (although this change may come first), but also changing the underlying attitudes and values that influence behaviour in an organisation.[11]

For my analysis, I drew on frameworks that are relevant to culture development in the public sector in particular, referring to resources from the Victorian Public Sector Commission, and a recent study of human rights culture in closed environments.[12] While closed environments have particular issues, we can draw on common themes from this work.

---

[9] William Seidman and Michael McCauley, 'A Scientific Model for Grassroots OD' (2009) 27(2) *Organization Development Journal* 27, 29.
[10] Jem Stevens, 'Changing Cultures in Closed Environments: What Works?' (2014) 31 *Law in Context: Human Rights in Closed Environments* 228, 243.
[11] Jem Stevens, 'Changing Cultures in Closed Environments: What Works?' (2014) 31 *Law in Context: Human Rights in Closed Environments* 228, 243.
[12] Victorian Public Sector Commission, *Organisational Change*, 9, accessed at http://vpsc.vic.gov.au/wp-content/pdf-download.php?postID=4781; Jem Stevens, 'Changing Cultures in Closed Environments: What Works?' (2014) 31 *Law in Context: Human Rights in Closed Environments* 228.

There is no one magic solution to achieving positive cultural change, which can be difficult and take time. Cultural change is also context specific, and effective approaches in one context may not have the same impact in another. However, drawing on existing research and experiences in the public sector, I identified three key influences that contribute to an effective human rights culture, particularly for the public sector:



In Victoria, many of these influences are underused. For the Charter to be most effective, we need to draw on all these levers to support better outcomes. As commentators observed:

> *… successful influencers drive change in organisations by relying on strategies from several different sources of influence ... Those who understand how to combine multiple sources of influence are up to ten times more successful at producing substantial and sustainable change.*[13]

1. Senior leadership and vision

Across the public sector, three key influencers of culture start at the top: (a) senior leadership, (b) the law, and (c) organisation-wide vision and values.

a. Senior leadership

To achieve a positive human rights based culture, the leadership of an organisation must be committed.

[13] Joseph Grenny, David Maxwell and Andrew Shimberg, 'How to Have Influence' (2008) 50(1) *MIT Sloan Management Review* 47-52, 5.

When examining human rights culture in the United Kingdom, the Equality and Human Rights Commission noted:

> *Senior level commitment to human rights has been a critical success factor in all case studies. Visible support for human rights from politicians, Chief Executives, Board members and senior staff has been fundamentally important in beginning the journey to embed human rights. … What seems to be most important is that those in positions of authority not only sign off policies and 'make the right noises' in speeches and at conferences, but that they seek to lead by example and demonstrate in their day-to-day activities how staff can put into practice the values underpinning the HRA [Human Rights Act].*[14]

Leaders need to show they are committed to the culture and to ongoing improvement. This effort can mean publicising and showing their support, as well as demonstrating commitment through leadership by example.[15]

Leadership works at multiple levels: from the Government and Ministers, to departmental Secretaries, to team leaders and individuals who show leadership.

At all levels, leadership needs attention in the mix of factors that influence a human rights culture in the Victorian public sector. As the Victorian Public Sector Commission noted, overlooking accountabilities at different levels is one of the common failings of organisational change.[16]

i. Leadership from the Government

The demonstration of leadership on human rights needs to start at the top. The Government and Ministers set the expectations as senior leaders. If they show a commitment to human rights, and if they expect human rights to be considered in work and options put to them, then that behaviour influences the effectiveness of the public sector human rights culture.

As the Human Rights Law Centre noted in its submission:

… high-level leadership within government and public authorities is essential in encouraging and supporting a strong human rights culture within public authorities and in the effective operation of the Charter.[17]

The risk appetite of leaders at this level also influences culture. As noted, a mature risk appetite is one of the elements needed for organisational change.

> *Staff need to know that the organisation backs them—that they can have a go at a decision … Sometimes that decision will involve risk—a decision that's rights-empowering or that takes away rights can be the media story either way. There needs to be leadership in the organisation and at the political level that supports these decisions being made.*
>
> **Meeting participant, July 2015**

[14] Equality and Human Rights Commission, *The Impact of a Human Rights Culture on Public Sector Organisations: Lessons from Practice* (2009) 9, 28.
[15] Jem Stevens, 'Changing Cultures in Closed Environments: What Works?' (2014) 31 *Law in Context: Human Rights in Closed Environments* 228, 244.
[16] Victorian Public Sector Commission, *Organisational Change*, 11, available at: http://vpsc.vic.gov.au/wp-content/pdf-download.php?postID=4781.
[17] Submission 95, Human Rights Law Centre, 17.

Recommendation 1: The Victorian Government make a public statement of commitment to human rights and Ministers reinforce in their dealings with departments and agencies their expectation that they should act compatibly with human rights.

ii. Leadership from Secretaries

The Victorian Secretaries Board is another key site of leadership in the public sector. Leadership includes creating and driving values, as noted recently by Chris Eccles, Secretary of the Department of Premier and Cabinet.[18] So, building a human rights culture within the Victorian public sector should be a visible part of the work of the Victorian Secretaries Board. To support this work, the Human Rights Leadership Forum should be re-established. This forum was an inter-departmental committee formed when the Charter was enacted. It provided leadership and coordination for public authorities' Charter implementation at the state government level.

Recommendation 2: The Victorian Secretaries Board include the development of a human rights culture as part of its work in setting values and standards across the Victorian public sector. An inter-departmental committee should support this work by providing leadership and coordination for departments and agencies at the state government level.

iii. Other leaders in organisations

Leaders can operate at all levels of the organisation. For example, the Department of Premier and Cabinet (DPC) reported in 2013 that:

> *DPC has operated a Charter Ambassador program for a number of years. The program recognises that the most useful resource is often an employee with the training and knowledge to assist their colleagues. … The program ensures that human rights awareness and events are promoted in the Department, and provides a first port of call for employees on human rights issues. Charter Ambassadors are encouraged to attend training on the Charter (including training provided by the Victorian Equal Opportunity and Human Rights Commission) and to participate in less formal knowledge-sharing within DPC.*[19]

In other areas of law, such as privacy, coordinator networks across departments and agencies offer ongoing source of information and practical support across organisations. But this sharing of expertise has fallen away with the Charter.

We do not need a formal program for change champions to influence organisational culture, but executive staff should be able to identify contact points or leaders at the officer level in their organisation. These leaders should be a reference point on the Charter for other staff. They need skills, time and training to undertake this role.

[18] Chris Eccles, Secretary of the Department of Premier and Cabinet, 'Leadership from the Centre' (Paper presented as part of Public Sector Week, Melbourne, 23 June 2015), edited extract available in *The Mandarin* at http://www.themandarin.com.au/41132-chris-eccles-leadership-centre/?pgnc=1.
[19] Information provided by the department to the reviewer, July 2015.

b. The law

Creating the Charter as a law was an act of leadership by the Victorian Parliament.

A traditional and recognised social policy tool, legislation can provide a symbol of accepted values and standards in society. The strength of legislation for bringing about change derives from the legitimate authority that the law commands in society, and from the fact that sanctions may back up the law. New laws can lead to changes in behaviour, especially when institutions enforce those laws.

The literature contains some debate about the extent to which human rights legislation alone can bring about culture change. Legislation can be criticised as creating a bureaucratic 'tick the box' compliance exercise. However, as one commentator suggested, 'there is no denying that legislation can play a role as part of the broader jigsaw of culture change'.[20] This role is evident in areas such as occupational health and safety, privacy and discrimination law, where legal standards have driven employers to address potential liabilities by taking reasonable steps to prevent breaches of the law in their workplace.

I make recommendations in **Chapters 3 and 4** of the Report on how to make the Charter more effective by clarifying its operation as a law and the ability of people to make complaints when they feel that things have gone wrong. These recommendations would affect the human rights culture of the public sector, so the Charter is seen not just as a policy statement but as something that has the force of law—that is, it is binding in nature and has consequences.

c. Vision and values at the whole-of-organisation level

The organisational paradigm (what the organisation does and why) is also a key element of developing a human rights culture. Its influence on culture involves setting human rights within an organisation's overarching vision and values. Most public sector organisations have a vision that sets the high-level direction of the organisation. Business plans and operational policies sit under it, to put the vision into action in the context of different work areas.

We are not starting from scratch in the effort to build human rights values into the public sector. Across the Victorian public sector, I have seen a lot of positive work to set the mission and put human rights within the context of public sector values. One key initiative was to incorporate human rights into the *Code of Conduct for Victorian Public Sector Employees*.

> *Human rights are not new to the public service – it's in our DNA. Most people are here because they believe in what we do…But the Charter can provide a more consistent and coherent framework. When your moral compass tells you something about the way you're treating a person isn't right – you might need to think outside the standard operating procedures to think about the person in front of you – the Charter can help to enliven that.*
>
> **Meeting participant, July 2015**

[20] Jem Stevens, 'Changing Cultures in Closed Environments: What Works?' (2014) 31 *Law in Context: Human Rights in Closed Environments* 228, 257.

State of the Public Sector Report: a snapshot of culture in the Victorian Public Service

Each year, the Victorian Public Sector Commission conducts a survey of state government public servants.

The results of the past three annual *People Matter Surveys*, indicate a high and consistent percentage of public sector survey respondents felt they understood how the Charter of Human Rights and Responsibilities applied to their work.[21] This finding is positive and represents a very high level of employee engagement with organisational values. Different questions were asked in previous years, so no direct comparison of results can be made across all years of the Charter's operation.

In 2014, 78 per cent of respondents indicated that they agree, or strongly agree with the statement '*I understand how the Charter of Human Rights and Responsibilities applies to my work*'. However, eight per cent either disagreed or strongly disagreed with this statement and 14 per cent said they didn't know. This proportion rose to 16 per cent who didn't know how the Charter affects them as an employee.

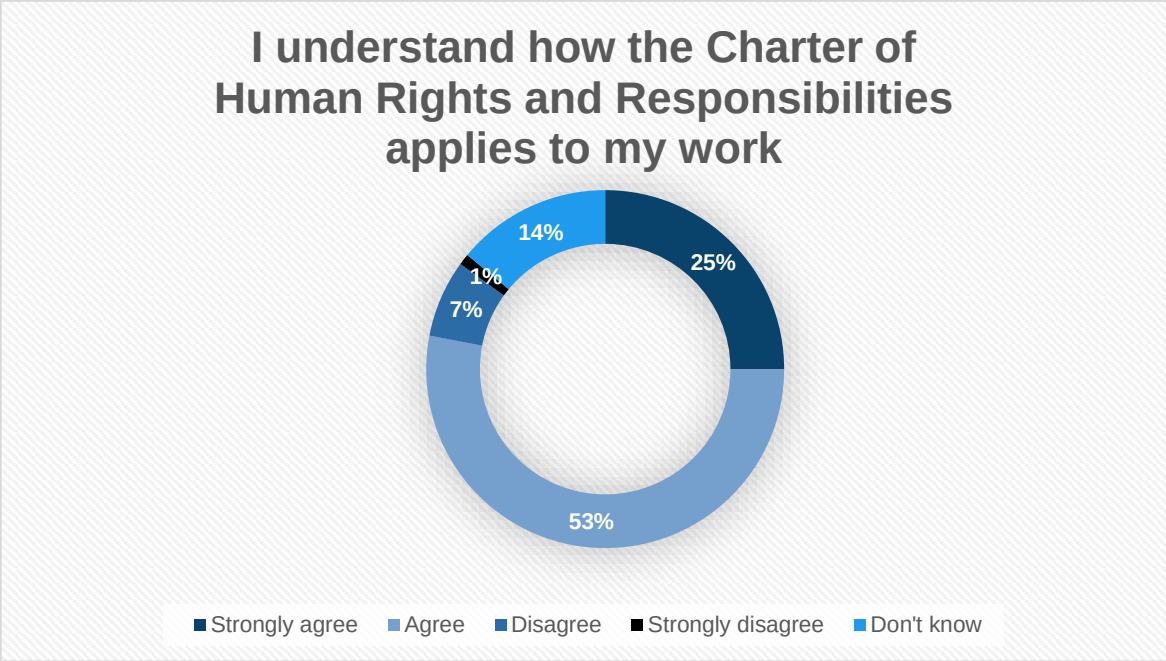
Ten per cent didn't know if their organisation has policies that require employees to act in ways that are consistent with human rights and three per cent disagreed or strongly disagreed that their organisation does have such policies.[22]

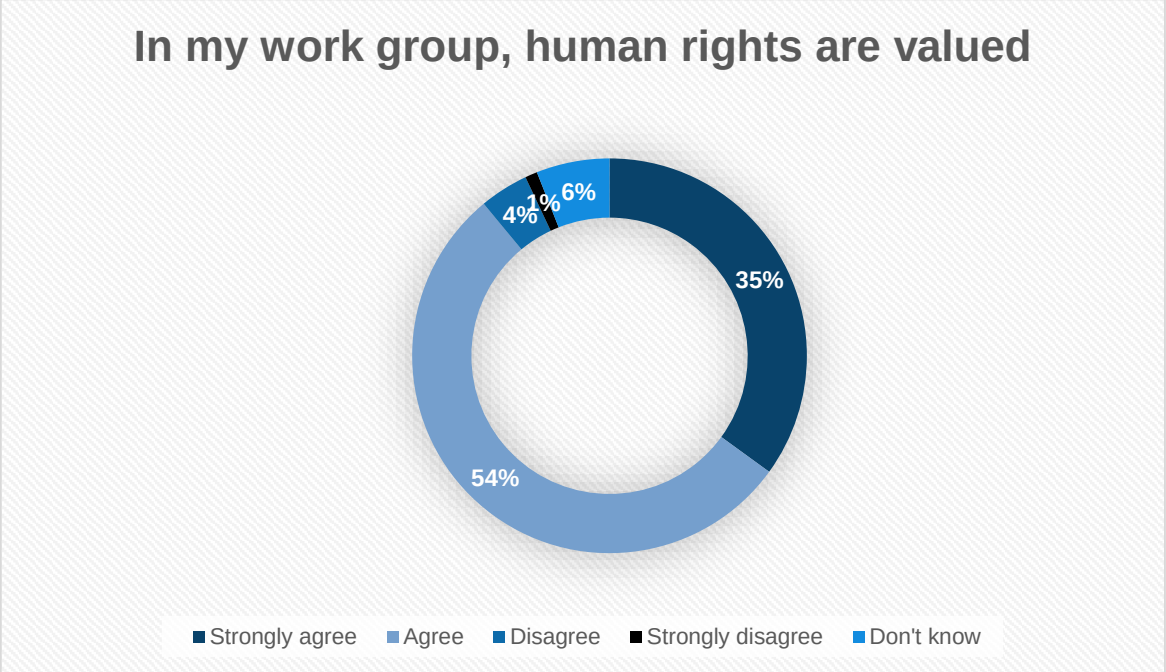
While respondents showed a very high overall agreement with the statement '*In my workgroup, human rights are valued'* (89 per cent), only 35 per cent of this group strongly agreed that human rights are valued in their workgroup.

The 2014 survey was conducted across 154 public sector organisations (58 per cent of employing organisations, excluding schools). Sixty per cent of all public sector employees (156,040) were invited to take part, and 19 per cent of those employees (50,159) responded—a 32 per cent response rate.[23] No data is available to indicate whether people who chose not to respond to the survey have less, more or the same engagement with human rights. But some correlations may exist between lower workplace engagement and survey non-response.

[21] Victorian Public Sector Commission, *The State of the Public Sector in Victoria* (2014) 120; Victorian Public Sector Commission, *The State of the Public Sector in Victoria* (2013) 143; Victorian Public Sector Commission, *The State of the Public Sector in Victoria* (2012) 128.
[22] Victorian Public Sector Commission, *The State of the Public Sector in Victoria* (2014) 120.
[23] Victorian Public Sector Commission, *The State of the Public Sector in Victoria* (2014) 100.

Figures 2 and 3: The State of the Service 2014[24]





[24] Victorian Public Sector Commission, *The State of the Public Sector in Victoria* (2014) 120.

To be effective, the vision and values of the organisation need to be articulated by the leadership of each public authority. They need to be written down and explained to all staff disseminated among staff so they become a point of reference in people's work.[25]

A number of organisations provide examples of how to set an organisation-wide vision. Victoria Police, for example, used the human rights to support its organisational values, and noted in its recent Blue Paper:

> *… the fundamental purpose of policing is the protection and vindication of the human rights of every citizen. Equally, police must protect human rights in the exercise of their duty; every interaction between a sworn officer and a member of the public conveys strong signals about whether that person is treated with respect and dignity.*[26]

As a new community health organisation (created by three community health services merging), cohealth, established a human rights-based approach as one of its key defining features:

> *The commitment to human rights was an explicit component of cohealth's 'merge proposition'. Rights-based practice and supporting mechanisms have successfully been embedded in the core architecture of our organisation, and are being implemented in planning, service-delivery and interactions with the community. The principles of participation, accountability, non-discrimination and attention to vulnerable groups, empowerment and linkages to human rights (PANEL principles) are being realised in all of these facets and dimensions of our organisation.*[27]

The shift in an organisation's vision and values to align with human rights sends a signal to staff and the community. Further, having a human rights consistent vision can have a profound effect on the way in which the organisation tackles challenging decisions. One example came out of the 2009 Victorian Bushfires Royal Commission:

Example: a human rights vision in bushfire management—protection of life

Recommendation 59 of the 2009 Victorian Bushfires Royal Commission was that the Department of Sustainability and Environment amend the Code of Practice for Fire Management on Public Land in part 'to include an explicit risk-analysis model for more objective and transparent resolution of competing objectives, where human life is the highest priority'.

The principles now state 'Protection of human life as the highest priority: The protection of human life (emergency services personnel and the community) will be given priority over all other obligations in bushfire management'.[28]

The prioritisation of the preservation of life has now been extended to all emergencies through the State's strategic control priorities.[29]

[25] Jem Stevens, 'Changing Cultures in Closed Environments: What Works?' (2014) 31 *Law in Context: Human Rights in Closed Environments* 228, 245.
[26] Victoria Police, *Victoria Police Blue Paper: A Vision for Victoria Police in 2025* (2014) 9.
[27] Submission 49, cohealth, 3-4.
[28] Department of Sustainability and Environment, *Code of Practice for Bushfire Management on Public Land* (2012) 5.
[29] Emergency Management Victoria, *Emergency Management Manual Victoria* (2013) 3-2.

This prioritisation is an example of a guiding mission that operationalises the right to life and balances it with competing rights and interests such as the protection of property. Putting people at the front of this high-level policy statement affects how operational decisions are made. So, it is important to get these guiding principles right to achieve a human rights consistent culture in the rest of the organisation. That is, referencing the Charter is not what matters, but rather achieving human rights outcomes on the ground. This example shows how a single statement brought the most fundamental of human rights to the front of decision making in emergency management.

Victorian public sector entities should ensure they have an organisational vision statement or goal that reflects human rights and puts people at the centre of their work. This would help to translate leadership vision into organisational policies and procedures, and ultimately, into action.

I make a recommendation below that public sector entities should ensure their organisation's guiding documents support human rights outcomes.

2. Operational capacity

The next key influence is what happens at the operational level. It is: (a) guided by plans, policies and procedures; (b) informed by supervisors and team behaviours; (c) shaped by recruitment and promotion; and (d) supported by the knowledge and capacity of staff.

a. Plans, policies and procedures

i. Plans

One way of creating a culture of action on human rights is to make commitments against which the organisation is measured. This mechanism can work through public or internal commitments, as long as they are built into organisational reporting and accountabilities mechanisms.

The Human Rights Law Centre's submission recommended, for example, 'the development of clear action plans to promote the effective implementation of the Victorian Charter'.[30]

Example: City of Darebin's Human Rights Action Plan

City of Darebin in 2011 developed the Darebin Human Rights Action Plan 2012-15. This plan was partly a response to opportunities provided by the Charter, but also built on Council's previous equity and diversity work. The initiative articulated Council's strategic commitment and set out actions that embed human rights in Council's culture and practice at all levels, and ensures Council meets its legal responsibilities under the Charter. The plan also includes actions that commit Council to working with citizens to strengthen relationships with, between and in communities based on the key human rights values.[31] The Council noted the plan has been the significant driver of change in the organisation.

[30] Submission 95, Human Rights Law Centre, recommendation 5.
[31] Submission 52, City of Darebin, 2.

Setting out human rights goals and targets helps to identify the organisation's desired improvements and achievements. Building them into an action plan, or into existing business planning and reporting mechanisms, helps give them the focus and attention needed to get done.

The Department of Education and Training provides one example of this idea in action. Its human rights commitments became mandatory content for all departmental office business plans in 2010:

> *DET office business plans must include actions to ensure employees understand how the Charter applies to their work and to ensure that they respect and promote human rights set out in the Charter. A help sheet is available with examples of strategies and performance indicators to support these actions.*[32]

I make a recommendation below encouraging public entities to ensure their organisational plans and policies support human rights outcomes.

ii. Operational policies and procedures

Operational policies and procedures help guide decision-making staff on how they put the organisation's vision and values into practice. As identified in my consultations:

> *High level policy is one thing, but you change behaviour in service delivery areas through operational policy. That's what people work to.*
>
> Meeting participant, July 2015

Example: establishing human rights compliance in a new agency

As a relatively new public authority, the Mental Health Complaints Commissioner (MHCC) is building Charter compliance into her operational practice from the start:

Key human rights relevant to the way we perform our functions are the right to equality before the law and the right to privacy and reputation …

The MHCC's principles of being accessible and supportive reflect our commitment to a non-discriminatory approach that ensures everyone can access and use our information and services, and that we treat all people with respect …

The right to privacy is a key Charter right that has guided our approach to accepting complaints from a person who is not the consumer … The MHCC has adopted … principles to ensure any interference with a person's privacy is lawful and not arbitrary [including a presumption of capacity of the consumer, case by case consideration of special circumstances, and making every effort to involve the consumer in the resolution of the complaint].[33]

I heard many great examples during my consultations. For example, in 2014 Moreland City Council began developing a Human Rights and Inclusion Policy to strengthen its social policies by bringing them together under one holistic, human rights based policy.[34]

[32] Information provided to the reviewer, July 2015.
[33] Submission 29, Mental Health Complaints Commissioner, 4-5.
[34] Submission 99, Moreland City Council, 1.

The Department of Education and Training noted its Wellbeing, Health and Engagement Division began in 2014 to develop policies to support students across the spectrum of gender identity and intersex students. Consideration of students' human rights in this context informed and shaped the development of the policies. The department also developed information sheets to support decision making by school principals.

The Department of Premier and Cabinet too noted an example of how the Charter is built into its decision making:

> *The Charter is considered and included in evaluation documents as part of the decision-making process under the Aboriginal Heritage Act 2006 (e.g. cultural heritage management plans and cultural heritage permits). Decision-makers at OAAV* [Office of Aboriginal Affairs Victoria] *consider whether any human rights in the Charter are engaged by their decision, and if so, whether the decision limits or is incompatible with the human right. Where the human right is limited or is incompatible, the decision-maker considers whether this is demonstrably justified.*[35]

As a community organisation committed to good human rights practice, Good Shepherd reviewed its internal policies against the Charter:

> *This included incorporating human rights into internal agency policies and procedures, and into workforce training at staffing meeting and bi-annual agency days. This is not and should not be considered to be a 'one-off' exercise. If we are genuine in our want to see cultural change this process must be an ongoing one, and is therefore built into the organisation's continuous improvement processes.*[36]

Some organisations use outside experts with human rights expertise and an understanding of the organisation to help build human rights considerations into operational documents.

Example: shaping policy and putting it into practice

In July and August 2012, five children were transferred from youth justice centres to adult prison, including a 16-year-old Aboriginal boy who was held in solitary confinement at Port Phillip Prison for a number of months.

These events prompted the Department of Human Services (the Department)[37] *to begin work to minimise the number of young people, particularly children, transferred from youth justice centres to prison. As part of this work, the Department requested that the* [Victorian Equal Opportunity and Human Rights] *Commission review key policy documents relating to the transfer of youth justice clients to adult prisons.*

Corrections Victoria also requested that the Commission review sections of their Sentence Management Manual … This allowed the Commission to conduct a holistic review of youth justice transfers to prison.

[35] Information provided by the department to the reviewer, July 2015.
[36] Submission 97, Good Shepherd Australia New Zealand, 7.
[37] The Department has the statutory responsibility for the care, custody and supervision of children who have been sentenced or remanded to a Youth Justice Custodial Centre. It initiates the request for transfers from the Youth Justice Precinct.

> *The Commission and the agencies took a collaborative approach to the review, with opportunities to seek clarification and solve problems together. … The Commission provided an overview of the legal framework and guidance on how human rights are engaged when a young person is transferred to prison, specific advice on current and proposed policy documents, and developed a practical guide to the 'Key questions to ask when thinking about the human rights implications of a transfer to adult prison'. The agencies accepted a significant proportion of these recommendations.*
>
> *Importantly, the collaborative approach also led to the agencies accepting the Commission's offer of human rights training for staff. The Commission delivered training to Youth Justice Centre unit managers, focussing on strengthening their human rights practice and developing a human rights-based framework for decision-making… Corrections Victoria and the Commission developed training designed specifically for Sentence Management Branch (SMB) staff responsible for conducting prisoner classification ... The core content of the training included the Charter, proper consideration of human rights at each step of the placement process, and when limits on rights are justified … The Education Consultant that delivered the training reflected that "… By the time the training was over, workers from the SMB were talking about the Charter as something that supported their work as a transparent tool for the decisions they face every day".*
>
> *Following the Ombudsman's investigation and the Commission's review, there have been no further transfers of children to adult prison.*
>
> **Victorian Equal Opportunity and Human Rights Commission Submission 90**

I make a recommendation below encouraging public entities to have operational policies and procedures that support human rights outcomes.

b. Supervisors and team behaviour

Supervisors and team behaviour significantly influence culture in an organisation. Supervisors translate an organisation's mission and values into real action, and the team's sub-culture has a self-regulating impact on its members.

The individuals in management positions (especially operational managers who deal with the everyday operations of an organisation) have a key role. They must show they believe in, and are prepared to enforce, the organisation's policies and procedures. This behaviour must not be just bureaucratic, but also recall the principles behind the policies and demonstrate how to practise them.[38]

cohealth noted how it is supporting this influence:

> *We provide staff education and training to ensure understanding of and compliance with human rights obligations. A key target of this training has been management-level staff with responsibility for development, approval and implementation of organisational frameworks and policy. … This approach is designed to build and support staff capacity to balance competing rights, discuss complex issues using a common set of shared values, and bring to the fore countervailing interests and obligations.*[39]

[38] Jem Stevens, 'Changing Cultures in Closed Environments: What Works?' (2014) 31 *Law in Context: Human Rights in Closed Environments* 228, 251-252.
[39] Submission 49, cohealth, 5.

The following example from Victoria Police shows what can happen when culture is not performing well. The organisation's response also demonstrates its awareness of what is needed to better harness the line manager and teams as builders of organisational culture.

Example: racist stubby holders that reveal issues at the team level

In 2013 and 2014, two stories were in the media about the production of racist stubby holders at Sunshine and Bairnsdale police stations.[40] These incidents illustrate three influence points for organisational culture. Each point could have acted as a brake on the incident before it reached the media, and thus lessened the impact on the organisation.

Influence point 1: Individual decision making—The individuals could have chosen not to create the stubby holders.

Influence point 2: Supervisor and team behaviour—Sergeants and other team members were another potential brake on the situation, to question or stop the behaviour.

Influence point 3: Internal complaint-handling and accountability—The internal complaint procedure was another potential influence to pull up and address the behaviour. IBAC noted the internal investigation:

… of allegations against members of the social club resulted in findings of 'unsubstantiated', except for one police officer … against whom the allegation was 'not proceeded with' …

IBAC regarded the PSC [Victoria Police's internal Professional Standards Command] *conclusion that the terms used were not racist as contentious, and noted the PSC acknowledgement of the language and terms used on the stubby holder as not compatible with Victoria Police values. On 16 January 2014, IBAC recommended to the CCP [Chief Commissioner of Police] that the outcome of the investigation be amended to 'substantiated' …*[41]

A human rights culture in the team could have corrected this behaviour at the operational level. Ultimately, Victoria Police's response recognised the role of supervisors in setting the standard for the team. When addressing the media about the final disciplinary action following the Sunshine incident, then Chief Commissioner Ken Lay APM said one sergeant was charged with disgraceful conduct and dismissed from Victoria Police. Other police members were moved after they failed to take decisive action when they became aware of the stubby holders. Additionally, these police officers were required to undertake a human rights training course developed by the Victorian Equal Opportunity and Human Rights Commission.[42]

[40] Jon Kaila, 'Officers Charged over Racist Stubby Holders Used at Sunshine Police Station', *Herald Sun* (online), 10 August 2013 http://www.heraldsun.com.au/news/law-order/officers-charged-over-racist-stubby-holders/story-fni0fee2-1226694644916; Peter Mickelburough, 'More Police Sackings Loom over Second Racist Stubby Holder', *Herald Sun* (online), 12 March 2014, http://www.heraldsun.com.au/news/law-order/more-police-sackings-loom-over-second-racist-stubby-holder/story-fni0fee2-1226852956715.

[41] Independent Broad-based Anti-corruption Commission, *Special Report Following IBAC's First Year of Being Fully Operational* (2014) 14.

[42] Statement by Chief Commission Ken Lay APM, youtube, accessed on 17 July 2015 https://www.facebook.com/victoriapolice/posts/798985263462205.

Example: Victoria Police Blue Paper—A Vision for the Future

The timely *Victoria Police Blue Paper* in 2014 identified system issues that could help to re-engage key influences of culture at the operational level:

1. Continuing education: *Continuing education and training for police does not sufficiently support psychological health and ethical standards, and many middle-level managers have received inadequate professional development for their roles; those in country areas can't readily access continuing professional development.*[43]

2. An enhanced ethical framework: *An enhanced ethical framework of the future will encompass:*

- *more rigorous recruitment processes and checks*
- *ongoing ethics training throughout an employee's career*
- *early intervention systems*
- *promotion requirements and performance indicators*.[44]

3. Leadership development: *Ongoing structured professional development in leadership, at all levels, should become a prominent and regular feature of education and training for Victoria Police members. Just as ongoing twice yearly requalification in operational tactics and safety is considered essential, leadership development should be similarly valued. Such professional development should support strong values-based leadership in daily activities. It should focus on people, performance and professionalism, to support the culture the Victoria Police needs*.[45]

4. Valuing the way people are treated as part of good performance: *Equally, they should be judged on the way in which they undertake their policing duties—the extent to which they treat citizens and their colleagues with respect and dignity. More senior officers should also be judged on management of people and financial resources, and public satisfaction. Appropriate weightings should be given to particular measures, so that an individual's performance is assessed according to a balanced view of good police practice*.[46]

c. The right people in the right place

Having the right supervisors and the right team culture starts at recruitment. The nature and demographic of the workforce can have a significant impact on the culture that develops within an organisation. Victoria Police took a proactive approach, being clear about the values and expectations of the organisation on entry, and working towards a workforce that is as diverse as the community that it serves.[47]

Positive cultural change will also involve ensuring the right staff are placed in key positions. It is not always enough to have the right person at the top. Particularly in large departments or agencies, individuals are needed with the skills to lead change and engage in human rights at the operational level.[48] These capabilities need to be valued, rewarded and considered as part of the organisation's performance and promotional structures.

[43] Victoria Police, *Victoria Police Blue Paper: A Vision for Victoria Police in 2025* (2014) 17.
[44] Victoria Police, *Victoria Police Blue Paper: A Vision for Victoria Police in 2025* (2014) 41.
[45] Victoria Police, *Victoria Police Blue Paper: A Vision for Victoria Police in 2025* (2014) 44.
[46] Victoria Police, *Victoria Police Blue Paper: A Vision for Victoria Police in 2025* (2014) 45.
[47] Victoria Police, *Victoria Police Blue Paper: A Vision for Victoria Police in 2025* (2014) 41.
[48] Jem Stevens, 'Changing Cultures in Closed Environments: What Works?' (2014) 31 *Law in Context: Human Rights in Closed Environments* 228, 249.

> *If my career progression depends on it, maybe I need to get my head around it.*
>
> **Meeting participant, May 2015**

Some agencies already send these messages to staff. Public Transport Victoria provides a useful guide to its 'values in action', which underpins its performance assessment cycle. This guide includes a commitment to being a 'customer-first' organisation: 'Putting the customer first is not just a frame of mind, it is a principle embedded in our processes'.

Victoria Police also reported using professional development opportunities as an incentive. For example, when implementing the Charter Victoria Police set up a professional development program that included employees designing and implementing a human rights project in their work area.[49] Such initiatives should be encouraged.

It would also be useful for the Victorian Public Sector Commission (and other professional bodies and institutions that help to build the leadership skills of the Victorian public sector) to ensure that human rights related capabilities are part of public sector leadership development courses and materials.

Recommendation 3: The Victorian Government encourage public sector entities to promote a human rights culture in their organisations, including by:

(a) ensuring their organisational vision, plans, policies and procedures support good human rights practice

(b) building relevant human rights capabilities into staff position descriptions and ongoing professional development.

d. Staff knowledge and capability

It will take time for a human rights culture to permeate all levels of government, but it will also require an ongoing commitment to human rights training and education. Sustained engagement and investment in education is the more efficient and economical approach to building a human rights culture in the early stages, rather than a stop and start approach that has been evident in some public authorities in recent years because of changes in priorities and resourcing.

Justice Connect Homeless Law noted in its submission:

> *… while Homeless Law witnessed changes in the quality and transparency of service provision to our clients in the initial years of the Charter's operation … some of these changes have stalled or even regressed.*
>
> *Institutional change takes time, and practical, compliance-focused training is important to strengthening the Charter's ability to deliver fair outcomes for Victorians. It is important that training is refreshed and repeated, particularly to accommodate for staff turnover and for new developments in the Charter's operation.*[50]

[49] Victoria Police, *Victoria Police Annual Report 2007-08* (2008) 46.
[50] Submission 79, Justice Connect Homeless Law, 30.

The support and infrastructure in place for education and training on the Charter when it started are significantly different now, which submissions noted.[51] For this Review, I looked at (i) state government, (ii) local government, and (iii) functional public authorities in the private and community sectors.

i. State government

The Charter came into effect on 1 January 2007. The Parliament allowed one year for public authorities to prepare for their obligations under the Charter, with those obligations starting from 1 January 2008. A range of government and non-government bodies were funded to train and educate public sector agencies with obligations under the Charter, so those agencies were prepared for its enactment. An overview of the support provided within the state government is below.

The Human Rights Unit of the then Department of Justice was responsible for developing and delivering a whole-of-government human rights education and communication strategy in 2007. This strategy included Legal and Legislative Policy Officer Training delivered to over 500 participants and a train-the-trainer course delivered to 300 services. Additionally, the Victorian Government Solicitor's Office and the Human Rights Law Resource Centre (now the Human Rights Law Centre) provided training and guidance.[52] Departments also undertook a range of education and communication initiatives.[53]

Some departments and agencies have continued their training agenda, which is positive:

- several departments reported having an online Charter of Human Rights training module in the department's induction or ongoing compliance calendar, and
- Victoria Police has put over 2,500 police recruits and protective services officers through compulsory human rights training at the foundation level.[54]

Others provided mechanisms for advice and guidance. The Department of Health & Human Services, for example, noted:

> *the Brimbank Melton Area has established a Human Rights Review Panel that meets monthly…The panel provides guidance to staff regarding the application of Charter rights in specific cases, and particularly involving potential limitations on human rights. … For example, the panel has been constructive in making recommendations and decisions regarding the types of supports being provided in the family home to persons with a disability or mental illness…*[55]

[51] For example, Submission 91, Federation of Community Legal Centres, 11.
[52] Victorian Equal Opportunity and Human Rights Commission, *Emerging Change: The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities* (2009) 30.
[53] Including information materials, guidelines, posters and postcards, online training modules, a human rights calendar, case studies and workshops. See Victorian Equal Opportunity and Human Rights Commission, *Emerging Change: The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities* (2009) 35-36.
[54] Submission 105, Victoria Police, 2.
[55] Information provided by the department to the reviewer, July 2015.

Core support within government: The role of the Human Rights Unit

At the broader state government level, the Human Rights Unit in the Department of Justice & Regulation now has limited capacity. It was 5.5 FTE in 2007-08, 4.2 FTE in 2009-10 and at the time of writing this Report was 1.7 FTE. The Unit now focuses on providing advice across government on legislation, statements of compatibility and human rights certificates for regulations.

The Human Rights Unit and the Victoria Government Solicitor's Office jointly manage the Victorian Public Service (VPS) Human Rights Portal (an online information repository for VPS staff).

The portal houses the Charter of Human Rights and Responsibilities: Guidelines for Legislation and Policy Officers in Victoria, which were published in 2008 and have not been updated due to resource constraints. The Department of Environment, Land, Water and Planning stated the document is 'an absolutely invaluable resource, but … it would be helpful if it could be updated to reflect any trends or changes that have arisen since the Charter commenced operation' and that there are now inconsistencies to be addressed.[56]

There is also public concern that the Human Rights Unit lacks the capacity to properly support the Charter. For example, the Castan Centre for Human Rights Law's submission noted:

> *We also recommend a substantial increase of resources for the Human Rights Unit within the Department of Justice. The HRU should have the capacity to lead the implementation of the Charter across the whole of government.*[57]

The Government should ensure the Human Rights Unit has sufficient capacity to provide advice, be the central point for information and resources on the Charter within government, and provide specialist training such as how to prepare Charter compatible policy, legislation and statements of compatibility. Further, resources such as the Charter Guidelines should be updated and supplemented with guidance for specific policy and service delivery areas.

The Government should review the structure of the Human Rights Unit to determine the staffing and skills needed to support Charter compliance within the Victorian public sector. The current staffing of 1.7FTE is not sufficient. The Unit should have additional personnel with qualifications and/or practical experience in human rights and the capacity to deliver specialist training and advice to government departments and agencies. This would build on work that is already being done by public authorities, such as the human rights training Victoria Police provides to its recruits and the implementation of human rights action plans by local councils.

Additionally, the Unit review should consider where in government the Human Rights Unit should sit. The Department of Justice & Regulation has the legal expertise and history of working with the Charter. This expertise is extremely valuable. On the other hand, the Department of Premier and Cabinet is the agency responsible for whole-of-government initiatives and provides oversight and consistency across the public service. It has policy responsibility for other areas of public administration and oversight, such as the Ombudsman, the Victorian Auditor-General's Office, Privacy and Freedom of Information. The Charter is about more than laws, it is also about policy and culture. The Government should consider this factor when determining placement of the Human Rights Unit.

[56] Information provided to reviewer, July 2015.
[57] Submission 26, Castan Centre for Human Rights Law, 4.

Recommendation 4: The Victorian Government review the structure and placement of the Human Rights Unit so that it can provide centralised expertise on human rights within government. The Unit's role should include providing advice, developing and maintaining human rights resources for use within the Victorian government, and providing specialist training (such as training on how to develop human rights compatible policy and legislation, and how to draft statements of compatibility).

Recommendation 5: The Human Rights Unit update the Charter Guidelines for Legislation and Policy Officers. The Unit should also work with departments and agencies to continue to develop specialist guidance and promotional materials in key areas of policy and service delivery, such as policing, corrections, health services, disability services, child protection and education.[58]

Broader human rights training within government: the role of the Victorian Equal Opportunity and Human Rights Commission

Broader human rights training for state government departments and agencies is now generally provided by in-house staff, the Victorian Government Solicitor's Office (on an ad-hoc basis) and the Victorian Equal Opportunity and Human Rights Commission.

The Commission is the core provider of Charter education and training. It does not have sufficient capacity for this broader educative role across government, but has tried to fill a gap in recent years. In addition to training, the Commission produced resources for public authorities (practical information, case studies and tools).[59] It also established a human rights network to provide information, ideas and networking opportunities to public sector workers. Members of the network receive email updates, invitations to events and resources.

The Commission also partnered with the Department of Justice & Regulation's Human Rights Unit to deliver training and education program for the VPS graduates. The Human Rights Unit reported this training had a significant impact on graduates' commitment to a human rights approach. Such training could be extended to other public servants.

Education work of the Office of the Victorian Privacy Commissioner

… Privacy Victoria undertakes a wide range of other stakeholder engagement activities to continually improve understanding of privacy issues, rights and best practice amongst the Victorian Public Sector … During 2013-14:

- *146 organisations and approximately 3,900 individuals participated in our privacy awareness and training program*
- *155 public sector awareness and training activities were delivered*
- *Almost 2,750 staff from 123 public sector and other organisations registered for online training, and*
- *At 30 June 2014, 705 people were members of the Privacy Victoria Network*.[60]

[58] See Chapter 6 for discussion of the guidance material available to departments when drafting statements of compatibility.
[59] For example, Victorian Equal Opportunity and Human Rights Commission, *The Charter of Human Rights and Responsibilities—A Guide for Victorian Public Sector Workers* (2014)*;*
Victorian Equal Opportunity and Human Rights Commission, *Rights and Risks: How Human Rights Can Influence and Support Risk Management for Public Authorities in Victoria* (2014)*.*
[60] Office of the Victorian Privacy Commissioner, *Annual Report 2013-14* (2014) 21.

In my conversations with departments and agencies, I found the most successful training was tailored, and had a persuasive as well as informative element. That is, it could demonstrate 'what's in it for me?' and 'how is this relevant to my job?'. Some people considered the generic nature of the Charter information available means operational areas may find it difficult to determine how the Charter is relevant to day-to-day activities.

The Equality and Human Rights Commission came to a similar conclusion in its study of a human rights culture in the United Kingdom:

> *The most effective training seems to be that which is conducted with the active buy-in of senior managers; is tailored to the specific needs of each service or department; and incudes an element of action planning, allowing staff to identify concrete ways in which they can embed lessons learnt into their working practice. …*
>
> *Though generic awareness-raising can be useful as a first step, what seems to be important is that staff are encouraged to think about the particular human rights issues that are relevant to their area of work.*[61]

Human rights education should be not one-off training, but part of an ongoing program to include new and existing staff. I make recommendations on education below. Priority should be given to oversight and complaint handling bodies, areas where oversight bodies have identified acute problems with Charter compliance, and department and agencies with responsibilities in relation to the most vulnerable Victorians.**ii. Local government**

To implement the Charter in local government, the Victorian Local Government Association and the Municipal Association of Victoria partnered with Local Government Victoria, the Department of Justice, the Australian Centre for Human Rights Education and the Victorian Equal Opportunity and Human Rights Commission to run a variety of training and education initiatives across councils.[62]

Local government appears to have taken up its Charter obligations and worked hard to understand and implement Charter-compliant policies and practices.

> *As the level of government closest to the people, councils have a significant role in developing resilient communities that respect human rights. The Charter is a catalyst to ensure that human rights are better protected, better understood and, importantly, better reflected in government operations and decisions. Victorian councils have been enhanced by the Charter, and accept their responsibility to lead by example.*
>
> **Municipal Association of Victoria, Submission 88**

Maribyrnong City Council's submission, for example, noted it has a Human Rights and Social Justice Steering Group to create 'a greater awareness of human rights and social justice issues in Council and to support social justice in the local community'.[63]

The Victorian Equal Opportunity and Human Rights Commission noted it conducted 159 education sessions for local government from 2011 to 2014 (compared with 37 for state government).[64] However, more assistance is needed.

---

[61] Equality and Human Rights Commission, *The Impact of a Human Rights Culture on Public Sector Organisations: Lessons from Practice* (2009) 9, 49.
[62] Victorian Equal Opportunity and Human Rights Commission, *Emerging Change: The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities* (2009) 49, 66.
[63] Submission 106, Maribyrnong City Council, 2.
[64] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 35.

For example, Wyndham City Council commented:

> *To assist Council to fully meet its obligations, we would welcome opportunities for further support and development. Resources and tailored support, such as the Victorian Local Governance Association's Human Rights Toolkit, are considered necessary to provide best practice examples from other local governments and to promote continued improvement across the sector.*
>
> *Furthermore, Council considers ongoing partnerships with community groups and organisations, other Councils, State Government Departments and the Victorian Equal Opportunity and Human Rights Commission as being central to the ongoing implementation of the Charter. Such partnerships will assist Council to develop a deeper understanding of human rights issues.*[65]

To improve the operation of the Charter, Hobsons Bay City Council suggested:

- *clearer guidelines on how to use the Charter, particularly monitoring and reporting of Council's work against the Charter, and*
- *improved training that is tailored specifically to address local government issues in relation to applying the Charter.*[66]

Yarra City Council similarly suggested 'a program of ongoing education of local government officers on the Charter would assist in developing a culture of human rights within Victoria'.[67]

Maribyrnong City Council noted:

> *The Charter is fundamental to local government as it has brought a real and tangible focus on human rights…*
>
> *However, the treatment of the Charter on a day-to-day basis in terms of policy development and application has been problematic. The Charter requires a high level of expertise which can seem unclear to non-experts. This has resulted in work being outsourced to specialists. The need for greater in-house expertise should be recognised and supported.*[68]

The Commission noted potential initiatives for local government (if it had capacity) could include, in addition to work it is already doing:

- *revitalising local government stakeholder networks*
- *providing consultancy services to assist and facilitate organisational behavioural change*
- *providing train the trainer programs to equip councils to undertake their own human rights education and training*
- *providing tools and resources including online education and training packages.*[69]

[65] Submission 89, Wyndham City Council, 2.
[66] Submission 22, Hobsons Bay City Council, 2.
[67] Submission 30, Yarra City Council, 2.
[68] Submission 106, Maribyrnong City Council, 7.
[69] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 36.

Peer-to-peer learning is also an effective mechanism for capacity building in this area. City of Darebin suggested giving more opportunities to the local government sector to share and learn from different approaches to implementing human rights, noting '[t]here is a role for the State Government in providing and facilitating these opportunities'.[70] I agree with this conclusion.

Similar observations were made during the Equality and Human Rights Commission's study in the United Kingdom: 'interviewees told us that more opportunities to network and share experiences with colleagues engaged in similar activities would be one of the most effective ways of strengthening their approach to human rights'.[71]

I also recommend that priority be given to developing information to support the induction of new councillors after the October 2016 local government elections.

iii. Functional public authorities

The learning needs of functional public authorities should not be overlooked in a strategy to build a more effective human rights culture in Victoria.

The Castan Centre for Human Rights Law recommended that the Victorian Government require private organisations that have public authority obligations under the Charter to provide appropriate training and education to their staff. With its training experience and expertise, the Victorian Human Rights and Equal Opportunity Commission could help with this training if it had capacity.

The Victorian Council of Social Service noted training, to be of most benefit and to encourage busy community sector staff to attend, needs to be tailored:

> *Some community organisations strongly embrace a rights based framework … while others appear to have limited understanding of the Charter… The reasons for this include a lack of awareness about the Charter, insufficient education for organisations about the use of the Charter and their obligations, as well as confusion around its relevance and coverage...* [Experience in the Australian Capital Territory showed that] *organisations preferred specifically tailored advice about how the Charter would impact across their organisation* [to general briefing sessions].[72]

Recommendation 6: The Victorian Equal Opportunity and Human Rights Commission be given responsibility to provide human rights education within the public sector to:

(a) leaders across the Victorian public sector, to ensure that they can influence a positive culture of human rights

(b) local government councillors. As a priority, materials should be available to support the induction of new councillors after the October 2016 local government elections

(c) staff of Victorian public sector departments, agencies and local government. Where possible, the training should be tailored to the needs of particular work areas and be delivered in consultation with front line staff who understand the operational aspects of the work area

[70] Submission 52, City of Darebin, 3.
[71] Equality and Human Rights Commission, *The Impact of a Human Rights Culture on Public Sector Organisations: Lessons from Practice* (2009) 11.
[72] Submission 64, Victorian Council of Social Service, 6-7.

(d) private entities that perform functions of a public nature and have obligations under the Charter.

Recommendation 7: The Victorian Equal Opportunity and Human Rights Commission facilitate opportunities for public and community sector workers to share experience and expertise on the Charter. Such opportunities could include Human Rights Network events, the production of resources, the establishment of communities of practice sponsored by a senior executive, and the use of existing networks.

3. External input and oversight

The final influence on a human rights culture that I address are the factors that sit outside the public sector. Key influencers in this area are: (a) community attitudes and expectations; (b) key advisers in the legal sector; and (c) external accountability and oversight mechanisms.

a. Community attitudes and expectations

Community attitudes can significantly influence the sustainability of culture change and how seriously an issue is treated within the public sector. Community attention on an issue can quickly trigger changes in practice. However, the public response to limitations on human rights will depend on community expectations and the extent to which democratic values are embedded in the community.[73] As the Assistant Commissioner for Privacy and Data Protection, Tony Nippard, observed, there is a way to go:

> *… we have a long way to go in entrenching human rights norms into Victorian society. For example, in the privacy sphere a sophisticated human rights culture should dismantle ideas such as 'if you have nothing to hide, you have nothing to fear', which misplaces the inherent value of privacy to our autonomy, and the importance of people having control over their personal information and of their personhood more generally.*[74]

Community attitudes and expectations can be influenced by: (i) building knowledge about human rights in the community; (ii) providing opportunities for community input; and (iii) engaging the private sector in the work of the Charter.

i. Building knowledge about human rights in the community

Article 2 of the United Nations Declaration on Human Rights Education and Training recognises human rights education contributes 'to the prevention of human rights violations and abuses by providing persons with knowledge, skills and understanding and developing their attitudes and behaviours, to empower them to contribute to the building and promotion of a universal culture of human rights'.[75] International experience suggests human rights education is particularly valuable for children and young people, and makes '[a] contribution to social cohesion and conflict prevention by supporting the social and emotional development of the child and by introducing democratic citizenship and values'.[76]

[73] Jem Stevens, 'Changing Cultures in Closed Environments: What Works?' (2014) 31 *Law in Context: Human Rights in Closed Environments* 228, 258-9.
[74] Submission 94, Assistant Commissioner for Privacy and Data Protection, 2.
[75] United Nations General Assembly, *United Nations Declaration on Human Rights Education and Training*, A/RES/66/137, 19 December 2011.
[76] Office of the United Nations High Commissioner for Human Rights, *Plan of Action: World Program for Human Rights Education—First Phase* (2006) 19.

In 2011 an extensive online RMIT survey of over 1,000 Victorians showed:

> *… many Victorians were still unaware of the Victorian Charter, for example over three-quarters (77%) of Victorians surveyed did not know of the existence of the Charter, and when told of the Charter, over two-thirds surveyed admitted they knew 'very little' or 'nothing' about it.*[77]

Human rights education in the community—what is happening now?

Human rights education is happening in the community:

- The Victorian Equal Opportunity and Human Rights Commission provides education about the Charter to the community through is website, enquiry line, publications, community events and training.

- The Department of Education and Training reported that human rights are taught in schools in subjects on civics and citizenship, and history and legal studies. Schools may also individually hold events to raise awareness about human rights struggles and achievements.

- Some Victorian universities provide opportunities for public education through lectures and activities, such as the recent video series on human rights produced by the Castan Centre for Human Rights Law.

- The Human Rights Law Centre trains community advocates, and it recently obtained funding to produce a manual on the Charter for community advocates and lawyers, and specific guides applying the Charter in the areas of disability, mental health, homeless and prisons. The project will likely have practical benefit for advocates and lawyers, so will result in help for vulnerable Victorians.

However, we need more awareness about human rights. This issue was the main concern raised in the Review's community forums.

> *A Human Rights Act will not, alone, magically create a rights-aware, and rights-respecting culture. There also needs to be a strong and ongoing [national] program of human rights education*.[78]
>
> **Graeme Innes AM**

The Victorian Equal Opportunity and Human Rights Commission argued for awareness raising not only through formal education, but also as part of a broader community awareness campaign, if we want to effectively and meaningfully improve the Victorian community's understanding of human rights.[79] Further, submissions to the Review recognised the need to target human rights education for specific groups in the community. Some submissions, for example, highlighted the importance of human rights education for Victorian Aboriginal communities, people with disabilities and disability service providers, and housing and legal services.[80]

[77] Submission 69, Rosetta Moors, 2.
[78] Cited by Paula Gerber and Annie Pettitt, 'Human Rights Education in the Australian Curriculum' in Paula Gerber and Melissa Castan (eds) *Contemporary Perspectives on Human Rights Law in Australia* (2013) 531.
[79] Submission 90, Victorian Equal Opportunity and Human Rights Commission.
[80] Submission 90, Victorian Equal Opportunity and Human Rights Commission; Submission 64, Victorian Council of Social Service, 8.

Organisations that raised the need for more targeted public education included:

- the Office of the Public Advocate, which supported a sustained awareness-raising campaign by government to promote the rights of people with disability[81]

- Youthlaw, which recommended the Charter should be accompanied by a well-resourced public education campaign that is accessible to all children and young people and their families.[82]

When talking about education and campaigns, I am keen to keep an eye on the end goal: the promotion and protection of human rights. Everyone in the community being able to recite the 20 Charter rights does not help the Government achieve better human rights outcomes. But building community knowledge of human rights, and building the broader community human rights culture, does influence the culture of the Government and the public sector. This culture supports better decision making because people are paying attention to outcomes and can raise concerns when things go wrong.

As suggested by the Salvation Army submission:

> *… the Charter must not only remain as an enduring symbol of our state's commitment to human rights but its scope and applicability should be part of ongoing and dynamic community conversations that seek to continually extend the ways in which we ensure the rights and protections of our most vulnerable citizens.*[83]

In its submission, the Victorian Equal Opportunity and Human Rights Commission noted it could extend its education and training, if it had additional capacity, to:

- digital photo stories

- human rights video series

- visual case studies

- plain English education and training resources.[84]

Recommendation 8: The Victorian Equal Opportunity and Human Rights Commission provide further human rights education to the community and community advocates.

ii. Finding opportunities for community input

For community views to have an impact on public sector culture, public authorities need a mechanism to hear from community members.

When considering the impact of a human rights culture on the public service in the United Kingdom, the Equality and Human Rights Commission noted 'effective mechanisms to take account of people's views can be a valuable foundation for embedding human rights'.[85]

[81] Submission 76, Office of the Public Advocate, 13.
[82] Submission 36, Youthlaw, 11.
[83] Submission 11, Salvation Army Victoria, 2.
[84] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 37.
[85] Equality and Human Rights Commission, *The Impact of a Human Rights Culture on Public Sector Organisations: Lessons from Practice* (2009) 9.

I make recommendations elsewhere in this Report to encourage public consultation and complaint-handling, but an additional element should be addressed—that is, communication with service users.

Public authorities can influence public knowledge of human rights in their day-to- day interactions with the community. For example, cohealth outlined its efforts to inform and educate service users and community members about their rights and responsibilities. In partnership with its community advisory committee, it designed feedback systems that are simple to use and navigate.[86]

This example shows the primary interface between government and the community is an opportunity for information exchange. That exchange can help people better understand their rights and how government accounts for those rights. It can also help public authorities better understand the needs and perspectives of community members. This understanding is critical to an effective human rights culture.

Recommendation 9: Public authorities make relevant human rights information available when providing services to the community and provide a way for people to have a say about issues that affect them.

iii. Engaging the private sector in the local human rights dialogue

Finally, in relation to community attitudes towards human rights, I want to address the role of the private sector.

The Charter governs the relationships between State and local government and the Victorian community. So, the private sector has not been a key focus for the Charter, other than to the extent that some businesses provide public services on behalf of government (and are public authorities under the Charter when providing those services).

In **Chapter 2**, I propose businesses be given the ability to 'opt in' to the Charter. Some community sector organisations have taken up this option in the Australian Capital Territory. However, even without taking up legal obligations, the private sector could be better engaged to promote a culture of human rights in Victoria and an understanding of the Charter.

The appetite is there. For example, some of Australia's biggest businesses (including Qantas, Optus, ANZ, Commonwealth Bank of Australia, Slater and Gordon, and Gilbert and Tobin) recently threw their weight behind the push for marriage equality, with a full-page newspaper advertisement in support.[87] These corporations recognised the value of diversity and equality for staff and customers.

This role of the corporate sector in human rights protection has also been promoted at the international level in recent years. In 2011 the United Nations Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (the Ruggie Principles). The principles aim to help states and companies to prevent and address human rights abuses committed in business operations. They contain three pillars: protect, respect and remedy. Each pillar defines steps for governments and companies to meet their respective duties and responsibilities to prevent human rights abuses in company operations, and to provide remedies if abuses take place.

[86] Submission 49, cohealth, 5.
[87] ABC Online, 'Gay Marriage: Australia's Businesses Take Out Full Page Ad Backing Same Sex Partnerships', 29 May 2015 http://www.abc.net.au/news/2015-05-29/corporations-behind-same-sex-marriage/6505758.

The UN Global Compact also calls on companies to align strategies and operations with universal principles of human rights, labour, environment and anti-corruption, and act to advance societal goals. It promotes tools and resources aligned with the Ruggie Principles.

Members of the Global Compact Network Australia include Allens, Australia Post, Commonwealth Bank of Australia, CPA Australia, David Jones, Deakin University, KPMG Australia, La Trobe University, National Australia Bank, University of Melbourne, Visy Industries, Wesfarmers, Westpac Banking Corporation and Woolworths Limited, among others.

In its statement on human rights, the ANZ Bank noted:

> *We respect and promote human rights as the universal foundation for dignity and equality for all. Our approach reflects ANZ's values of Integrity, Collaboration, Accountability, Respect and Excellence which guide interactions with all our stakeholders.*[88]

Internationally, businesses such as Microsoft have focused on work areas that are particularly important to human rights: namely privacy, security, free expression, labour rights, equality, diversity, and access to education.[89] These businesses are bringing the relevant sections of international human rights to life in their work. In Victoria, the Charter provides a local outlet for this approach that could be better used. We need to harness the alignment of values and private sector influence on community understanding and practice of human rights. Doing so would contribute to a more effective human rights culture in Victoria.

> *If you think about the current engagement by the private sector with human rights internationally—it's the business case that sells it for them, not the feel good factor. I think there's something in that for Victoria and how that desire for corporate social responsibility could be harnessed. The private sector are not bound by the rights, but they can put their hand up to act consistently with one or two rights that are relevant to them. They can scrutinise what they plan to do under a human rights framework like SARC [Scrutiny of Acts and Regulations Committee] does. Make the corporate sector supporters like the global compact model and you make the Charter and human rights part of the language of everyday people in the community. This is how you build the culture—the way we do business.*
>
> **Kate Eastman SC, May 2015**

Recommendation 10: The Victorian Equal Opportunity and Human Rights Commission look for ways to engage with the private sector to build a broader human rights culture in Victoria. Such engagement could include establishing a Corporate Charter Champions group, partnering with businesses on activities, or working with business networks to build understanding of the Charter.

[88] ANZ Bank, *Respecting People and Communities: ANZ's Approach to Human Rights* (September 2012) www.anz.com.au/resources/7/7/77ae69004d7182bfae8daf32c55cda98/ANZ_HumanRights.pdf?MOD=AJPERES.
[89] Microsoft, *Global Human Rights Statement* (September 2013) http://www.microsoft.com/About/CorporateCitizenship/en-us/DownloadHandler.ashx?Id=03-01-01.

b. Expert advisers in the legal sector

The legal sector is another big influence on human rights culture. It is a site of accountability for human rights practice by public authorities, but lawyers and judges are also a source of advice and guidance.

That guidance should be straight-forward and comprehensible. As one person I met observed:

> *A culture can build up that the Charter can only be dealt with by an elite group of lawyers, but the skills of lawyers should be to distil the material and present a way through, not to present a textbook.*
>
> Meeting participant, May 2015

More work needs to be done to achieve this. Further, I found the legal sector does not use the Charter as much as it could. The Hon Marilyn Warren AC, Chief Justice of Victoria, and the Hon Justice Pamela Tate noted:

> *Despite the encouragement of courts, and the support of individual judges, we continue to see reluctance on the part of practitioners to raise arguments under the Charter.*[90]

The Judicial College of Victoria noted:

> *Education is an essential aspect of promoting and protecting Charter rights. Educative programs on the Charter, including those aimed at judicial officers, help to embed the human rights culture envisioned by the Charter and its community supporters, by helping to create an environment receptive to Charter arguments.*
>
> *Dismissal of the Charter as either too complex or too weak is undermining the real value it can add to our legal system. Education is the key to demystifying the Charter and unlocking that value.*[91]

My consultations for this Review revealed many factors influence this underuse of the Charter: some legal practitioners view the Charter as something foreign; some view it as too hard or unclear to engage with; some didn't have enough knowledge to feel confident raising it; some were concerned about the reaction from the bench when they did raise it; and others assessed that raising the Charter may not be in their client's interest, as 'piggy backing' it onto another claim would not achieve any more than the original claim.

I make recommendations elsewhere in this Report to make the Charter more effective, practical and accessible. They address many of the issues raised above. Below, I address how education and capacity building can help embed the Charter in our legal culture.

[90] Chief Justice Marilyn Warren AC and the Hon Justice Pamela Tate, 'Editorial' (2014) 2 *Judicial College of Victoria Online Journal: Human Rights Under the Charter: The Development of Human Rights Law in Victoria* 2, 3.
[91] Submission 31, Judicial College of Victoria, 2.

i. Research tools and legal education

Some work has been done to support the legal profession and the judiciary since the initial implementation of the Charter. For example, the Law Institute of Victoria produced a Charter Case Audit database, with support from Ashurst. It contains Victorian court and tribunal decisions in which issues under the Charter have been raised. During my consultations, many lawyers said this database is useful to support their case law research about the Charter and to educate lawyers about how the Charter is used in different areas of law.

The professional development conferences and seminars run by the Law Institute of Victoria and the Victorian Bar are also useful opportunities for capacity building within the profession. These activities are welcome and should be encouraged. My consultations revealed, however, more opportunity to build human rights components into existing forums on other areas of law, such as criminal law.

I also received feedback that aspects of legal training (for example, at universities and in the Bar Reader's course) could contain more Charter components. I encourage universities that offer law programs to address the Charter in relevant courses, including how it applies to statutory construction and the use of proportionality tests. Professional bodies should continue to facilitate peer-to-peer continuing legal education.

ii. Continuing education for the judiciary and tribunal members

To prepare for the start of the Charter, the Judicial College of Victoria delivered training programs for judges, magistrates and tribunal members.

More recently, the Supreme Court, the Judicial College of Victoria and Monash University Law School held a conference in 2014 on the Charter. The papers from the conference were collected and published in the Judicial College of Victoria's online journal. The Chief Justice noted:

> *It is hoped that this collection of papers will assist practitioners to develop their skills and expertise in Charter jurisprudence. Not only will building their awareness of the Charter assist practitioners to identify relevant issues and to ask the right questions about a case, it will also assist them to come to court equipped with cogent submissions on the Charter's operation and effect on statutory interpretation.*[92]

Other useful tools include the Judicial College of Victoria's Charter Case Collection (published in April 2015). This was developed in collaboration with the Supreme Court of Victoria.

The proposed development of a Human Rights Bench Book (due for release in early 2016) is also welcome. The Judicial College of Victoria noted the Bench Book will be a comprehensive resource on the rights in the Charter, and the roles of the courts, public authorities and Parliament under it. The Bench Book will discuss relevant local and comparative jurisprudence, and will be regularly updated. It will be an online resource, freely available to the public.

[92] Chief Justice Marilyn Warren AC and Justice Pamela Tate, 'Editorial' (2014) 2 *Judicial College of Victoria Online Journal: Human Rights Under the Charter: The Development of Human Rights Law in Victoria* 2, 3.

The Judicial College of Victoria noted 'further education for the judiciary will be vital to the continued utility and relevance of the Charter, particularly if it is amended following its eight-year review. Subject to the availability of resources, the College is well-placed to undertake this education in line with our core functions'.[93]

Victoria Legal Aid's submission also noted views on the need for tailored judicial education:

> *… there should be specific training for magistrates and judicial officers to empower them to understand the obligations and rights under the Charter, and how certain sections of the Charter have a direct interplay with the criminal law system (e.g. for bail, diversion, adjournments and other proceedings). Ideally, this training should encourage decision-makers to use the Charter to inform their approach to limitations of rights in a criminal context.*[94]

Recommendation 11: The Judicial College of Victoria be responsible for educating judicial officers and tribunal members regularly on how the Charter operates. Where appropriate, this education could be done in conjunction with professional development for the legal profession.

c. External accountability and oversight

Our behaviour, priorities and values are in part shaped by our assessment of likely consequences. External oversight contributes to this assessment when considering human rights. Complaints mechanisms can shine a light on incidents or areas that need to improve and this exposure can be an important driver of change within a culture.

Example: complaint as a force for systemic change

The Victoria Council of Social Service reflected on the systemic changes that can result from complaint:

A community health service had a policy which enabled staff to refuse treatment for clients considered to be 'aggressive'. A complaint was lodged and it was found that this policy was non-compliant with the Charter. Following this finding, the service reviewed all of its policies and processes. Significant changes were made to ensure that their new policies were inclusive and reflected a human rights culture, including developing a new client engagement policy. The organisation has also taken a proactive approach to help support other health services to be more inclusive. With assistance from the local community legal centre they have co-delivered a number of workshops/sessions for other health services to educate them around ways to deal with conflict and aggressive behaviour among vulnerable clients.[95]

Sometimes changes are made in response to a single case, but they can highlight broader systemic issues and human rights concerns, as well as the need for cultural change.[96] The Human Rights Law Centre observed, for example, the Charter's valuable role in advocacy, which has led to better outcomes. Sometimes, that role has also led to a change in policy or the method by which a policy or service is delivered, to make it more compatible with human rights.[97]

[93] Submission 31, Judicial College of Victoria, 3.
[94] Submission 93, Victoria Legal Aid, 14.
[95] Submission 64, Victorian Council of Social Service, 9.
[96] Jem Stevens, 'Changing Cultures in Closed Environments: What Works?' (2014) 31 *Law in Context: Human Rights in Closed Environments* 228, 254.
[97] Submission 95, Human Rights Law Centre, Submission 17.

For public authorities, better coordination is needed to share these lessons and experiences. The above example (see box) about managing aggressive behaviour in a health service is a lesson for many front line staff. Better capacity within the Human Rights Unit and the Victorian Equal Opportunity and Human Rights Commission would enable them to collate and disseminate lessons from such experiences.

My recommendations in **Chapters 3 and 4** on the role of oversight bodies and legal proceedings will help to build up external accountability as an influence on human rights culture.

Chapter 2

Clarifying responsibilities for human rights—acts and decisions of public authorities

Chapter 2 Clarifying responsibilities for human rights—acts and decisions of public authorities

Overview

The Charter focuses on the relationship between the Victorian Government and the community. It imposes obligations on 'public authorities' and binds private entities only when they are acting on behalf of government to perform public functions.

Guiding principles for this Review include making the Charter clearer and its human rights protections more effective. Obligations on public authorities are a key way in which the Charter protects human rights. In this context, clear and effective human rights protection means:

- greater certainty about who is a public authority, so that individuals are aware of their rights, and entities are aware of their obligations
- flexibility in the definition of 'public authority', to ensure the Charter's application is broad and adaptable to changes in entities or the way in which government operates
- clarity about what section 38(1) of the Charter requires of public authorities
- enforceability of public authority obligations to promote human rights culture within public authorities and to ensure compliance (see discussion about legal proceedings and remedies in **Chapter 4**).

This part of the Report makes recommendations to clarify the identification of public authorities, and to improve the operation of the public authority obligations under section 38 of the Charter. It also considers the application of the Charter to courts and tribunals, both as public authorities when they are acting in an administrative capacity and under section 6(2)(b) of the Charter.

Terms of reference: 2(a): Clarifying the provisions regarding public authorities, including the identification of public authorities and the content of their human rights obligations; and 1(e): Application of the Charter to non-State entities when providing State-funded services

The definition of 'public authority'

In recommending the Charter's enactment in 2005, the Human Rights Consultation Committee recognised the competing needs for certainty but also flexibility in defining a public authority. It rejected the idea of listing all public authorities, because it might reduce the flexibility required to cover future governance arrangements, and it might result in an unduly narrow application of the Charter.[98] The definition that appears in the Charter is broadly consistent the Human Rights Consultation Committee's recommended definition.

[98] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 54-55.

Section 4 of the Charter sets out who is a public authority:

- a public official within the meaning of the *Public Administration Act 2004* (Vic) (for example a public servant employed in a government department or a person appointed under statute, such as the Chief Commissioner of Police or the Commissioner of the Victorian Equal Opportunity and Human Rights Commission)
- Victoria Police
- local councils, councillors and council staff under the *Local Government Act 1989* (Vic)
- Ministers
- members of parliamentary committees when the committee is acting in an administrative capacity
- courts and tribunals when they are acting in an administrative capacity
- any entity declared by Regulations to be a public authority
- a body established by a statutory provision that has functions of a public nature, for example VicHealth, VicRoads and WorkSafe
- a body whose functions are, or include, functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (for example, an organisation contracted by the Victorian Government to deliver disability services or public transport services).

A public authority does not include Parliament or a body declared by Regulations not to be a public authority. The *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* (Vic) declare that the Adult Parole Board, Youth Parole Board and Youth Residential Board are not public authorities.[99] These exemptions have been in place since the Charter commenced operation on 1 January 2008, were extended in 2013 and now have effect until 23 October 2023.[100]

In its 2011 review of the Charter, SARC noted that the definition of public authority is 'lengthy and complex'. It referred to a lack of clarity about what constitutes a function of a public nature. If the public authority obligations in the Charter were retained, SARC recommended replacing most of section 4 with a schedule to the Charter exhaustively listing the entities that must comply with section 38 and the specific functions that must be carried out in compliance with section 38 (that is, functions of a public nature).[101]

[99] The Youth Residential Board has since been abolished and its functions were transferred to the Youth Parole Board: *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic) ss 9-10.
[100] See *Charter of Human Rights and Responsibilities (Public Authorities) (Interim) Regulations 2007* (Vic).
[101] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) recommendation 22. A majority of SARC recommended repealing the public authority obligations in the Charter: see recommendation 35.

Functional public authorities

The definition of public authority can be divided into 'core' public authorities and 'functional' public authorities.[102] Core public authorities are always public authorities, while functional public authorities may or may not be public authorities depending on the function they are performing.[103]

A body that has **functions of a public nature** and is **exercising those functions on behalf of the State or a public authority**[104] is a functional public authority and attracts the same obligations under section 38 as does any other public authority. For example, a private company is a public authority under the Charter when operating a Victorian prison, but not when it is conducting its other private business. This approach draws from the functional approach taken in New Zealand, where the focus is on the nature of the function being performed rather than who is performing it.[105]

Section 4(2) of the Charter provides a non-exhaustive list of factors for consideration when identifying 'functions of a public nature' to determine whether an entity is a functional public authority. These are:

- the function is conferred on the entity by or under a statutory provision
- the function is connected to or generally identified with functions of government
- the function is of a regulatory nature
- the entity is publicly funded to perform the function
- the entity that performs the function is a company (within the meaning of the Corporations Act), and all of its shares are held by or on behalf of the State.

An entity may be acting on behalf of the State or a public authority even if there is no agency relationship between them.[106] The fact that an entity is publicly funded to perform a function does not always mean it is exercising the function on behalf of the State or a public authority.[107]

In *Metro West v Sudi,* Justice Bell held that determining what constitutes a functional public authority under section 4(1)(c) involves two questions:

> *The first is whether the functions being exercised are of a public nature. That turns on the nature of the functions, and whether they are being exercised in the public interest, not on the nature of the entity. The second is whether the functions are being exercised on behalf of the State or a public authority. That turns on the relationship between them and the entity, and whether there is some arrangement under which, in exercising the functions, it is representing them or carrying out their purposes in the practical sense.*[108]

---

[102] 'Functional public authority' is not a legal term, but is used in this Report for ease of reference.
[103] Mark Moshinsky QC, 'Bringing Legal Proceedings Against Public Authorities for Breach of the *Charter of Human Rights and Responsibilities*' (2014) 2 *Judicial College of Victoria Online Journal: Human Rights Under the Charter: The Development of Human Rights Law in Victoria* 91, 93.
[104] Charter, s 4(1)(c).
[105] *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 [69]-[70].
[106] Charter, s 4(3).
[107] Charter, s 4(4).
[108] *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009) [143].

Clarifying who is a public authority

This Review has highlighted the need to clarify the application of the Charter to functional public authorities. I also address the application of the Charter to courts and tribunals. Otherwise, the definition of public authority generally appears to be operating well.

A number of submissions noted a lack of clarity in the Charter's definition of functional public authorities reduces the Charter's effectiveness. The Law Institute of Victoria submitted:

> *The lack of clarity about who and what is a public authority:*
>
> - *reduces the Charter's ability to contribute to development of a human rights culture in the provision of public services; and*
> - *makes it more difficult for individuals to raise potential breaches of their human rights, because they do not know if the entity is bound by the Charter.*
>
> Law Institute of Victoria, Submission 78

Dr Liz Curran noted a lack of certainty has shielded some public authorities from complying with their human rights obligations.[109] The Victorian Equal Opportunity and Human Rights Commission said it 'continues to receive feedback through its education and training function that the definition of 'public authority' under the Charter is unclear', which can lead entities to assume they are not public authorities.[110] The Victorian Council of Social Service described the consequences of uncertainty about who is a public authority for both individuals and agencies:

> *If a person cannot clearly determine whether an organisation is obliged to protect their human rights, they are far less likely to raise this objection in any complaint or action regarding an infringement … If an organisation does not have a clear indication that they are covered by the Charter, it is difficult to make the case to funding agencies for the resources to make sure that human rights are protected.*
>
> Victorian Council of Social Service, Submission 64

In the housing sector, Justice Connect Homeless Law noted the continuing uncertainty about whether community housing providers are functional public authorities, which 'is a barrier to the incorporation of the Charter in the day-to-day work of community housing providers' and 'slows down the development of a "human rights culture"'.[111] The Federation of Community Legal Centres agreed this uncertainty makes the Charter less useful for clients in community housing than in matters when the landlord is the Office of Housing.[112] Some submissions noted differences in opinion among community housing providers about whether they are public authorities.[113]

But the Victorian Equal Opportunity and Human Rights Commission and others emphasised the need to retain a flexible definition to avoid narrowing the Charter's application.[114] As the Human Rights Law Centre noted, 'The state's obligation to respect human rights should not be contingent on the vehicle that the state chooses to deliver public services'.[115]

[109] Submission 7, Dr Liz Curran, 8.
[110] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 52.
[111] Submission 79, Justice Connect Homeless Law, 3, 17.
[112] Submission 91, Federation of Community Legal Centres, 16.
[113] Submission 91, Federation of Community Legal Centres 16; Submission 93, Victoria Legal Aid, 11.
[114] Submission 78, Law Institute of Victoria, 17; Submission 90, Victorian Equal Opportunity and Human Rights Commission, 54, recommendation 12; Submission 91, Federation of Community Legal Centres, 16.
[115] Submission 95, Human Rights Law Centre, 22.

Submissions broadly supported retaining a category of public authority based on performing public functions on behalf of government, but they suggested ways to clarify the Charter's application to functional public authorities and to ensure human rights protections are not lost when a non-State entity provides services on behalf of government. These suggestions included:

- listing functions of a public nature, as in the Australian Capital Territory[116]
- using the existing power to prescribe public authorities by regulation[117] and expanding the regulation-making power to prescribe functions of a public nature[118]
- including additional examples in the Charter of when an entity is acting on behalf of the State[119] and/or requiring government agency public authorities to notify non-government agencies of any functions that they consider the agency to be performing on their behalf[120]
- including Charter obligations in government service agreements[121]
- permitting private entities to 'opt in' as public authorities.[122]

[116] Submission 78, Law Institute of Victoria, 15-16; Submission 90, Victorian Equal Opportunity and Human Rights Commission, 55; Submission 91, Federation of Community Legal Centres, 16, recommendation 14; Submission 95, Human Rights Law Centre, 23, recommendation 10. The Law Institute of Victoria considered further guidance should be provided on what is meant by the function of 'public housing', to reflect the different ways in which public housing is provided.

[117] Submission 54, Victorian Bar, 8-9; Submission 79, Justice Connect Homeless Law, 21; Submission 90, Victorian Equal Opportunity and Human Rights Commission, 55, recommendation 13; Submission 91, Federation of Community Legal Centres, 16, recommendation 15. However, the Law Institute of Victoria opposed this view, based on the volume of public authorities and the changing nature of government outsourcing and funding arrangements: Submission 78, 17. Justice Connect Homeless Law and the Federation of Community Legal Centres recommended prescribing all housing providers registered under the *Housing Act 1983* (Vic). Footscray Community Legal Centre called for clarification that social housing providers are public authorities: Submission 56.

[118] Submission 64, Victorian Council of Social Service, 19-20.

[119] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 55.

[120] Submission 64, Victorian Council of Social Service, 20.

[121] Submission 78, Law Institute of Victoria, 15; Submission 79, Justice Connect Homeless Law, 21-22; Submission 90, Victorian Equal Opportunity and Human Rights Commission, 56, recommendation 14; Submission 91, Federation of Community Legal Centres, 16, recommendation 16; Submission 93, Victoria Legal Aid, 11, recommendation 3. The Law Institute of Victoria suggested modelling this inclusion on the approach in section 17 of the *Privacy and Data Protection Act 2014* (Vic). The Assistant Privacy and Data Protection Commissioner preferred the approach taken for data protection in that Act, under which the outsourcing agency remains responsible for ensuring that the service provider does not contravene a data protection standard: Submission 94, Assistant Privacy and Data Protection Commissioner, 4. The Victorian Equal Opportunity and Human Rights Commission recommended that the Victorian Public Sector Commissioner should help develop standard terms for inclusion in government service contracts and a project's procurement stage should also consider human rights.

[122] Submission 64, Victorian Council of Social Service, 19; Submission 26, Castan Centre for Human Rights Law, 19 (submission adopted from 2011 review); Submission 78, Law Institute of Victoria, 15; Submission 91, Federation of Community Legal Centres, 16-17, recommendation 17; Submission 93, Victoria Legal Aid, 12, recommendation 4; Submission 95, Human Rights Law Centre, 20-21, recommendation 9.

Providing more certainty about how the Charter applies to functional public authorities, including non-State entities

A guiding principle of this Review is to make the human rights protection in the Charter more effective. To be more effective, the Charter must provide certainty and clarity about its application. Individuals must know whether the Charter applies when they interact with a service provider, so they can raise their human rights effectively. Similarly, service providers must know whether they have legal obligations under the Charter, so they can prioritise human rights in resource allocation, training and decision making.

As well as providing certainty, the Charter must be sufficiently flexible to recognise the variety of ways in which government engages non-government agencies to perform functions of a public nature. Section 4 of the Charter seeks to strike this balance. While prescribing all public authorities in regulations would provide certainty, it would not provide the necessary flexibility and breadth of coverage (such as when the Government contracts out a new activity to the private sector). However, section 4 does not provide sufficient guidance on when an entity is a functional public authority. This growing area needs to be addressed.

Chris Eccles, the Secretary to the Department of Premier and Cabinet, spoke about the emergence of a 'public purpose' sector in Victoria, comprising government, business and the community sector.[123] The public sector works collaboratively with agencies outside government to deliver public services and value. This arrangement presents opportunities, but also challenges. In recognition of the increasing complexity of arrangements to deliver public services, shared values and accountabilities must be clear. In the Charter context, the application of public authority obligations to functional public authorities (including non-State entities) must be clear, so human rights protection is not diminished when non-government entities provide public services.

I propose three ways to clarify the Charter's coverage of functional public authorities:

- specifying functions of a public nature
- more actively using the existing regulation-making power to clarify whether entities are or are not public authorities, including relevant bodies under national schemes
- having a whole-of-government policy to include Charter obligations in relevant State contracts, and adding a provision to the Charter to encourage this inclusion.

I agree with submissions that it would be useful for the Charter to include a non-exhaustive list of functions of a public nature.

[123] Chris Eccles, Secretary of the Department of Premier and Cabinet, 'Leadership from the Centre' (Paper presented as part of Public Sector Week, Melbourne, 23 June 2015), edited extract available in *The Mandarin* at www.themandarin.com.au/41132-chris-eccles-leadership-centre/?pgnc=1.

In particular, the Charter's application to the community housing sector needs to be clarified. This need was highlighted in the submissions of both the Community Housing Federation of Victoria and Justice Connect Homeless Law. Justice Connect Homeless Law said 'the vast majority of community housing providers are registered and regulated under the *Housing Act 1983* (Vic)' and are functional public authorities, but it felt this should be made certain.[124] The Community Housing Federation noted uncertainty about the extent to which the Charter applies to community housing providers, due to a range of different funding models used in the sector. It said that the case law has not provided much guidance.[125] Justice Connect Homeless Law submitted certainty could be achieved by amending the definition of public authority or by using regulations to declare certain classes of housing providers to be public authorities.[126]

The *Human Rights Act 2004* (ACT) contains a provision in the same terms as the Charter, making an entity a public authority if its functions are of, or include, functions of a public nature when it exercises those functions for the Territory or a public authority (whether under contract or otherwise). Like the Charter, it also sets out a non-exhaustive list of factors for determining whether a function is a function of a public nature. However, the Human Rights Act goes beyond the Charter by providing a non-exhaustive list of functions of a public nature:[127]

- the operation of detention places and correctional centres
- the provision of:
    - gas, electricity and water supply
    - emergency services
    - public health services
    - public education
    - public transport
    - public housing.

The Charter identifying functions of a public nature would make clear that entities with these functions are public authorities when exercising those functions on behalf of the State or a public authority. Most of the functions listed in the ACT Human Rights Act apply equally in Victoria.

The Charter already provides examples of functions that are of a public nature.
Section 4(1)(c) of the Charter makes clear that a non-government school may be exercising functions of a public nature in educating students but, because it is not doing so on behalf of the State, it is not a public authority.[128] In the factors that point to a function being of a public nature, examples note:

[124] Submission 79, Justice Connect Homeless Law, 19. The Community Housing Federation of Victoria also noted most (but not all) community housing organisations are regulated under the Housing Act: Submission 45, 5-6.
[125] Submission 45, Community Housing Federation of Victoria, 2.
[126] Submission 79, Justice Connect Homeless Law, 21.
[127] *Human Rights Act 2004* (ACT) s 40A(3).
[128] The submission from the Australian Association of Christian Schools, Adventist Schools Australia and Christian Schools Australia said that the clear exemption of non-government schools from the definition of 'public authority' should be retained: Submission 35, 4-5.

- providing correctional services (such as managing a prison) is a function generally identified as being a function of government

- the shares in all water companies responsible for the retail supply of water in Melbourne are owned by the State.

I consider the Charter should include the list of functions in the ACT Human Rights Act as a non-exhaustive list of functions of a public nature. The Charter list should use terminology that is consistent with Victorian legislation, with some modifications:

- The list should not include the provision of gas and electricity, because these industries were privatised in Victoria.[129]

- The list should include the provision of public disability services.

- Public tertiary education should be specifically included in the function of providing public education. Even though providers of these services may be aware that they have public authority obligations, these obligations are not always clear to the community. The Charter should retain the example in section 4(1)(c), to make clear that non-government schools are not public authorities, because they do not provide education on behalf of the State.

- Public housing should specifically include housing provided by registered housing providers under the Housing Act. This inclusion would give much needed clarity to the community housing sector. Providers are registered to access State funding or assets, so they are sufficiently connected to the Government to attract public authority obligations under the Charter.

Recommendation 12: Section 4 of the Charter be amended to set out a non-exhaustive list of functions of a public nature under section 4(1)(c), including:

(a) the operation of prisons and other correctional facilities

(b) the provision of public health services

(c) the provision of public education, including public tertiary education

(d) the provision of public housing, including by registered housing providers

(e) the provision of public disability services

(f) the provision of public transport

(g) the provision of emergency services

(h) the provision of water supply.

[129] ActewAGL provides the majority of electricity and gas in the ACT (more than 90 per cent in 2014). Its retail and distribution branches are each 50 per cent owned by Icon Water Ltd, which is owned by the ACT Government (with the Chief Minister and Deputy Chief Minister as voting shareholders). In Victoria, companies that supply gas and electricity are not government owned.

Section 4(1)(h) of the Charter provides for Regulations to declare an entity to be a public authority.[130] To date, the Regulations have been used only to exempt entities from the definition of public authority.[131] But they could be used also to resolve uncertainty about whether entities at the margins are functional public authorities. In this way, the Government can make a clear statement that an entity is bound by public authority obligations, when there is a need to resolve doubt.

Regulations prescribing Victorian public authorities could also be used to clarify the Charter's application to entities providing services in Victoria under a national scheme. I discuss public authority obligations under national schemes further in **Chapter 7**.

Recommendation 13: The Victorian Government use the *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* (Vic) to prescribe entities to be or not be public authorities—including entities that provide services under national schemes—where necessary to resolve doubt.

Providing further clarification in contracts with the State

Non-State entities are public authorities under section 4(1)(c) of the Charter when they have functions of a public nature and are exercising those functions on behalf of the State or a public authority. State contracts are one of the primary ways in which an entity is given and exercises functions of a public nature on behalf of government. But the line between a contractor's public functions and private functions is not always clear.

One way to clarify this division would be for the Government to include Charter obligations in its State contracts. As well as providing certainty, this inclusion would affirm the Government's commitment to human rights throughout the public sector. It would ensure human rights coverage is not lost when government services are contracted out. This practice already occurs to some extent—for example, the Victorian Equal Opportunity and Human Rights Commission noted contracts between Public Transport Victoria and its operators (including Metro Trains Melbourne, Yarra Trams and V/Line) contain clauses on Charter compliance.[132]

An analogy exists in sections 17(2)–(3) of the *Privacy and Data Protection Act 2014* (Vic), which provide that a State contract may bind a contracted service provider to comply with the Information Privacy Principles when performing acts under the contract (as if it were the outsourcing party). The Charter should contain a provision that enables public authorities to similarly bind contracted parties in their contracts. The Charter should specify that State contracts may provide for a contracted service provider to be bound by the public authority obligations in section 38 when performing functions under the contract (or particular functions), in the same way as the State or the public authority would be bound when exercising those functions.

[130] See also the regulation-making power in section 46 of the Charter:
[131] The Adult Parole Board, Youth Parole Board and Youth Residential Board: *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* (Vic).
[132] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 56.

In the privacy context, if a State contract does not include such a provision, any interference with a person's privacy by the contracted service provider is taken to have been done by both the outsourcing party (that is, the government agency) and the contracted service provider (section 17(4)). However, in the Charter context, this approach could conflict with section 38(1), under which public authority obligations apply to the public authority that is doing the act or making the decision.[133] For this reason, I do not recommend the Charter include any equivalent to section 17(4) of the Privacy and Data Protection Act. Under section 4(1)(c) of the Charter, contracted service providers can also have public authority obligations irrespective of their State contract, and this situation should not change.

Recommendation 14: A whole-of-government policy be developed for relevant State contracts to include terms that contracted service providers will have public authority obligations when performing particular functions under the contract and a provision be included in the Charter to authorise this.

Corporate social responsibility and 'opting in' to public authority obligations

Internationally, the adverse impacts that private enterprises can have on human rights are increasingly recognised. The United Nations Guiding Principles on Business and Human Rights (the Ruggie Principles) provide that business enterprises have a responsibility to respect human rights and avoid contributing to adverse human rights impacts in their activities.[134] The principles advise businesses to have policies to ensure they meet their responsibility to respect human rights. They also encourage businesses to conduct human rights due diligence that assesses the actual and potential human rights impacts of the business and how to manage these impacts.

Additionally, clients, employees and shareholders expect corporate social responsibility from companies: that is, they expect companies to conduct business ethically and have regard to social and environmental concerns, as well as financial interests. In his submission to the National Human Rights Consultation in 2009, Professor Bryan Horrigan drew the link between corporate social responsibility, human rights and the development of a human rights culture:

> *If the corporate social responsibility of business means anything, it points to at least a socio-ethical responsibility (and sometimes even a responsibility that is regulated in more direct ways) to advance the cause of human rights in business organizations, and the advent of a [national] charter might be expected to foster a national human rights culture of which that forms part…*[135]

I recommended earlier that the Charter clarify the human rights obligations of non-State entities that perform public functions on behalf of the State or a public authority. My recommendations include further defining functions of a public nature, prescribing entities to be public authorities in regulations, and including public authority obligations in relevant State contracts. But, in light of growing recognition of the role that the private and non-government sectors have in realising human rights in practice, and the emphasis on corporate social responsibility, the Charter has the potential to have a broader impact.

---

[133] In his submission, Assistant Commissioner for Privacy and Data Protection Tony Nippard, preferred the data protection model to the privacy model. Under his preferred model, the State retains data protection obligations even when functions are contracted out (a vicarious liability model): Submission 94, 4. The preferred approach taken in this Report is for public authority obligations to continue to attach to the public authority that is doing the act or making the decision.

[134] The Ruggie Principles are available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[135] Professor Horrigan's submission to the national consultation is available at: http://www.austlii.edu.au/au/journals/ALRS/2009/7.html.

The business practices of some non-State entities already align with the human rights obligations in the Charter, and those entities may find benefit in publicly and voluntarily committing to act compatibly with the human rights protected by the Charter. The ACT Human Rights Act permits any entity to ask the Attorney-General to declare it a public authority.[136] A number of community sector organisations have taken up this opportunity, including public housing providers. Unpublished academic research by Louis Schetzer[137] showed entities choose to be public authorities in the ACT for reasons including: to make a public statement of the organisation's support for human rights; human rights are already a strong part of the organisation's values and principles, and the choice sets an example for other non-government agencies in advocacy work.

While I recognise uptake of this option may not be large, I consider that the Charter should allow entities to elect to be bound by the public authority obligations in the Charter. This ability would fit with the increasing focus on human rights beyond the public sector and would help build a human rights culture in Victoria (see my discussion about human rights culture in **Chapter 1**). A public register of entities who have opted to comply with public authority obligations may also be useful.[138] The Victorian Equal Opportunity and Human Rights Commission, on notification by the Attorney-General, should manage this register because the Commission is the public hub for information about the Charter.

Recommendation 15: The Charter provide for any entity to 'opt in' to public authority obligations by requesting the Attorney-General declare them to be a public authority, as in section 40D of the *Human Rights Act 2004* (ACT).

Clarifying the interaction between the Charter and the Public Administration Act

The application of the Charter to some public sector workers who are not employed under the *Public Administration Act 2004* (Vic) is another area in which the Charter could provide a clearer path for determining whether a worker is a public authority. Under the Charter, a public authority includes a public official within the meaning of the Public Administration Act.[139] A 'public official' is defined in section 4(1) of the Public Administration Act as '(a) a public sector employee', among other things. The Act defines public sector employee as 'an employee' or 'a person employed by a public entity or special body', and an employee as 'a person employed under Part 3 in any capacity and includes a public service body Head'.

This means that an individual public servant in the Department of Education and Training or the Department of Health & Human Services has public authority obligations under the Charter and has to consider relevant human rights when making decisions (in accordance with section 38(1)). Victoria Police is a special body under section 6(1) of the Public Administration Act, so employees of this 'special body' are public sector employees and, therefore, are public officials within the meaning of the Public Administration Act. This makes individual employees of Victoria Police public authorities under the Charter.[140]

However, some public sector workers (such as teachers in public schools) are employed under other legislation and do not appear to meet this definition of public authority. In the case of teachers, the Charter fails to clearly connect to any limb of the definition:

[136] Section 40D. A declaration can only be revoked if the entity asks the Minister to revoke it.
[137] PhD Candidate, University of New South Wales.
[138] The Law Institute of Victoria suggested this in its submission: Submission 78, 15.
[139] Charter, s 4(1)(a).
[140] Under section 4(1)(d) of the Charter, a public authority also includes 'Victoria Police'. The Charter notes 'Victoria Police' has the same meaning as in the *Victoria Police Act 2013* (Vic). Section 3(1) of the Victoria Police Act says '***Victoria Police*** means the body established by section 6'. Section 6 established the police force, so this duty applies to the entity.

- **Are teachers employees under the Public Administration Act?**
  No. Teachers are employed under the *Education and Training Reform Act 2006* (Vic).

- **Are teachers employed by a public entity?**
  Maybe not. Teachers are employed by the Secretary to the Department of Education and Training, on behalf of the Crown.[141] The Secretary is a 'Department Head' under the Public Administration Act and does not readily fit within the definition of 'public entity' in section 5 of the Public Administration Act.

- **Are teachers employed by a special body?**
  No. 'Special body' is defined in section 6 of the Public Administration Act and does not include the Secretary to the Department of Education and Training.

Arguably, teachers are functional public authorities under section 4(1)(c) of the Charter, because they undertake functions of a public nature on behalf of a public authority (the Secretary). This is a convoluted path for deciding whether such a large and important section of public sector workers have obligations under the Charter.

Whether this lack of clarity was intentional is unclear, and I see no obvious policy rationale for distinguishing between government teachers and other public sector employees such as public servants and police. This anomaly seems to be an unintended one that has arisen because teachers are not employed under the Public Administration Act, and their employer is the Secretary rather than a statutory body. This issue may arise for other Victorian public sector workers who are not employed under the Public Administration Act.

Recommendation 16: The Victorian Government review and clarify how the Charter applies to public sector employees who are not employed under the *Public Administration Act 2004* (Vic) (such as teachers).

Exemption of the parole boards from public authority obligations

As noted, the Adult Parole Board, Youth Parole Board and Youth Residential Board are declared by Regulations to not be public authorities, and the Regulations are in force until 2023.[142] A number of submissions to this Review raised the boards' exemption from the Charter and recommended the exemption be revoked.[143] They noted the likelihood of the boards' decisions to engage human rights, given the boards' roles in relation to community safety and the liberty of individuals:

> *The Commission acknowledges that the important functions performed by the Parole Boards in Victoria engage complex human rights considerations, particularly given the significance of parole to a person's liberty, the critical importance of public safety objectives and the rights of all other persons affected by parole decisions.*
>
> Victorian Equal Opportunity and Human Rights Commission
> Submission 90

[141] *Education and Training Reform Act 2006* (Vic) s 2.4.3(1)
[142] *Charter of Human Rights and Responsibilities (Public Authority) Regulations 2013* (Vic).
[143] Submission 36, Youthlaw; Submission 78, Law Institute of Victoria; Submission 90, Victorian Equal Opportunity and Human Rights Commission; Submission 91, Federation of Community Legal Centres; Submission 95, Human Rights Law Centre; Submission 96, Liberty Victoria.

> *When making those decisions, those tribunals* [the parole boards] *should be required to comply with the Charter, including the right to provide a fair hearing as protected by s 24 of the Charter.*
>
> Liberty Victoria, Submission 96

> *These tribunals are often the bodies that deal with the most sensitive rights-based issues. The Adult Parole Board, for example, makes important decisions in managing the appropriate release of offenders on parole orders, decisions which can affect their right to liberty under the Charter.*
>
> Law Institute of Victoria, Submission 78

> *Prisoners are uniquely impacted by decisions of public authorities by virtue of their status, and any further derogation of their rights or recognition under the Charter should only be taken with great precaution… These Boards … exercise a broad and essentially non-reviewable power to grant parole to prisoners after their non-parole period of their sentence is served.*
>
> Federation of Community Legal Centres, Submission 96

Example: transfer of children to adult prisons

The Youth Parole Board has the power to transfer a child aged 16 years or older from a youth justice centre to an adult prison.[144] Submissions from Youthlaw, the Victorian Equal Opportunity and Human Rights Commission and the Human Rights Law Centre all raised the transfer of children into adult custody by the Youth Parole Board.

Following a number of transfers in July and August 2012, the Ombudsman conducted an investigation and the Commission reviewed the policy documents of the Department of Health & Human Services. The Ombudsman investigation:

… revealed that there were 24 instances of children received into adult custody between 2007 and 2013. Some of the children were held in disturbing conditions including solitary confinement for 23 hours each day with only one hour of exercise in a yard while in handcuffs.

Youthlaw, Submission 36

Youthlaw and the Human Rights Law Centre contended that removing the exemption on the Youth Parole Board and requiring the Board to consider children's rights (including the protection of children in their best interests under section 17 of the Charter) would help avoid decisions such as the transfer of children to adult prisons.[145]

The Victorian Equal Opportunity and Human Rights Commission acknowledged the work of the parole boards is 'complex and sensitive', but noted the same could be said of many other public authorities that are required to act compatibly with the Charter. The Federation of Community Legal Centres and Liberty Victoria noted public authority exemptions from the operation of the Charter creates an expectation further bodies will be carved out in future.[146] Both Liberty Victoria and the Commission recommended repealing the power to make regulations to exempt public authorities from the Charter.[147]

[144] *Children, Youth and Families Act 2005* (Vic) s 467.
[145] Submission 36, Youthlaw, 15; Submission 95, Human Rights Law Centre, 36.
[146] Submission 96, Liberty Victoria, 11.
[147] Submission 96, Liberty Victoria, 11; Submission 90, Victorian Equal Opportunity and Human Rights Commission, 58.

I recognise the parole boards undertake complex work, which includes managing the risk of releasing parolees into the community, and I acknowledge any amendment for the boards to be bound by the Charter would require work to build a human rights framework into their decision making. This will be a matter for the Government of the day to consider at the expiry of the current Regulations in 2023.

Public authority obligations under the Charter

Under section 38(1) of the Charter, it is 'unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right'. This section includes both a '**substantive**' requirement to act compatibility with human rights and a '**procedural**' requirement to give proper consideration to relevant human rights in making a decision. Section 38 is a central operative provision of the Charter, requiring public authorities to consider and act compatibility with human rights. It gives the Charter 'teeth' in the everyday work of government and in government's interactions with community members.

The Attorney-General explained section 38 in his second reading speech as a key provision of the Charter, noting it is designed to bring about administrative compliance with human rights:

> *Clause 38 of the bill provides that it is unlawful for a public authority to act in a way that is incompatible with a human right protected by the bill or to fail to give proper consideration to a human right protected by the bill. This is a key provision of the charter. It seeks to ensure that human rights are observed in administrative practice and the development of policy within the public sector without the need for recourse to the courts. The experience in other jurisdictions that have used this model is that it is in the area of administrative compliance that the real success story of human rights lies. Many public sector bodies that already deal with difficult issues of balancing competing rights and obligations in carrying out their functions have welcomed the clarity and authority that a human rights bill provides in dealing with these issues. In conjunction with the general law, the charter provides a basic standard and a reference point for discussion and development of policy and practice in relation to these often sensitive and complex issues.*

The Human Rights Consultation Committee had recommended that all public authorities be required to comply with the Charter to 'impose new checks and balances on how government undertakes its work'.[148] The Committee sought to require public authorities to genuinely consider to human rights when making decisions and delivering services, and for these obligations to be enforceable through an updated form of administrative law.[149]

Many submissions supported section 38. The Human Rights Law Centre considered it has played a key role in the Charter to date.[150] The Victorian Equal Opportunity and Human Rights Commission agreed:

[148] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 63-64, recommendation 10.
[149] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 125.
[150] Submission 95, Human Rights Law Centre, 23.

> *Section 38 plays an important role in ensuring that human rights are embedded into government policy and practice, and that human rights are respected on an everyday basis.*
>
> Victorian Equal Opportunity and Human Rights Commission
> Submission 90

Section 39 of the Charter permits a person to challenge an act or decision of a public authority if the public authority did not consider relevant human rights in making a decision or did not act compatibly with human rights. If a person may seek relief or remedy on the ground that an act or decision of a public authority was unlawful, section 39(1) of the Charter permits the person to seek that relief or remedy on a ground of unlawfulness arising under section 38 of the Charter. Judicial review is one way in which the decisions of public authorities can be challenged for unlawfulness under the Charter.[151] I discuss section 39 and the remedies available for a breach of the Charter in **Chapter 4**.

What does section 38(1) require of public authorities?

The courts have considered what section 38(1) requires public authorities to do. In *Castles v Secretary of the Department of Justice,* Justice Emerton gave a clear statement on what the procedural obligation in section 38(1)—that is, the requirement to give proper consideration to relevant human rights when making a decision—requires of decision makers. Justice Emerton also set out the factors the court will look at when reviewing a decision. In making a decision, the decision maker must 'do more than merely invoke the Charter like a mantra' but:

> *… it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights.*[152]

In administrative law, a court can set aside decisions if the decision-maker failed to take into account a relevant consideration. The courts have held that the requirement for public authorities to give 'proper' consideration to relevant human rights imposes a higher standard on decision-makers than this traditional 'relevant considerations' ground of judicial review. In *Patrick's Case*, Justice Bell held judicial review for unlawfulness under section 38 'is a more intensive, and is intended to be a more intensive, standard of judicial review than traditional judicial review'.[153]

---

[151] *PJB v Melbourne Health ('Patrick's Case')* (2011) 39 VR 373, 438-439 (Bell J); *Director of Housing v Sudi* (2011) 33 VR 559, 580 [96] (Maxwell P). See also discussion in Chapter 4. The ground of review is not required to be the same in both causes of action, 'merely that the relief or remedy sought is the same': *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414, 430 [105]. It is required only that the person 'may seek' relief or remedy on the ground of non-Charter unlawfulness, not that they succeed in obtaining it or having the non-Charter claim determined: *Patrick's Case* (2011) 39 VR 473, 438-439 [297]; *Director of Public Prosecutions v Debono* [2013] VSC 407 (1 February 2013) [87]; *Goode v Common Equity Housing* [2014] VSC 585 (21 November 2014) [29]-[30]. However, the act or decision for which a person may seek relief or remedy on non-Charter grounds must be the same act or decision in respect of which Charter unlawfulness is raised: *Goode* at [44]-[45].

[152] *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, 184 [185]-[186]. This approach was endorsed by Justice Bell in *Patrick's Case*: (2011) 39 VR 373, 442 [311].

[153] *Patrick's Case* (2011) 39 VR 373, 423 [229], 443-444 [315] (Bell J). Justice Bell used, as an example, judicial review on the ground of Wednesbury unreasonableness.

In *Bare v IBAC*, Justice Tate of the Court of Appeal observed the common law ground for judicial review of failure to take into account a relevant consideration requires a decision maker 'to call his own attention to the matters which he is bound to consider',[154] while the procedural obligation in section 38(1) imposes a higher standard:

> *The difference between the statutory language in s 38(1) and the manner in which the common law ground of review is expressed supports the view that s 38(1) is intended to impose a test that is more strict than that applicable at common law … the evaluative exercise inherent in the procedural obligation demands more from a decision-maker than the bringing of human rights to one's attention.*[155]

To satisfy the procedural obligation in section 38(1), a decision maker must:

- understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, the decision will interfere with those rights
- seriously turn their mind to the possible impact of a decision on a person's human rights and the implications for the affected person
- identify the countervailing interests or obligations, and
- balance competing private and public interests as part of the exercise of justification.[156]

Less judicial consideration has been given to the substantive obligation not to act incompatibly with human rights. I propose below that the Charter clarify this obligation.

How do the procedural and substantive obligations in section 38(1) interact?

The interaction between the substantive obligation to act compatibly with human rights and the procedural obligation to give proper consideration to relevant human rights in making a decision is not settled. In particular, the way that section 38(1) applies to decisions of public authorities remains open on the case law to date. The key issues are whether acts and decisions should be distinguished and, in respect of a decision, whether the Charter requires both (a) proper consideration of relevant human rights in the decision-making process, and (b) that the decision also be substantively compatible with human rights.

[154] *Bare v Independent Broad-based Anti-corruption Commission* [2015] VSCA 197 (29 July 2015) [275], citing *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 39 (McHugh J).
[155] *Bare v Independent Broad-based Anti-corruption Commission* [2015] VSCA 197 (29 July 2015) [276], [287].
[156] *Bare v Independent Broad-based Anti-corruption Commission* [2015] VSCA 197 (29 July 2015) [288]-[289] (Tate J).

In *Patrick's Case*, Justice Bell applied the substantive obligation in section 38(1) to public authority decisions. He took the view that, for section 38(1), 'what matters is the result'[157]—that is, whether the act or decision is substantively compatible with human rights. While an act or decision is more likely to be human rights compatible if the decision maker considered human rights, it is 'the actual compatibility of the act or decision that is at issue, not the quality of the reasoning supporting it'.[158] Justice Bell's reasoning implies 'to act' in section 38(1) includes 'to make a decision", so decisions must be substantively compatible with human rights'.[159]

In a recent conference paper, Justice Kyrou took a different view. He distinguished between the acts and decisions referred to in section 38(1):

> *Although s 38(1) prohibits acts which are incompatible with a human right, it does not prohibit decisions which are incompatible with a relevant human right. In the case of decisions, s 38(1) simply requires public authorities to give proper consideration to a relevant human right.*[160]

On the first view, decisions must be substantively compatible with human rights, and an incompatible decision cannot be made lawful by demonstrating human rights were considered. By contrast, the latter approach means a decision maker needs only to give proper consideration to human rights in the decision-making process, and a decision is then lawful whether or not it is compatible with human rights. Using this approach to section 38(1), only acts (not decisions) must be substantively compatible with human rights.

The latter approach raises a further question: if section 38(1) distinguishes between acts and decisions, and a decision is substantively incompatible with human rights but is lawful because human rights were given proper consideration in the process, what does section 38(1) say about the lawfulness of an act implementing that decision?[161] The act is presumably unlawful if it is substantively incompatible with human rights, while the decision remains lawful on procedural grounds.

Improving the operation of section 38

Clarity in the operation of section 38(1) is important, because it is the gateway for people to enforce their rights when a public authority has breached those rights. Section 38(1) clearly requires acts to be compatible with human rights.[162] It also clearly requires decision makers to give proper consideration to relevant human rights in making a decision. What is not clear is whether section 38(1) requires decisions on their own to be substantively compatible with human rights.

The Charter should clarify that decisions that are substantively incompatible with human rights are unlawful under section 38(1). To achieve this clarity, 'to act' could be defined to include making a decision. Alternatively, section 38(1) could specify it is unlawful for a public authority to act in a way or make a decision that is incompatible with human rights (subject to the exceptions in section 38).

---

[157] *Patrick's Case* (2011) 39 VR 373, 442 [312] (Bell J).
[158] *Patrick's Case* (2011) 39 VR 373, 441 [310] (Bell J).
[159] *Patrick's Case* (2011) 39 VR 373, 442 [312] (Bell J). *In Kerrison v Melbourne City Council*, the Full Court of the Federal Court considered, but did not determine, whether 'to act' in section 38(1) includes making a decision: (2014) 228 FCR 87, 130-131 [187] (Flick, Jagot and Mortimer JJ).
[160] Justice Emilios Kyrou, 'Obligations of Public Authorities Under Section 38 of the Victorian Charter of Human Rights and Responsibilities' (2014) 2 *Judicial College of Victoria Online Journal: Human Rights Under the Charter: The Development of Human Rights Law in Victoria* 77, 78.
[161] Justice Emilios Kyrou, 'Obligations of Public Authorities Under Section 38 of the Victorian Charter of Human Rights and Responsibilities' (2014) 2 *Judicial College of Victoria Online Journal: Human Rights Under the Charter: The Development of Human Rights Law in Victoria* 77, 78.
[162] *Patrick's Case* (2011) 39 VR 373, 442 [312] (Bell J).

Recommendation 17: The Charter be amended to clarify that decisions of public authorities must be substantively compatible with human rights, whether by defining 'to act' as including 'to make a decision' or by specifying in section 38(1) that it is unlawful for a public authority to make a decision that is incompatible with a human right.

'Act' is defined as a noun in section 3 of the Charter—'act includes a failure to act and a proposal to act'. 'Act' is used in its noun sense in section 38(3) and sections 39(1)-(2). Conversely, 'act' is used as a verb in sections 38(1) and (4). This difference should be reconciled; how to do so is a matter for legislative drafting.

Exceptions to public authority obligations

There are exceptions to the obligations in section 38(1):

- Section 38(1) does not apply if a public authority could not reasonably have acted differently or made a different decision as a result of the operation of another law (section 38(2)).

- The public authority obligations do not apply to an act or decision of a private nature (section 38(3)).

- Section 38(1) does not require a public authority to act in way, or to make a decision, that has the effect of impeding or preventing a religious body (including itself when the public authority is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates (section 38(4)). 'Religious body' is defined in section 38(5).

Several submissions raised the exception in section 38(4) from public authority obligations. If a public authority is a religious body, then the exception prevents it from having to act in a way or make a decision that impedes or prevents it from acting in accordance with its religious doctrines, beliefs or principles. The exception also operates to prevent other non-religious body public authorities from having to act in a way that so impedes a religious body.

Section 38(4) operates as a defence to unlawfulness under section 38(1). For example, consider a religious body that receives public funding to provide homeless services, and a manager at the service refuses to provide accommodation to a same-sex couple because their relationship is not in accordance with the religious beliefs and doctrines under which the service operates. If the body could show this decision was required by religious beliefs and doctrines, it could raise this exception as a defence to acting incompatibly with to the right to equality in section 8 of the Charter.

I have had to use an artificial example here, because it is not clear to me that any religious organisation acting as a functional public authority in Victoria has relied on the exception when performing public functions on behalf of government. Nor is it clear to me that they should.

The Victorian Gay & Lesbian Rights Lobby (VGLRL) considered the continuing existence of the exception to be inconsistent with the Government's equality agenda, and noted:

> *The VGLRL is highly concerned by the existence of the exception for religious organisations. Such a carve out is unjustifiable under international human rights law, particularly given the role of these organisations to deliver publicly funded services or perform other government functions.*
>
> Victorian Gay & Lesbian Rights Lobby, Submission 77

Jamie Gardiner considered there is no reasoned basis for the exceptions for religious bodies in sections 38(4) and (5) of the Charter, which:

> *unjustifiably quarantine some organizations from the ambit of a law intended to apply generally. If the relevant public authorities, or bodies they supervise, are acting compatibly with human rights these subsections are irrelevant, and if they would be or are found to be acting incompatibly with human rights that means they have been acting incompatibly with what 'can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom' [under section 7(2)]. No principled argument can justify giving licence to such behaviour.*
>
> Jamie Gardiner, Submission 104

The VGLRL's submission noted many religious bodies that are also public authorities do not discriminate and do not support an exception.[163] The Catholic Archdiocese of Melbourne agreed section 38(4) may imply religious bodies generally act incompatibly with human rights, stating the formulation of section 38(4):

> *… can give rise to an inference that the doctrines, beliefs and principles of religious bodies may be contrary to human rights (and therefore have to be "exempted"); and that in any case religious communities are not lawfully obliged to act in a way which is compatible with human rights.*
>
> *Such an interpretation is clearly not Parliament's intention, nor what is intended by the provision itself. This ambiguity could be clarified to avert the danger of a misleading and prejudicial inference which works powerfully to devalue respect for freedom, thought, conscience and belief in the Charter itself, as well as casting doubt on the commitment of religious Victorians to human rights.*
>
> Catholic Archdiocese of Melbourne, Submission 107

If the exception to public authority obligations in section 38(4) were removed, all public authorities (including public authorities that are religious bodies) would still be bound to act in a way and make decisions that are compatible with human rights, including the right to freedom of thought, conscience, religion and belief in section 14 of the Charter. That right gives every person the freedom to have a religion or belief of their choice, and the freedom to demonstrate it in worship, observance, practice and teaching. A person must not be coerced or constrained in a way that limits their freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

As is the case for all other rights, a public authority would be able to act in a way or make a decision that was incompatible with the right to freedom of religion only if the limitation on the right was reasonable and demonstrably justified, having regard to the factors in section 7(2).

The operation of section 38(4) has been put squarely on the table as an issue in this Review. Removing the exception in section 38(4) would accord with amendments to the *Sex Discrimination Act 1984* (Cth) in 2013 to limit exemptions for religious organisations so they do not apply to the provision of Commonwealth-funded aged care services. I note the Government has committed to review the religious exceptions in the *Equal Opportunity Act 2010* (Vic) and the provision of adoption services to same sex couples.[164] The application of section 38(4) should be considered alongside these broader proposals to ensure a consistent approach across different Victorian laws.

---

[163] Submission 77, Victorian Gay & Lesbian Rights Lobby, 4.
[164] *Victorian Labor Platform* (2014) https://www.viclabor.com.au/wp-content/uploads/2014/05/Victorian-Labor-Platform-2014.pdf.

Recommendation 18: The Victorian Government consider the exception from public authority obligations in section 38(4) of the Charter (an exception relating to the religious doctrines, beliefs and principles of a religious body), as part of its current examination of religious exceptions and equality measures in other Victorian laws, so it can apply a consistent approach.

Term of reference 2(e): Clarifying the obligations of courts, including under sections 4(1)(j) and 6(2)(b)

Courts and tribunals have three distinct functions under the Charter:

- **An interpretive function:** Section 32 requires courts and tribunals to interpret statutory provisions compatibly with human rights, so far as it is possible to do so consistently with the provision's purpose.

- **An enforcement function:** Under section 39, courts and tribunals enforce public authorities' obligations to act compatibly with human rights and give proper consideration to human rights in decision making.

- **A compliance function:** Section 4(1)(j) makes courts and tribunals public authorities when they are acting in an administrative capacity, which means they must comply with section 38(1) of the Charter when acting in an administrative capacity. In addition, section 6(2)(b) applies the Charter to courts and tribunals in terms of their 'functions' under Part 2 of the Charter.

This section of the Report deals with only the third of these functions. I discuss the courts' functions in relation to legal proceedings and statutory interpretation in **Chapters 4 and 5**.

Courts and tribunals as public authorities

In its 2005 report, the Human Rights Consultation Committee clearly stated that the definition of public authority should not bind the courts in their development of the common law.[165] The Committee considered the inclusion of courts as public authorities when acting in a judicial capacity 'may create challenges in Australia's federal system, which according to the High Court has one unified common law'.[166] To avoid any part of the Charter being struck down by the High Court as unconstitutional, the Committee recommended that courts and tribunals be included as public authorities only when acting in an administrative capacity.[167]

In accordance with the Human Rights Consultation Committee's recommendation, section 4(1)(j) of the Charter provides that courts and tribunals are not public authorities except when they are acting in an administrative capacity. The note to section 4(1)(j) states a court or tribunal is acting in an administrative capacity when hearing committal proceedings, issuing warrants, listing cases or adopting practices and procedures.[168]

[165] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 59, recommendation 11.
[166] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 59.
[167] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 59.
[168] Pursuant to the *Interpretation of Legislation Act 1984* (Vic), this note forms part of the Charter: s 36(3A).

The courts have not had difficulty determining when a court or tribunal is acting in an administrative capacity and, therefore, when it is bound by the public authority obligations in the Charter. The relevant distinction is between acting in an administrative capacity and acting in a judicial capacity; or exercising administrative power as distinct from exercising judicial power.[169] Generally a court exercises judicial power and a tribunal exercises administrative power, but there are exceptions to this general rule. Some examples from the case law are set out below.

Examples from the case law: 'acting in an administrative capacity'

The Victorian Civil and Administrative Tribunal is a tribunal for the purposes of section 4(1)(j) of the Charter.[170] Its original jurisdiction under the *Guardianship and Administration Act 1986* (Vic) is administrative in nature, so the Tribunal is a public authority when appointing an administrator under that Act.[171]

The Medical Practitioners Board is a tribunal for the purposes of section 4(1)(j) of the Charter. Because disciplinary board proceedings do not involve the determination of criminal guilt (a marker of judicial power), the Board acts in an administrative capacity when exercising its powers to suspend a doctor.[172] Additionally, the Mental Health Review Board is a tribunal for the purposes of section 4(1)(j) of the Charter. It acts in an administrative capacity when reviewing involuntary treatment orders and community treatment orders.[173]

In making a coercive powers order under section 8 of the *Major Crime (Investigative Powers) Act 2004* (Vic), the Supreme Court exercises an administrative function in a judicial way—that is, 'in a just and fair manner with judicial detachment'.[174] No submissions were made to the Court on whether exercising this power involves acting in an administrative capacity, so the Court assumed that it did and, therefore, that the Supreme Court was a public authority when making coercive powers orders.[175]

A judge is not acting in an administrative capacity 'when he or she is hearing an application for adjournment of a trial which has already been listed by the listings section of the court', so is not a public authority when doing so.[176] The Court of Appeal has confirmed that a court exercises judicial power when determining whether to grant or refuse an adjournment of a trial.[177] This determination involves managing a trial either to determine criminal guilt and its punishment or to determine a civil dispute between parties, so is not administrative.

[169] *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414, 432 (Hollingworth J). Justice Bell rejected any further distinction between a tribunal acting judicially and quasi-judicially for the purposes of s 4(1)(j). He considered a tribunal exercising administrative functions quasi-judicially constitutes 'acting in an administrative capacity': *Patrick's Case* (2011) 39 VR 373, 402-403. See *Patrick's Case* for Justice Bell's list of principles for distinguishing administrative and judicial power: 404-405. These two types of power are further distinguished from legislative power.
[170] *Patrick's Case* (2011) 39 VR 373, 401.
[171] *Patrick's Case* (2011) 39 VR 373, 406.
[172] *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414, 433 (Hollingworth J). It was also an entity established by a statutory provision that has functions of a public nature under section 4(1)(b), so it was necessary to consider whether the exception in section 4(1)(j) for tribunals applied. The exception did not apply, because the board was acting in an administrative capacity: [112], [127].
[173] *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) [315] (Bell P). He distinguished administrative power from legislative and judicial power: [270].
[174] *Director of Public Prosecutions v Debono* [2013] VSC 407 (1 February 2013) [54], citing *R v Debono* [2012] VSC 350 (21 August 2012).
[175] *Director of Public Prosecutions v Debono* [2013] VSC 407 (1 February 2013) [56]. Authority supports the proposition that a decision does not cease to be administrative in character because the decision maker is required to act judicially: see citations in *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) [279] (Bell P).
[176] *R v Williams* (2007) 16 VR 168, 176 (Williams J).
[177] *Slaveski v The Queen (2012)* 40 VR 1, 31 (Nettle and Redlich JJA).

The references in the note to section 4(1)(j) to hearing committal proceedings and issuing warrants are largely uncontroversial.[178] However, the case law has raised questions about listing cases and adopting practices and procedures. For example, in *Kracke*, Justice Bell (sitting as the President of the Victorian Civil and Administrative Tribunal) noted the listing of cases by administrative or registry staff would be an exercise of administrative power, but could be an exercise of judicial power when done by a judicial officer.[179] He also said adopting practices or procedures could be either administrative or judicial, depending on the context and by whom it is done.[180]

In its 2011 review of the Charter, SARC recommended removing the words 'except when it is acting in an administrative capacity' from section 4(1)(j) of the Charter if section 38 (public authority obligations) were retained.[181] This change would exclude courts and tribunals from the definition of public authority. A majority of SARC recommended repealing the public authority obligations in section 38 of the Charter.

Functions of courts and tribunals to give effect to the rights in Part 2

In addition to courts' and tribunals' public authority obligations when acting in an administrative capacity, the Charter applies to courts and tribunals under section 6(2)(b) to the extent they have functions under Part 2 of the Charter and Division 3 of Part 3. Part 2 of the Charter contains section 7 and all of the human rights. Division 3 of Part 3 requires all statutory provisions to be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose.

The reference to courts having 'functions under Part 2' of the Charter raises the question of whether courts have a duty to give effect to relevant rights when acting in a judicial capacity, even though they are only public authorities when acting in an administrative capacity. In *Kracke*, Justice Bell (sitting as the President of the Tribunal) summarised the problem:

> *There is a need to reconcile the interpretation of s 4(1)(j), which excludes courts and tribunals from definition of 'public authority' in s 4(1) except when they are acting in an administrative capacity, with s 6(2)(b), which makes the Charter applicable to courts and tribunals to the extent that they have the specified functions.*[182]

In *De Simone v Bevnol Constructions & Developments*, the Court of Appeal held that section 6(2)(b) means the rights in Part 2 of the Charter (including the right to fair hearing in section 24 and the criminal procedure rights in section 25) apply directly to courts and tribunals.[183]

[178] For example, in *Sabet*, Justice Hollingworth noted '[i]t is well-established at common law that in conducting committal proceedings to determine whether there is sufficient evidence to stand an accused for trial, a magistrate is exercising an administrative, not a judicial, function': (2008) 20 VR 414, 432. In *Patrick's Case*, Justice Bell referred to High Court authority that issuing a warrant is an exercise of administrative, not judicial, power: (2011) 39 VR 373, 402 footnote 181.
[179] *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) [268] (Bell P).
[180] *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) [269] (Bell P).
[181] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 119, recommendation 28.
[182] *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) [239] (Bell P). A typographical error in the judgment referred to section 6(2)(a) instead of 6(2)(b).
[183] *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237, [52] (Neave and Redlich JJA).

In *Victoria Police Toll Enforcement v Taha*, Justice Tate of the Court of Appeal considered whether courts have functions in respect of the right to fair hearing in section 24 of the Charter. The three possible interpretations of courts' functions under Part 2 were:

> *(1) the broad construction, whereby the function of courts is to enforce directly any and all of the rights enacted in Part 2;*
>
> *(2) the intermediate construction, whereby the function is to enforce directly only those rights enacted in Part 2 that relate to court proceedings;*
>
> *(3) the narrow construction, whereby the function of courts is to enforce directly only those rights that are explicitly and exclusively addressed to the courts.*[184]

Justice Tate described it as 'undeniable' that the right to a fair hearing in section 24 of the Charter 'relates to the core functions that courts perform'. She found that courts are directly bound by section 6(2)(b) of the Charter to act compatibly with the right.[185] To this extent, the intermediate construction was accepted, but the Court did not need to determine its general correctness.[186]

There is no judicial support for either the broad or narrow constructions. The broad construction cannot be reconciled with the exclusion of courts and tribunals as public authorities when acting in a judicial capacity. The narrow construction would give courts functions only in respect of the very few rights for which their role is explicitly stated, which do not include the right to fair hearing in section 24(1).

In *Momcilovic v The Queen*, Justices Crennan and Kiefel of the High Court acknowledged that section 6(2)(b) may require courts to ensure compliance with processes for a fair hearing and the provision of Charter protections in criminal trials.[187] Justice Gummow raised (but did not determine) whether section 6(2)(b) requires a court to apply the Charter even when the parties have not raised it.[188]

In its 2011 review of the Charter, SARC recommended removing the reference to Part 2 in section 6(2)(b) (if section 6(2)(b) were retained).[189] SARC considered these words conflict with section 4(1)(j), under which courts and tribunals are only public authorities when acting in an administrative capacity. SARC also noted it is unclear which rights in Part 2 are relevant and what it means for a court or tribunal to have 'functions' under those rights.[190]

Improving the Charter's application to courts and tribunals

In its submission to the 2011 review of the Charter, which it resubmitted to this Review, the Castan Centre for Human Rights Law contended there is no reason the Charter should not apply to judges when they are acting in their judicial capacity.[191] It considered making courts and tribunals public authorities for all purposes would resolve confusion about what is meant by courts and tribunals having 'functions' under Part 2 of the Charter.[192]

---

[184] *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [246] (Tate JA).
[185] *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [247]-[248] (Tate JA).
[186] *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [248] (Tate JA).
[187] *Momcilovic v The Queen* (2011) 245 CLR 1, 204 [525].
[188] *Momcilovic v The Queen* (2011) 245 CLR 1, 91 [163].
[189] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 120-121, recommendation 30.
[190] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 120.
[191] Submission 26, Castan Centre for Human Rights Law, 19 (submission adopted from 2011 review).
[192] Section 6(2)(b).

Both the Castan Centre and Dr Julie Debeljak considered courts and tribunals should be treated as public authorities when acting judicially. They argued human rights should influence the common law, and they disagreed with objections based on Australia's unified common law, because other areas of the common law have been codified differently by different states state level and codification of human rights law should be no different.[193]

The Victorian Bar did not recommend change to section 4(1)(j) of the Charter.[194] However it considered section 6(2)(b) creates uncertainty and is not needed given courts already have functions in respect of the Part 2 rights when interpreting legislation compatibly with them.[195]

The Law Institute of Victoria recommended making tribunals public authorities for all purposes, and clarifying section 6(2)(b) of the Charter to require courts and tribunals to give effect to any rights under Part 2 of the Charter that relate to court or tribunal proceedings.[196] The Law Institute cited concerns that 'if courts do not have direct obligations with respect to rights such as the right to a fair trial or the presumption of innocence, there could be serious gaps in the protection of those rights'.[197]

But the Victorian Equal Opportunity and Human Rights Commission submitted the case law has now resolved initial uncertainty about 'acting in an administrative capacity' and the obligations of courts and tribunals under section 6(2)(b).[198] It did not consider any amendment to sections 4(1)(j) or 6(2)(b) is needed.

No need for significant change to section 6(2)(b) or 4(1)(j)

To date, courts and tribunals have struck an appropriate balance in determining what their 'functions' are under Part 2 of the Charter pursuant to section 6(2)(b). Section 6(2)(b) provides an additional layer of rights protection that goes beyond courts' and tribunals' roles as public authorities, interpreters of the law, and enforcers of public authority obligations. Section 6(2)(b) has been interpreted to oblige courts and tribunals to give effect to those rights that relate to their functions, while maintaining consistency with section 4(1)(j). For these reasons, I consider section 6(2)(b) should be retained without amendment.

In relation to section 4(1)(j), it is appropriate for Victoria to be cautious so that the Charter does not go against the grain of the Australian legal system. For the Charter to be effective and practical, it needs to be clearly valid within this structure. In the United Kingdom, courts are public authorities in their judicial capacity and bound to make decisions that are compatible with human rights. This arrangement has affected how the courts develop the common law. But, in Australia, the High Court has stated that there is 'a unified common law which applies in each State but is not itself the creature of any State'.[199]

[193] Submission 26, Castan Centre for Human Rights Law, 19 (submission adopted from 2011 review); Submission 72, Dr Julie Debeljak, 29 (this part of submission adopted from 2011 review).
[194] It referred to Justice Hollingworth's decision in *Sabet v Medical Practitioners Board of Victoria* that 'administrative capacity' should be read as equivalent to the concept of 'administrative power' at common law. Submission 54, Victorian Bar, 6-7.
[195] Submission 54, Victorian Bar, 7.
[196] Submission 78, Law Institute of Victoria, 30, recommendations 26, 28.
[197] Submission 78, Law Institute of Victoria, 30, citing Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) 14.
[198] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 80. It referred to the following cases on 'administrative capacity': *R v Williams* (2007) 16 VR 168; *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414; *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009); *Patrick's Case* (2011) 39 VR 373.
[199] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 112 (McHugh J); *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Lipohar v R* (1999) 200 CLR 485, [43]-[59] (Gaudron, Gummow and Hayne JJ), [167] (Kirby J).

The High Court distinguishes between a state legislature codifying an area of common law in a particular way and a state court developing its own version of the common law.[200] That is, state Parliaments can displace the unified common law by legislation or modify its operation in that jurisdiction, but the unified common law of Australia remains in place and is revived in that state if the relevant state legislation is repealed.[201]

To apply the Charter to courts and tribunals in their judicial capacity would go beyond the statutory codification of human rights law, because it would require Victorian courts and tribunals to develop all common law in a different (more human rights compatible) way from common law development by any other state court or the High Court. This outcome would be at odds with the existence of a single, unified common law. Further, as the Human Rights Consultation Committee concluded, it would expose the Charter to constitutional risk. For these reasons, I consider courts and tribunals should remain public authorities only when acting in their administrative capacity.

I am also satisfied that courts and tribunals can to determine when they are acting in an administrative capacity and, consequently, when they are bound by the Charter as public authorities. However, the references in the note to section 4(1)(j) to listing cases and adopting practices and procedures are not exclusively examples of a court or tribunal acting in an administrative capacity. To the extent that these functions may be judicial when performed by a judicial officer, their inclusion in the note to section 4(1)(j) is more likely to cause confusion than provide useful guidance.

It may already be difficult for a layperson to know what is meant by ‘acting in an administrative capacity’, because this understanding relies on the common law. The examples in the note should be clearer in showing when a court or tribunal is acting in an administrative capacity and, therefore, when it is subject to the public authority obligations in section 38(1).

Recommendation 19: The second sentence in the note to section 4(1)(j) of the Charter be removed or amended, because listing cases and adopting practices and procedures may sometimes involve acting in a judicial capacity rather than in an administrative capacity.

[200] *Lipohar v The Queen* (1999) 200 CLR 458, 507 [49], 509 [57] (Gaudron, Gummow and Hayne JJ).
[201] *Lipohar v The Queen* (1999) 200 CLR 458, 507 [49], 509-510 [57] (Gaudron, Gummow and Hayne JJ).

Chapter 3

Facilitating good practice and dispute resolution—the role of statutory authorities

Chapter 3 Facilitating good practice and dispute resolution—the role of statutory authorities

This Chapter looks at the functions of relevant statutory authorities (term of reference 1(b)) and links closely to issues in **Chapter 4** on legal proceedings and remedies (term of reference 2(b)).

Through these two terms of reference, we move from awareness and education at the front end of the system, to responses to complaints and remedies when things go wrong at the back end. We need to consider these elements of the Charter's framework in the context of where the Charter sits as a law and its statutory purpose (namely, to protect and promote human rights).

Part of the new administrative law

At its heart, the Charter is about the relationship between government and the people whom it serves. Through Parliament, the community gives significant power to the Executive Government. The Charter is part of the Parliament's contract with the community about this power: the people give power to the Government, and in return, the Victorian Parliament requires government to treat people fairly by acting compatibly with the 20 fundamental rights and freedoms set out in the Charter.

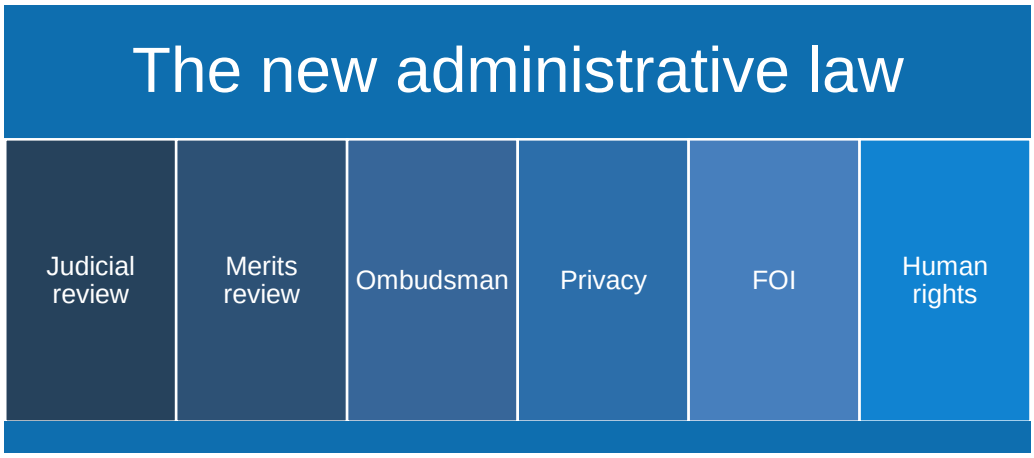
In this way, the Charter is a clearer articulation of one of the pillars of the 'new administrative law' that has guided public administration in Australia for the past four decades. That is, human rights are more than a conversation about values, they are part of the system of public administration:

> *To win, and justify, public confidence in government as a positive instrument for serving the interests of the community requires more than fashionable slogans about 'reinventing' government. Government needs to be seen to be well regulated; to be under control, in the sense of being both subject to limits and effectively directed towards achievable purposes within those limits.*[202]

Professor John McMillan described key elements of the administrative law system as 'judicial review by the courts, merit review by administrative tribunals, investigation of administrative action by the Ombudsman and human rights agencies, and conferral of information and privacy rights under freedom of information and privacy legislation'.[203] Administrative law is part of the system that holds the Executive accountable, ensures democratic control, improves the quality of administration, informs the public, legitimises administrative action and protects human rights.

[202] Ian Harden, 'Regulating Government' (1995) 66(4) *The Political Quarterly* 299.
[203] Professor John McMillan, 'Parliament and Administrative Law' (Research Paper No 13, Parliamentary Library, Parliament of Australia, 2000-01) i, available at: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP13.

Figure 4: Components of the new administrative law



A responsible regulatory framework

Human rights should be normalised and integrated within this context of public administration. The question then is how we make the Charter an effective and practical system for the protection and promotion of human rights. This is a regulatory goal and applying well-tested models of regulatory theory to this endeavour is instructive.

In their 1992 book *Responsive Regulation*, Ian Ayers and John Braithwaite shifted the regulatory enforcement discussion away from the 'deterrence' or 'compliance' debate. They said both strategies have a place within regulation: 'the trick of successful regulation is to establish a synergy between punishment and persuasion'.[204] It is important to recognise:

> *… compliance has a positive and a negative dimension. The positive dimension involves encouraging, facilitating and rewarding compliance or – more importantly – best practice … The negative dimension involves inspecting for compliance, and enforcing non-compliance.*[205]

Ayers and Braithwaite introduced the model of responsive regulation and the concept of the enforcement pyramid. They argued compliance is more likely when regulation works through an enforcement pyramid from persuasion at its base, through warnings and monitoring for non-compliance and to enforcement action and penalties at the tip of the pyramid where voluntary compliance fails. Regulatory interventions commence, and most effort is spread at the base of the pyramid, but escalates with more interventionist responses when other efforts fail to secure compliance.

As Julian Gardiner observed in the 2008 Equal Opportunity Act review, '[t]he reasons for non-compliance will vary. They can include ignorance; defects in the policies and practices that have been implemented; the cost of compliance; and deliberate non-compliance'.[206] The powers available in the regulatory tool-box should allow an appropriate response to each of these circumstances.

[204] Ian Ayers and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) 25.
[205] Chris Maxwell, *Occupational Health and Safety Act Review* (2004) 11.
[206] Julian Gardner, *An Equality Act for a Fairer Victoria* (2008) 44.

1. Facilitating voluntary compliance

Dr Parker observed the first step of compliance-oriented regulation is 'providing incentives and encouragement to voluntary compliance and nurturing the ability for private actors to secure compliance through self-regulation, internal management systems, and market mechanisms where possible'.[207] In particular, a regulator can foster an agency's compliance through education, guidance and other assistance.

For the Charter, this part of the regulatory model is reflected in:

- an agency's internal promotion and education about human rights
- the Victorian Equal Opportunity and Human Rights Commission's education function (section 41(d) of the Charter)
- the Commission's advisory roles when requested by the Attorney-General or relevant public authority: to look at the effect of statutory provisions and the common law on human rights (section 41(b)), to conduct a voluntary compliance review (section 41(c)), or to advise the Attorney-General on anything relevant to the operation of the Charter (section 41(f)). These functions are currently underused functions in the regulatory framework
- interventions in court or tribunal proceedings to offer an institutional perspective and guidance (interventions are carried out by the Attorney-General and the Commission under sections 34 and 40 of the Charter)

2. Informed monitoring

Dr Parker explained the second element of compliance-oriented regulation is 'informed monitoring for non-compliance'.[208] Monitoring must be used 'to determine whether regulatory design is having its desired effect on the target population'.[209] Because regulators cannot enforce every rule or cover every problem, they should use information collected about the regulatory problem to develop a 'risk-based approach to targeting inspections'.[210]

For the Charter, this part of the regulatory model is reflected in:

- the Commission's annual report on the operation of the Charter (section 41(a) of the Charter)
- Ombudsman investigations and recommendations, which are available in some cases
- Independent Broad-based Anti-corruption Commission investigations and recommendations, in relation to some allegations of misconduct by police and protective services officers.

[207] Christine Parker, 'Reinventing Regulation within the Corporation: Compliance Oriented Regulatory Innovation' (2000) 32 *Administration and Society* 529, 531.
[208] Christine Parker, 'Reinventing Regulation within the Corporation: Compliance Oriented Regulatory Innovation' (2000) 32 *Administration and Society* 529, 535.
[209] Christine Parker, 'Reinventing Regulation within the Corporation: Compliance Oriented Regulatory Innovation' (2000) 32 *Administration and Society* 529, 537.
[210] Christine Parker, 'Reinventing Regulation within the Corporation: Compliance Oriented Regulatory Innovation' (2000) 32 *Administration and Society* 529, 537.

3. Enforcement

Finally, Dr Parker observed a compliance-oriented regulatory design also must provide for enforcement in the event of non-compliance. As Dr Parker explained, when organisations fail to comply in the first instance, the preferred approach in compliance-oriented regulation would be to 'attempt to restore or nurture compliance rather than reverting immediately to a purely punishment-oriented approach'.[211] Dr Parker noted, however, these attempts to nurture and restore compliance operate in the presence of more punitive sanctions, because the evidence shows 'persuasive and compliance-oriented enforcement methods are more likely to work where they are backed up by the possibility of more severe methods.[212]

For the Charter, this part of the regulatory model is patchy, being reflected in:

- the piggy-backing of a Charter claim onto another legal claim for a court or tribunal to determine whether a public authority acted unlawfully under the Charter
- judicial review by the Supreme Court, which is available in some cases.

The regulatory model of the Charter largely relies on facilitation and persuasion techniques such as awareness raising, reporting and recommendations. While the Charter would be expected to do most of its work in these areas (given the public sector, in particular, should be readily persuaded to comply with the law), the absence of enforcement mechanisms weakens the Charter's regulatory model and makes its compliance pyramid unstable. For this reason, the current regulatory model is insufficient to embed a culture of human rights. Further, elements of the framework can wax and wane with the personalities involved. My consultations revealed the Charter, without any enforcement mechanism, was sometimes treated as a lesser standard than other legal rights and obligations.

The lack of consequences in many areas in the regulatory model influences leadership, oversight, workplace culture and, in the end, whether effect is given to fundamental human rights. The same would not be said of compliance with discrimination law or privacy laws, for example, or other areas of public administration that use the full compliance pyramid.

Since [the Court of Appeal's decision in] *Sudi, Homeless Law has observed less accountability for human rights compliance, which presents a greater risk of eviction for vulnerable tenants. In Homeless Law's experience, some social landlords are less motivated to try to comply with human rights obligations because there are limited consequences of not doing so. Although social landlords still have an obligation under section 38 of the Charter to act compatibly with human rights and to give proper consideration to human rights in decision-making, it is unlikely that tenants have meaningful recourse in the event of non-compliance given the costs and complexity associated with challenging the decisions of social landlords in the Supreme Court.* [The reluctance to negotiate in the lead up to the decision in Burgess] *was referred to by Macaulay J in his judgement… The lack of oversight from VCAT has also slowed down—and in some cases reversed—positive changes in social housing policies and practices that the early years of the Charter's operation had delivered.*

Justice Connect Homeless Law, Submission 79

[211] Christine Parker, 'Reinventing Regulation within the Corporation: Compliance Oriented Regulatory Innovation' (2000) 32 *Administration and Society* 529, 539

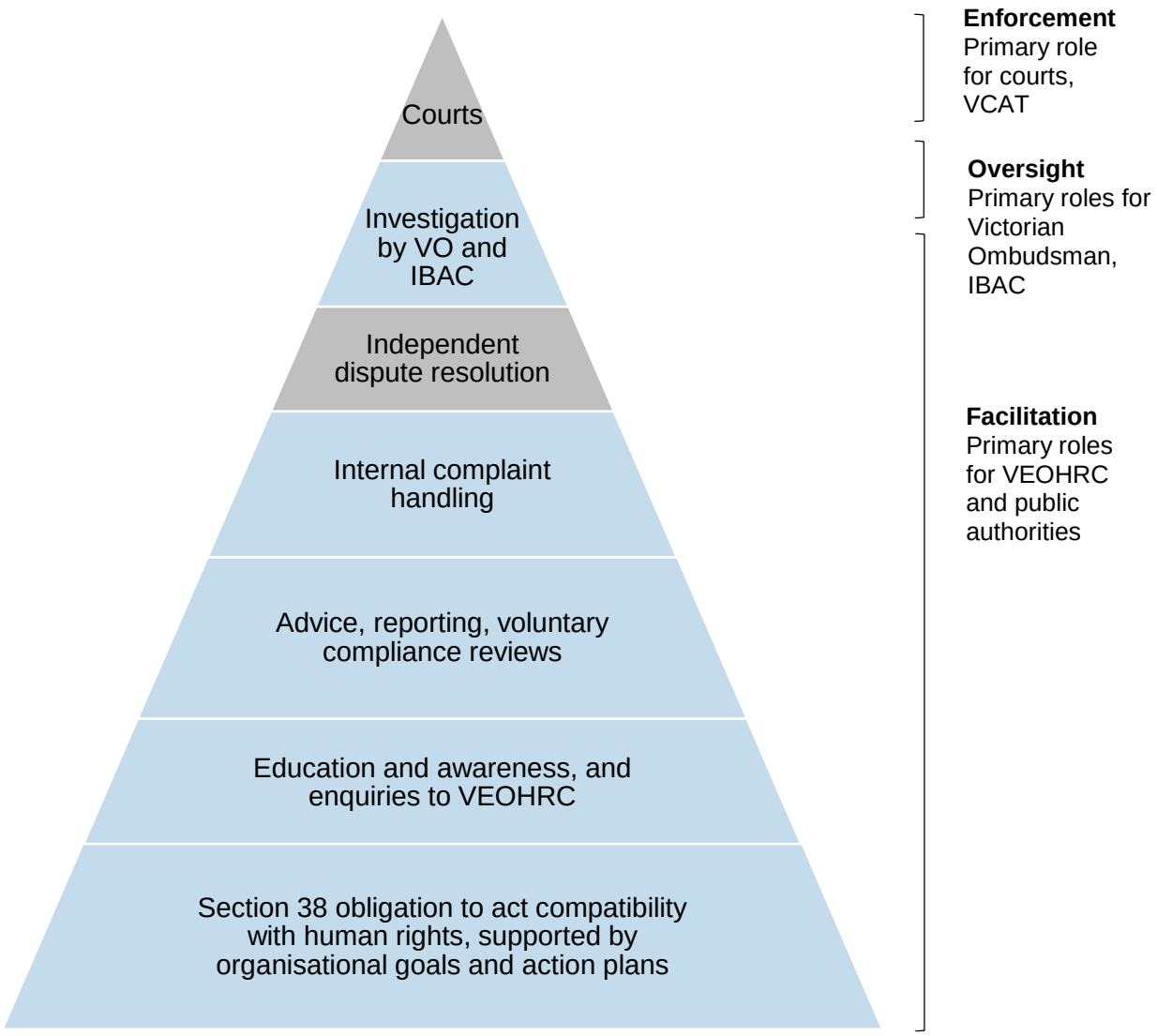
[212] Christine Parker, 'Reinventing Regulation within the Corporation: Compliance Oriented Regulatory Innovation' (2000) 32 *Administration and Society* 529, 541.

In the discussion below, I look at where elements of the Charter's enforcement pyramid could be 'switched-on' to create a more effective accountability mechanism of public administration.

> *To be accountable means to have the duty to explain and justify one's actions and hence involves exposure to the possibility of criticism if the performance revealed by the account is unsatisfactory. Being accountable may also include a liability to more formal sanctions, or measures to control and check future actions.*[213]

When developing the recommendations in this Report, I accounted for the principles contained in the *Victorian Guide to Regulation* and the Victorian Government's commitment to effective regulation.[214]

Figure 5: The proposed regulatory pyramid for the Charter



[213] Ian Harden, 'Regulating Government' (1995) 66(4) *The Political Quarterly* 299, 300
[214] Department of Treasury and Finance, *Victorian Guide to Regulation* (December 2014).

Term of reference 1(b): The functions of the Victorian Equal Opportunity and Human Rights Commission under the Charter and the Victorian Ombudsman under the *Ombudsman Act 1973*, particularly in relation to complaint-handling

Overview

This term of reference looks at the functions of the Victorian Equal Opportunity and Human Rights Commission and the Victorian Ombudsman, particularly in relation to complaint handling. I recommend:

- the Commission have power to request information to help it perform its functions under the Charter, and public authorities be given a duty to assist
- the Commission be given a clear statutory basis for charging for compliance reviews and education at its discretion
- other complaint-handling and oversight bodies, including the Victorian Ombudsman, be given power to ask for assistance from the Commission
- the Commission be given the function to offer voluntary dispute resolution for disputes about a public authority's compliance with the Charter
- the Victorian Ombudsman's jurisdiction clearly cover the administrative actions of all public authorities (excluding police and protective services officers), when it is looking at compliance with human rights
- a note be inserted in the Charter to flag the human rights-related jurisdiction of the Ombudsman and other relevant oversight bodies so this is clear in the text of one Act
- all relevant public sector complaint handlers be able to look at relevant Charter issues that arise in their jurisdiction. Further, appropriate referral mechanisms and information sharing between agencies should be facilitated, and these roles should be noted in the Charter.

Functions of the Victorian Equal Opportunity and Human Rights Commission

The Victorian Equal Opportunity and Human Rights Commission is an independent statutory authority reporting to Parliament through the Attorney-General.[215] It has functions under the Charter, the *Equal Opportunity Act 2010* (Vic) and the *Racial and Religious Tolerance Act 2001* (Vic).

When the Charter was introduced, the then Equal Opportunity Commission Victoria was given functions to provide education, voluntary reviews and information about human rights to the government, the public and the courts.

[215] More information about the Commission is available on its website: http://www.humanrightscommission.vic.gov.au/

In its 2005 Report, the Victorian Human Rights Consultation Committee noted it wanted 'to avoid a situation where public authorities are under an obligation to observe Charter rights in a climate where there is a "lack of awareness, lack of leadership and lack of help"'.[216] The human rights roles established for the Commission following this consultation have been central to providing this help.

The Commission's functions under the Charter

The Charter gives the Commission specific powers and functions:

- a right to intervene in proceedings before any court or tribunal in which a question of law arises that relates to the application of the Charter or that arises with respect to the interpretation of a law in accordance with the Charter (section 40(1)) (the Attorney-General also has this right)
- a requirement to present an annual report to the Attorney-General on the operation of the Charter, including its interaction with other laws, all declarations of inconsistent interpretation made during the year, and all override declarations made during the year (section 41(a))
- when requested by the Attorney-General, a function to review the effect of statutory provisions and the common law on human rights[217] and report to the Attorney-General in writing (section 41(b))
- when requested by a public authority, a function to review that authority's programs and practices to determine their compatibility with human rights (section 41(c))
- a function to provide education about human rights and the Charter (section 41(d))
- a function to assist the Attorney-General in the four- and eight-year reviews of the Charter (section 41(e))
- a function to advise the Attorney-General on anything relevant to the operation of the Charter (section 41(f)).

These functions focus the work of the Commission on the facilitation and persuasion planks at the base of the enforcement pyramid. Below, I address each of the functions.

a. Interventions in court or tribunal proceedings

The Attorney-General and the Commission have a right to intervene in court or tribunal matters that raise Charter issues (sections 34 and 40).

As interveners, they provide the court or tribunal with the benefit of their expert perspectives on the interpretation and application of the law. This function was built into the Charter to help with the development of local case law, which is still in a relatively early stage after eight years.

Many people, including members of the judiciary and the legal profession, commented on the usefulness of the interveners' participation in Charter proceedings.

[216] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 110.
[217] In this Report a reference to 'human rights' is used as defined in section 3 of the Charter and refers to the 20 human rights set out in Part 2 of the Charter, unless otherwise specified.

In its 2015 review of its intervention functions, President Maxwell described the Commission's Charter interventions as 'helpful, illuminating, instructive and independent' and noted the Commission had 'provided instructive assistance to the court' in its interventions. A judge also commented that the Commission's submissions helped judges think through the issues and the ways to resolve a matter. This assistance was observed to be particularly important in test cases involving alleged human rights breaches:[218]

> *[I]nterventions by the Commission and Attorney General can greatly assist the running of a Charter case. They do this by clarifying the human rights issues in dispute and identifying important legal principles and material to assist the court in its decision.*
>
> Law Institute of Victoria, Submission 78

> *[T]he role has been helpful in the clarification of Charter arguments. VLA also notes the positive role that the VEOHRC's intervention has played in cases where a party is unrepresented, or where there is no other contradictor on Charter issues.*
>
> Victoria Legal Aid, Submission 93

The Commission noted its right to intervene:

- reflects the Commission's expert role as the regulatory body with responsibility for administering and promoting the Charter;
- recognises the importance of an expert body such as the Commission in developing the jurisprudence related to a new law;
- is derived from its independence, autonomy and expertise, which is particularly important when raising human rights issues of high public interest;
- promotes the objectives of the legislation;
- validates the importance of the Charter's human rights protections.[219]

This role continues to be valuable for its clarifying and educative influence, and I do not recommend changing the actual function. However, I address the use of the function in **Chapter 5**, in my discussion of term of reference 2(h), which deals with the notification provision under section 35 of the Charter.

b. Reporting and advice

Under section 41(a), the Commission is required to report annually to the Attorney-General on the Charter's operation. This report is tabled in Parliament.

The Commission has tabled seven annual reports and a number of thematic reports or reports on human rights in local government.

[218] Victorian Equal Opportunity and Human Rights Commission, *Report to Stakeholders: Review of the Commission's Intervention Functions in the* Charter of Human Rights and Responsibilities Act 2006 *(Vic) and the* Equal Opportunity Act 2010 *(Vic)* (May 2015) 17.
[219] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 38.

This reporting is one mechanism by which human rights practice within government is exposed to 'the sunlight test':to 'open up the windows and encourage debate about the public expectations of duty in the daily decisions of employed professionals'.[220] These reports are a primary vehicle for identifying systemic issues and promoting implementation of the Charter.

The Commission noted in its submission:

> *… [a]lthough there is no statutory requirement for organisations to report to the Commission, public authorities actively participate in the reporting process each year—to showcase the work they are doing to actively promote and protect human rights, as well as to let the Commission know how we can help them to better understand their obligations under the Charter.*[221]

However, the City of Darebin observed:

> *The current audit and reporting arrangements tend to be descriptive and provide little practical guidance… Council acknowledges that [the] annual Charter audit survey led by the Commission has provided an important trigger for Council to record and reflect on its annual progress in implementing the Charter. It has also provided Councillors and the Senior Executive Team an opportunity to consider this progress. The audit survey has not driven progress, however. Instead, Council's Human Rights Action Plan has provided the imperative for action.*
>
> *The current format and tone of the annual reporting document written by the Commission for the Government inflates the 'good news' stories at the expense of the opportunity to share the far more challenging situations, including where the Charter is failing to impact decision-making.*[222]

> *State Government and all its departments …* [should] *develop an action plan for the protection and promotion of human rights and compliance with the Charter, undertake an annual audit of their human rights compliance and publish the outcomes on an annual basis ... all Councils* [should] *undertake an annual audit of their human rights compliance.*
>
> **City of Darebin, Submission 52**

Communication Rights Australia also observed:

> *There should be set targets for government and funded agencies to measure against set performance targets with publically reportable achievements.*[223]

The Victorian Council of Social Service noted human rights reporting and auditing should be embedded into existing accountability mechanisms:

> *This process should not seek to add another layer of 'red tape' over reporting requirements, but rather to reinforce the importance of embedding human rights across organisational structures and documents, rather than as a discrete and isolated consideration.*[224]

[220] Deen Sanders, 'Reinventing Regulation' (June 2014) *Law and Financial Markets Review,* 98-102, 100.
[221] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 41.
[222] Submission 52, City of Darebin, 6, 7.
[223] Submission 12, Communication Rights Australia, 7.
[224] Submission 64, Victorian Council of Social Service, 8.

I agree the Commission's reporting mechanism could be more effective in driving continuous improvement in practice if it could connect to goals and indicators. This connection would allow the Commission to fulfil an accountability role as well as an educative one. For this reason, in **Chapter 1** on embedding a human rights culture (term of reference 1(d)), I recommend public authorities set and report against key goals in relation to human rights.

The Commission should also have the ability to request information to facilitate its Charter functions (as it does under section 157 of the Equal Opportunity Act). Given the public sector context, public authorities should have a duty to assist. Public sector body Heads have a similar duty under section 110 of the *Privacy and Data Protection Act 2014* (Vic).

> *As an oversight body, it helps to be able to access information, or at least for people to know you can formally require this cooperation. What's the argument against that in the public sector? With human rights, you're dealing with public authority obligations in relation to the community. It's public information and a question of transparency and can help improve outcomes. We're all here to help improve government service delivery to citizens. As an oversight body it's your job to point out legitimate issues and assist government to identify why it's come up and how to fix it.*
>
> **Meeting participant, May 2015**

Matthew Potocnik recommended the Commission be resourced to log and maintain a systemic issues register.[225] While I do not recommend legislating the detail of how the Commission choses to exercise its unctions, I agree some kind of register or tracking of issues would facilitate the Commission's work. It would help the Commission to capture and mine the information it receives through many sources: enquiries and complaints; research data; and its experience with education and compliance reviews. It would also be a valuable and evidence-based resource to help the Commission and other relevant statutory bodies target their education and other regulatory activities.

Recommendation 20: The Victorian Equal Opportunity and Human Rights Commission be given the power to request information to assist with its statutory functions under the Charter and public authorities be given a duty to assist, as exists under the *Privacy and Data Protection Act 2014* (Vic).

c. Compliance reviews, audits and investigations

The regulatory model outlined above recognises more formal mechanisms are often needed when problems with compliance are identified.

Under section 41(c) of the Charter, the Commission can undertake a review for compliance with the Charter at the request of a public authority. This is a voluntary process for both parties. A review can only be conducted at the request of a public authority and the Commission can agree or decline to undertake a review.

The Commission has conducted six formal Charter compliance reviews at the request of a public authority.[226]

[225] Submission 73, Matthew Potocnik, 1.
[226] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 27.

Example: Charter compliance review of same gendered health care

In 2014/15, the Commission conducted a compliance review under both the Equal Opportunity Act and the Charter. Monash Health requested that the Commission conduct a compliance review of its policy relating to the provision of same-gendered healthcare as contained in the Monash Women's maternity services' patient information. The Commission considered how the policy applied to patients who would request same-gender care due to their cultural and religious backgrounds, such as Muslim, Jewish and Aboriginal patients, or where they had experienced trauma. The review involved reviewing the written policy of Monash Women's, as well as consulting with key staff and members of the community about the policy and its implementation. The Commission also considered the policy in light of Monash Health's existing patient centred care and diversity framework to ensure any recommendations would be practical and workable within the existing Monash Health policy and practice framework.

The Commission completed the review in early March 2015, and provided a confidential report to Monash Health. In May 2015, Monash Health publicly committed to implementing all of the Commission's recommendations, including amending their policy to state that staff will try to accommodate requests for same gender care wherever possible, although could not guarantee a carer of a particular gender for every appointment, examination or procedure. For example, if there is an emergency and a patient needs urgent medical attention, they will be treated by the available doctors who could be male or female. Patients could also ask to have another person, such as a relative or friend, attend the consultation, examination or procedure with them and reasonable endeavours to accommodate their request would be undertaken where practicable …

A person accessing health services provided by a public authority has the right to receive them free from racial or religious discrimination, and for that public health service provider to take their human rights into consideration and not unreasonably limit them when they make decisions about the services provided. Most relevantly to culturally appropriate health care services are a patient's right to equality, freedom of thought, conscience and religion, and cultural rights.[227]

The Victorian Equal Opportunity and Human Rights Commission noted:

> *One of the significant benefits of voluntary compliance is the willingness of public authorities to cooperate in the process, implement the recommendations of a review, and be genuinely committed to improve their practice. Engagement in the review process has served to clarify the human rights obligation … analyse the effectiveness of existing actions and other tailored corrective action. In particular, the review process has brought to the forefront issues confronting the most vulnerable in our community and how public authorities respond to such groups.*[228]

Youthlaw also noted the example of the Ombudsman's investigation into children being transferred to or detained in adult custody and the Commission's Charter compliance review of the practice of transferring children to adult prisons which resulted in a revision of policy guidelines and training.[229] Such reviews, in which the Commission works with a public authority, have great capacity to identify issues and positively influence human rights in practice.

[227] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 29.
[228] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 30.
[229] Submission 36, Youthlaw, 4.

This function could be better used. The Commission identified obstacles that prevent public authorities from requesting reviews: a lack of awareness, resistance to change, concern for negative exposure, and the cost of compliance.[230] It should promote its review function, and a stronger human rights culture in the public sector is likely to lead to more requests for assistance.

People are also learning how to better use the Commission's expertise. For example, the Commission for Children and Young People noted it was working with the Victorian Equal Opportunity and Human Rights Commission to develop a human rights 'matrix' or assessment tool to help assess human rights issues in its review and inquiries. It observed '[t]hrough collaboration with VEOHRC, the Commission for Children and Young People sees potential to harness VEOHRC's Charter review function as a tool to encourage public authorities to review their human rights compliance records and systems'.[231]

Hard thinking to prevent problems at the front end: applying the justice reinvestment framework to human rights

Many benefits arise for government in undertaking reviews and making changes up front. This approach is similar to current thinking about the justice reinvestment framework—an approach that seeks to address the causes of the problem (by shifting funding to community-based initiatives), not simply respond to the problem when it occurs (by funding prisons).

This re-gearing of where energies are expended is challenging. But, to adapt the words of John F Kennedy, government should be doing the hard things 'because that goal will serve to organize and measure the best of our energies and skills'.[232] This approach is not new for the public sector, and is engrained in how the sector approaches risk management. However, human rights and the consequences of a breach of human rights need to be valued sufficiently to be part of the balance sheet.

Ideally, the Victorian Equal Opportunity and Human Rights Commission should be funded to provide the advisory service of compliance reviews so cost does not stop public authorities asking for help. However, if dedicated funding is insufficient to meet demand, the Commission should be able to charge for the reasonable costs of these reviews at its discretion, as it does under section 151(1A) of the Equal Opportunity Act. In doing so, it could maximise its ability to provide these services. This is sharing cost across the State budget rather than shifting the cost in real terms.

Similarly, the Commission should be given a clear statutory basis so it can choose when it will charge for training services under the Charter.

Recommendation 21: The Victorian Equal Opportunity and Human Rights Commission be given the discretion to charge for the reasonable costs of voluntary compliance reviews, and education and training services.

A number of submissions to the Review also argued the Commission should have the power to conduct some form of compulsory compliance review, audit or investigation.[233]

[230] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 29.
[231] Submission 51, Commission for Children and Young People, 4.
[232] John F Kennedy, *Moon Speech*, Rice Stadium, 12 September 1962, accessed on 13 July 2015, http://er.jsc.nasa.gov/seh/ricetalk.htm.
[233] Submission 47, Victorian Ombudsman, 5; Submission 48, Gippsland Community Legal Service, 2; Submission 69, Rosetta Moors, 3; Submission 70, Disability Discrimination Legal Service, 2; Submission 73, Matthew Potocnik, 1; Submission 745, Tenants Union of Victoria, 14; Submission 77, Victorian Gay & Lesbian Rights Lobby, 2; Submission 78, Law Institute of Victoria, 10; Submission 91, Federation of Community Legal Centres, 12.

> *While a voluntary review will generally be the preference, this will not always be an appropriate or feasible way to ensure compliance. To fully embed a culture of human rights in Victoria, it will be important on occasions for the Commission to be able to initiate an audit of a public authority for compliance with the Charter if the Commission identifies significant compliance issues based on reliable information and the public authority is not willing to initiate a review of its programs and practices.*
>
> Victorian Equal Opportunity and Human Rights Commission Submission 90

> *While admitting impracticalities and complications that come with the regular auditing of a large number of public authorities and government-funded community services and initiating enforcement options to address non-compliance, ECCV sees benefits in targeted audits of those involved in social service delivery … ECCV holds the view that this requirement would prompt organisations to develop and deliver programs and services that are accessible and responsive to the needs and circumstances of culturally diverse communities.*
>
> Ethnic Communities Council of Victoria, Submission 63

An audit or investigation function is a common feature of regulatory models. Audits shine a light on practice and offer recommendations for corrective action, whereas investigations are generally prompted by an allegation of wrongdoing or systemic failure.

For example, the ACT Human Rights Commission can conduct audits under section 41(1) of the Human Rights Act and the Victorian Privacy and Data Protection Commissioner can conduct audits under sections 103 of the Privacy and Data Protection Act.

Kerrie Keleher noted the Commission should have more power 'to enforce human rights when a complaint has been lodged'.[234] I note the Commission can conduct investigations under Part 9 of the Equal Opportunity Act. I agree an effective regulatory system needs an oversight body to be able to look into compliance concerns when facilitative compliance mechanisms fail.

However, I am not persuaded that an auditing or investigation role for the Commission can be sufficiently distinguished from the role of the Ombudsman, the Victorian Auditor-General's Office or IBAC (in relation to police), to warrant the overlap of jurisdiction. Supporting this view is my recommendation below to ensure that the Ombudsman has jurisdiction over the administrative actions of all public authorities (other than police and protective services officers). In coming to this conclusion, I am conscious of the goals of the Review to make the Charter both effective and practical.

The Commission noted '[w]hereas those bodies have a full range of investigation powers in responding to serious contraventions, the audit function would be geared toward providing incentives and corrective action for compliance'.[235] This role of providing guidance on corrective action is equally the role of the Victorian Ombudsman or the Victorian Auditor-General's Office in their performance reviews. A functional separation is also useful, with one organisation being able to work in a cooperative role (the Commission) and one in an oversight role (Victorian Ombudsman).

[234] Submission 60, Kerrie Keleher, 1.
[235] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 29.

The Commission's ongoing roles of education, intervention and, as I propose, dispute resolution, will continue to build its human rights expertise. So, I propose other oversight bodies be able to formally request assistance from the Commission. The mechanism for this should remain flexible, but could be through secondments, cooperative partnerships or the provision of information, guidance and reviews.

The Commission should also have power to refer human rights issues that come to its attention to relevant oversight bodies. I address this recommendation later in this Chapter (**recommendation 25**), because it is a broader issue of cooperation between oversight bodies when Charter issues are raised.

Recommendation 22: The Victorian Ombudsman, the Independent Broad-based Anti-corruption Commission, and other relevant oversight bodies be given the power to request the Victorian Equal Opportunity and Human Rights Commission to help them when they exercise their statutory powers in relation to human rights issues.

d. Information and education

The Commission has a broad function under section 41(d) to provide education about human rights and the Charter.

It runs a free enquiry line and publishes information about human rights: in 2013-14 it handled 9,157 enquiries about human rights and equal opportunity issues.[236] The Commission also conducts training for public authorities, community organisations and private individuals. In 2013-14 it delivered 616 workshops to over 9,000 participants across human rights and equal opportunity issues.[237]

The Commission's education function during the first four years of the Charter was focused on training community organisations, setting up education initiatives for local councils, and promoting an understanding of the Charter to the broader community.[238]

From 2011 to 2014, it provided 37 education and training sessions to government departments. Training with state government has focused on two categories of public authority: those that deliver services to the most vulnerable parts of the community; and those that have specific functions to manage complaints and monitor parts of the public service.[239]

In the same period, the Commission conducted 159 education and training sessions for local government[240] and 148 sessions for advocates.[241] Further, it produced human rights resources including a Charter guide for public sector workers, fact sheets about the Charter and each Charter right, and a website called *Protecting Us All* (www.humanrights.vic.gov.au).

> *DPC considers the resources provided by the Commission to be valuable. DPC has made extensive use of these resources, in particular in designing and offering the learning and development opportunities made available to staff. DPC also recognises the wider work the Commission undertakes to promote public awareness of the Charter and human rights.*
>
> **Department of Premier and Cabinet, July 2015**

[236] Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2013-14* (2014) 9.
[237] Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2013-14* (2014) 10.
[238] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 32.
[239] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 33.
[240] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 35.
[241] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 36.

In 2014 the Commission also started a Victorian Public Sector Human Rights Network, which aims to provide information, ideas and networking opportunities to public sector employees who are interested in applying human rights in their work. Network activities have included a panel discussion and paper on human rights and risk management, a panel discussion on human rights complaint-handling, and a series of short videos on accounting for human rights in planning decisions.[242]

In **Chapter 1**, I make recommendations about the education function under term of reference 1(d) on embedding a human rights culture.

e. Complaint-handling—proposed dispute resolution role

Good complaint-handling procedures are part of the regulatory model outlined above, and they should be part of the accountability mechanisms of the Charter:

> *Human rights complaints mechanisms are important. The Charter provides a vehicle by which government says to the community that we are working to protect your rights. A complaints process says here's a way of bringing it to us if you think that's not working well.*
>
> Karen Toohey, former CEO of the Victorian Equal Opportunity and Human Rights Commission, May 2015

How a person can make a human rights complaint now

A person who has concerns about their human rights can:

- complain directly to a public authority via its internal complaints procedures
- make a complaint to the Ombudsman for investigation in relation to administrative action, when the Ombudsman has jurisdiction
- make a complaint to IBAC in relation to police personnel and protective services officers
- raise the Charter in a court or tribunal where the claim can be attached to an existing legal claim.

In 2013-14 the Victorian Equal Opportunity and Human Rights Commission received approximately 670 enquiries from individuals raising allegations of a breach of human rights.[243] At present, the Commission cannot take human rights complaints under the Charter.

[242] Victorian Equal Opportunity and Human Rights Commission website, 'Victorian Public Sector Human Rights Network' accessed 13 July 2015, http://www.humanrightscommission.vic.gov.au/index.php/vps-human-rights-network.
[243] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 18.

Internal complaint handling

Internal complaint procedures are an important first step. Disputes should be resolved at the earliest opportunity, which is often in a person's day-to-day interaction with a public authority.

In its 2011 review, the Scrutiny of Acts and Regulations Committee recommended 'public authorities that do not have internal complaints procedures relating to human rights be supported through the development and distribution of templates for incorporating such procedures into existing complaints processes'.[244]

The internal culture also needs to support appropriate handling of human rights complaints, starting at the front reception and going right up to the Secretary and the Minister's office.

During the public consultation for the Review, I heard mixed responses to issues raised directly with a public authority.

> *Sometimes complaints get cut off at the bottom—there can be blockages internally, people bury things, they're not listening or not hearing the issue amongst everything else they're dealing with. But when people feel their only option is to go to the Herald Sun, that's not how you want to hear about something as an executive. The complaint you see is often at the pointy end of the experience of a whole bunch of people. Heads of public authorities need to bring that up and see it—it's either a service delivery issue or a reputational issue you have an opportunity to manage: why wouldn't you want that opportunity? Too often people see complaints as something to bat back or hide.*
>
> Karen Toohey, former CEO of the Victorian Equal Opportunity and Human Rights Commission, May 2015

Example: building human rights capacity into complaints procedures

The State Revenue Office (SRO) has a formal policy for registering complaints, including human rights complaints. All complaints are treated as priority issues. Each complaint is recorded in a database and automatically escalated to the Branch Manager of the relevant areas of the SRO. Branch managers are required to act on complaints as soon as possible, and may seek assistance from SRO Human Rights Specialists in relation to human rights complaints. To ensure all complaints are followed up, complaints are reported to the SRO Executive monthly, including the number received by month and the number of outstanding items in each area.[245]

The Department of Justice & Regulation is developing further guidance for internal complaint-handling procedures to help public sector workers identify and address the human rights issues that may arise.

But many people who participated in the public consultation for this Review were concerned about the adequacy of existing mechanisms. They clearly wanted an easier way to raise their human rights concerns with government. People raised issues such as:

- **scope:** some areas fall between the cracks (for example, the Victorian Ombudsman does not have clear jurisdiction over all public authorities)

[244] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 69.
[245] Information provided by the department to the reviewer, July 2015.

- **independence:** often people wanted to make the complaint to someone independent rather than someone at the department, agency or local council that they consider breached their human rights. This option is not always available under the current structure

- **accessibility:** for some matters, such as public housing evictions, the human rights issue has to be raised in a judicial review application to the Supreme Court. This process is not accessible to many people, particularly those facing eviction from public housing

- **a focus on individual rights and remedies:** some complaint systems are about government, not the individual community member and their rights and needs (for example, the Victorian Ombudsman focuses on administrative issues, and a disciplinary process at Victoria Police or an IBAC investigation is about the police member's professional obligations). These processes focus on public administration

- **clarity:** people have no one clear place to go to make a human rights complaint. Some people within both the community and government assumed the Commission is already the place to go.

This theme was strong in the public submissions:

> *The Charter is unusual among pieces of legislation that protect key rights in Victoria in that it does not explicitly provide an accessible, timely means to seek redress for breaches of rights.*
>
> **Victoria Legal Aid, Submission 93**
>
> *The current charter of human rights is so 'weak and watery' even for members of the general population having adequate capacity to properly represent themselves.*
>
> **Lifestyle in Supported Accommodation, Submission 10**

The need for alternative dispute resolution

Often, vulnerable or disadvantaged people are interacting with government at the pointy end of human rights issues. The complexity of the complaints system is difficult to navigate and, for many people, inaccessible. As a recent decision in the housing area illustrates, a person facing eviction from public housing could exercise her rights only by getting quickly to the Supreme Court with a judicial review application. Justice Connect Homeless Law observed:

> *Fortunately for Ms Burgess, she was able to obtain pro bono legal representation and was courageous enough to commit to protracted legal proceedings, which carried significant stress, as well as a risk of overwhelming costs in addition to homelessness, if she was unsuccessful.*
>
> *This is not, however, an avenue that is available to the majority of social housing tenants.*[246]

Successive governments have been committed to alternative dispute resolution, looking for ways to help people resolve their issues at an early point and in an accessible and resource-effective way. These principles should be applied to disputes with government.

[246] Submission 79, Justice Connect Homeless Law, 16.

Indeed, dispute resolution as a model is particularly appropriate in this context. Having an ongoing relationship with the community member, government has every incentive to try to work things out when an individual raises concerns. The involvement of an independent conciliator can help.

Dr Liz Curran observed dispute resolution sees 'different people able to sit around a table and problem solve to ensure human rights options are in place that are appropriate and allow a voice for participants whose rights are at risk'.[247]

> *Dispute resolution processes are about the practicalities. They give government a way to engage with people, a formalised process to follow where there is an independent person* [the conciliator] *with expertise in the area to help guide the process.*
>
> *The conciliator can help give the community member an opportunity to articulate their concerns. give guidance to both parties on what is or isn't covered by the law which narrows the issues, they can help to identify practical and systemic solutions, and can remind people that they often have an ongoing relationship with the public authority, whether they like it or not.*
>
> *The conciliator can identify options—sometimes a decision-maker is doing something because they think they have to or because that's the way they've always done it. That's not necessarily the best or the only way to do it. The dispute resolution process can help unpack that.*
>
> *This is a cost-reducer in the long-term: it reduces risks for government service areas, it builds relationships between government and community and can help to identify and address systemic issues more quickly and efficiently than court processes and with more flexibility. That's a big benefit to government in the long-term and an investment in our democratic system. There's a public value in the government's relationship with the community and the community's trust in government. Dispute resolution processes can help to build that.*
>
> **Karen Toohey, former CEO of the Victorian Equal Opportunity and Human Rights Commission, May 2015**

The Commission does not currently have jurisdiction to receive complaints under the Charter. But it can handle disputes under the Equal Opportunity Act and the Racial and Religious Tolerance Act. It offers free and impartial dispute resolution for complaints of discrimination, sexual harassment, racial and religious vilification, and victimisation under those Acts. It can receive these complaints against public authorities and private entities.

Under this model, an applicant may bring a dispute to the Commission for resolution. Participation in dispute resolution is voluntary: that is, parties to the dispute are not compelled to participate and any party may withdraw at any time.

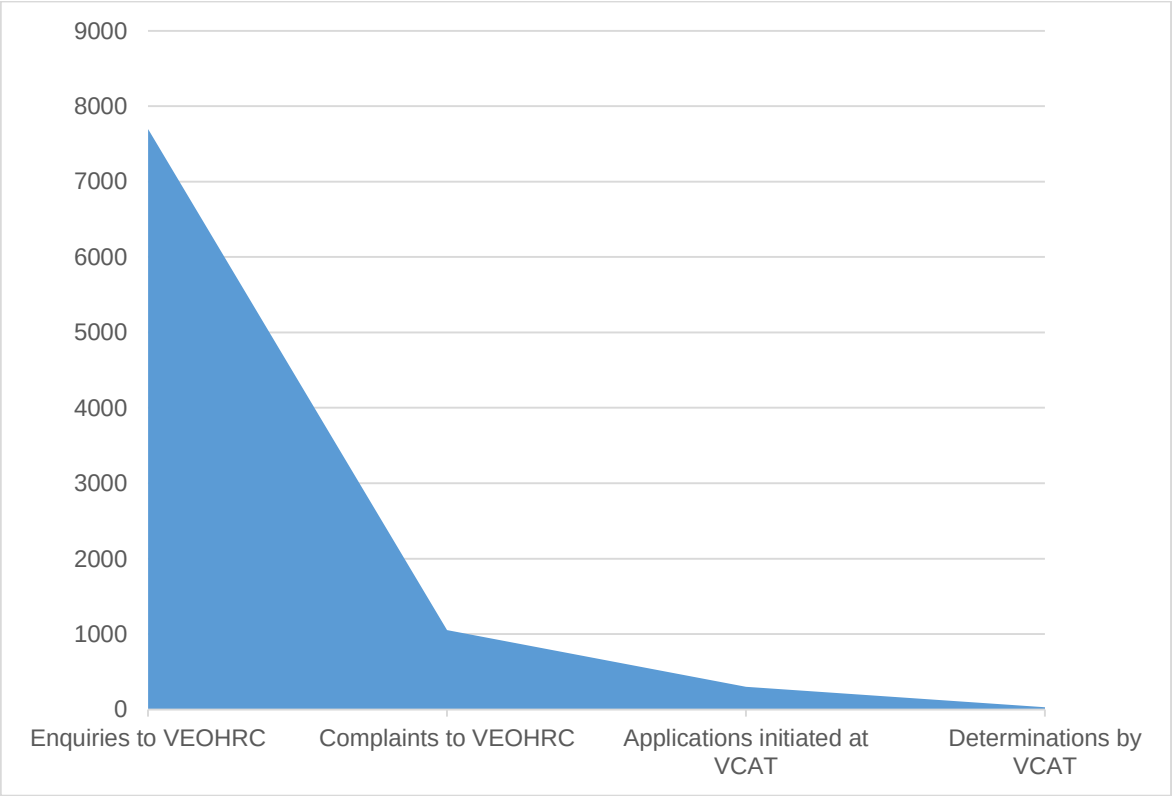
An application may also be made to the Victorian Civil and Administrative Tribunal in relation to a dispute, whether or not the dispute has been brought to the Commission for resolution. The application can be made if the dispute is not resolved at the Commission, or if the parties choose not to engage in or to end dispute resolution. After hearing and determining the application, the Tribunal can award a range of remedies, including declarations, injunctions and orders to redress any damage suffered by an applicant.

[247] Submission 7, Dr Liz Curran, 5.

In 2013-14 the Commission handled 1,053 complaints raising 2,718 issues under the Equal Opportunity Act and the Racial and Religious Tolerance Act.[248] It reported a reasonable rate of success in resolving disputes. Of 1,130 disputes that were finalised in 2013-14, 36.5 per cent were resolved. The resolution rate increased to 62 per cent for those disputes in which parties attempted conciliation.[249] Only 124 respondents withdrew from this voluntary dispute resolution process.[250]

This model also works well for triaging issues and helping to resolve them before they get to a court or tribunal. Figure 6 shows the number of enquiries and complaints made to the Commission, compared with those matters that end up at the Victorian Civil and Administrative Tribunal.[251]

Figure 6: Equal Opportunity Act and related matters 2013-14



[248] Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2013-14* (2014) 22.
[249] Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2013-14* (2014) 24.
[250] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 21.
[251] The number of enquiries covers all enquiries received by the Commission under the three Acts it has responsibility for, the *Charter of Human Rights and Responsibilities Act 2006,* the *Equal Opportunity Act 2010*, and the *Racial and Religious Tolerance Act 2001*. Complaints to the Commission are only under the Equal Opportunity and Racial and Religious Tolerance Act. The number of applications initiated at the Tribunal is for the Human Rights List which covers a number of other acts including the *Health Records Act 2001*, the *Information Privacy Act 2000* and the *Mental Health Act 1986.* The number for the Equal Opportunity Act and the Racial and Religious Tolerance Act alone would be even lower.

A number of submissions suggested the Commission should be given a dispute resolution function under the Charter:[252]

> *An informal, low or no cost dispute resolution service could have a number of benefits in terms of encouraging and facilitating greater use by Victorians of the Charter. It could potentially lead to faster resolution of disputes and a broader range of potential outcomes for individuals. There are many potential barriers and disincentives to individuals seeking to resolve human rights complaints by way of legal proceedings, including their cost, complexity and delay, the potential adverse cost risk of bringing unsuccessful litigation and limitations in terms of available remedies.*
>
> Law Institute of Victoria, Submission 78

> *Community lawyers advise that most people who are concerned their protected human rights have not been taken into consideration do not want to litigate as a first resort. Rather, they want a specific practical issue resolved and, sometimes, reassurance that the public authority they believe has disregarded their rights will make changes to ensure they will not treat others the same way in future...*
>
> *Making this complaints resolution mechanism available for complaints of Charter breaches would provide many people with a clear, accessible and non-litigious path to raise and resolve their issues.*
>
> Federation of Community Legal Centres, Submission 91

Others felt the current balance should be maintained:

> *The expertise of the VO [Victorian Ombudsman] in dealing with complaints about public sector authorities is also effectively utilised within this distribution of roles. The broader complaint handling functions of the VO also ensures that the full range of any complaint can be addressed within a single process while complaints under the Charter are dealt with by the same body as other complaints. The public is not forced to try and determine the appropriate agency to deal with, in effect the VO provides a 'one stop shop' for bodies within its wide reach.*
>
> Australian Association of Christian Schools, Adventist Education Australia, Christian Schools Australia, Submission 35

However, the Ombudsman's investigative powers do not extend to dispute resolution between a complainant and a public authority. The functions of the Ombudsman and those of the Commission (and their purpose) are of a different nature: one focuses on the rights of the individual and their relationship with government, while the other focuses on public administration. If the Ombudsman concludes that an administrative action is incompatible with a Charter right then she can report her findings and any recommendations to the principal officer of the agency and, in some circumstances, to the responsible Minister and to Parliament.

[252] Submission 39, Peninsula Community Legal Centre, 2; Submission 54, Victorian Bar, 21; Submission 64, Victorian Council of Social Service, 22; Submission 73, Matthew Potocnik, 1; Submission 77, Victorian Gay & Lesbian Rights Lobby, 2; Submission 78, Law Institute of Victorian, 9; Submission 91, Federation of Community Legal Centres, 15; Submission 93, Victoria Legal Aid, 10; Submission 94, Assistant Commissioner for Privacy and Data Protection, 3; Submission 95, Human Rights Law Centre, 14; Submission 98, Victorian Aboriginal Legal Services, 5; Submission 101, Koori Caucus of the Aboriginal Justice Forum, 25.

In her submission to this Review, the Victorian Ombudsman noted the Commission's expertise in offering dispute resolution services under the Equal Opportunity Act and the Racial and Religious Tolerance Act. The Ombudsman considered:

> *… the Charter should provide for a similar initial dispute resolution process, notably conciliation, for breaches which directly affect individuals. The Commission is well placed to provide this service.*
>
> *Conferring such a function on the Commission could complement the role of my office, which focuses on enquiries and investigations and improving public administration through the resolution of complaints and the investigation of systemic issues.*[253]

Not having a clear way to raise human rights concerns treats these most fundamental rights as a second-class of right compared with other areas of public administration such as privacy and freedom of information. For example, the Assistant Commissioner for Privacy and Data Protection noted:

> *Individuals may complain to the CPDP [Commissioner for Privacy and Data Protection] in relation to breaches of their information privacy. In 2013-14 this office received 2,468 enquiries regarding alleged breaches, with 289 of these investigated as potential complaints, 58 dealt with as actual complaints, with 46 of these closed in that year. Of the closed complaints 26 were dismissed, 11 were referred to VCAT, 7 were successfully conciliated and 2 were withdrawn...*
>
> *Alternative dispute resolution should be considered for inclusion in the Charter as the first level of redress … as is the case with the PDPA. This could provide a speedy and accessible way for people to informally resolve individual disputes about their human rights … [this process] currently exists for complaints of discrimination, sexual harassment, victimisation and vilification. The dispute resolution process under the privacy provisions of the PDPC also provides a workable model. As the data referred above demonstrates, this process has not to date created an unworkable burden for this office.*[254]

The introduction of the independent review role of the Freedom of Information Commissioner also shows how an independent body can help to resolve many issues without the need to go to the Victorian Civil and Administrative Tribunal.

[253] Submission 47, Victorian Ombudsman, 4.
[254] Submission 94, Assistant Commissioner for Privacy and Data Protection, 2.

Example: how an independent review by the FOI Commissioner reduces applications to the Victorian Civil and Administrative Tribunal

The number of matters under the *Freedom of Information Act 1982* (Vic) initiated at the Tribunal dropped from 204 in 2012-13 to 117 in 2013-14.[255]

The number of reviews remained steady. In 2013-14, the FOI Commissioner received 474 applications for review of agency decisions. As a percentage of complaints for the year, this number is similar to the percentage of internal reviews requested in the last full year before the creation of the FOI Commissioner.[256]

Of the 220 fresh review decisions made by the FOI Commissioner in 2013-14, 116 were the same as the agency decision.[257] One applicant for review commented 'I am indebted to your office for the impartiality and integrity that it has exhibited in conducting this review'.[258]

Dispute resolution should be provided as early as possible, be appropriate to the nature of the dispute, and be fair.

> *Alternative dispute resolution provides a quick, cheap, accessible, informal and easy-to-navigate method of redress outside the traditional court system. Parties can negotiate an outcome that is mutually acceptable and which can provide a personal remedy for the complainant, such as compensation or an apology, or system change such as changes to customer practices and procedures, changes to internal or staff practice and procedures, modification of facilities and/or premises and the introduction or review of policies and provision of training…*
>
> *This kind of framework already exists under the Equal Opportunity Act for complaints of discrimination, victimisation, sexual harassment and racial and religious vilification.*
>
> Victorian Equal Opportunity and Human Rights Commission
> Submission 90

Youthlaw also observed the Commission, in exercising its jurisdiction under the Equal Opportunity Act, generally has:

> *… high engagement by respondents to early dispute resolution, and an authority's responsibility under the Charter is sometimes included in the dispute resolution terms. This often leads to a systemic outcome, such as changes to policy.*[259]

[255] Victorian Civil and Administrative Tribunal, *Annual Report 2013-14* (2014) 35.
[256] Freedom of Information Commissioner, *Annual Report 2013-14* (2014) 14.
[257] Freedom of Information Commissioner, *Annual Report 2013-14* (2014) 17.
[258] Freedom of Information Commissioner, *Annual Report 2013-14* (2014) 18.
[259] Submission 36, Youthlaw, 5.

It highlighted too the need for information about legal and complaint processes to be in a form that young people can easily understand.[260] This need applies equally to other parts of the community. A common theme in the community forums was for information about human rights and complaints mechanisms to be accessible to people where they are. The needs of younger people, older people, people from culturally and linguistically diverse backgrounds, and people with disabilities were raised in this context.

In summary, I am persuaded that the Victorian Equal Opportunity and Human Rights Commission would provide the best mechanism to enliven independent dispute resolution within the regulatory model outlined above. Below, I address the Commission's relationship to other complaint-handling bodies.

I am satisfied the Commission can manage a dispute resolution function alongside its other roles. One person raised concerns with me about a potential conflict of interest for the Commission in having both dispute resolution and intervention roles, and I have considered this point. However, I am not concerned about these multiple roles in practice. Under the proposed dispute resolution role, a conciliator from the Commission's Dispute Resolution Unit would act as an impartial third party to help people resolve disputes through a voluntary process. In interventions, a separate Legal Unit manages the function. In these proceedings, the Commission does not represent one party or another, but instead provides the court or tribunal with the benefits of institutional views on the law. Under both dispute resolution and intervention functions and others (such as education), it is appropriate that the Commission has a view on the law. This is its expertise.

This approach is also consistent with my earlier discussion about placing the Commission in the facilitative and persuasive part of the regulatory model, separating the Commission's role from enforcement. Further, the Commission already manages this balance now, having a range of functions under the Equal Opportunity Act.

Recommendation 23: The Victorian Equal Opportunity and Human Rights Commission be given the statutory function and resources to offer dispute resolution for disputes under the Charter.

Functions of the Victorian Ombudsman

The term of reference 1(b) also requires me to consider the functions of the Victorian Ombudsman in relation to the Charter. The Ombudsman is an independent officer of the Victorian Parliament.[261] Her office investigates complaints about administrative actions taken by a wide range of Victorian public authorities. When the Charter was introduced, the *Ombudsman Act 1973* (Vic) was amended to clarify that the Ombudsman's power includes the power to enquire into and investigate alleged breaches of the Charter. This amendment was part of the decision to make the Charter 'business as usual' across the public sector.

The Ombudsman has jurisdiction over more than 1,000 Victorian public bodies, including government departments, statutory authorities, professional boards, councils, universities and government schools, prisons (including private prisons) and authorised officers on public transport. In addition, the Ombudsman can exercise her jurisdiction to investigate private organisations contracted to perform functions for government agencies when those organisations are exercising functions under that contract. For example, under subsections 13(3) and (4) of the Ombudsman Act, the Ombudsman can examine the administrative actions of an entity taken on behalf of, or under instructions from, an authority covered by the Ombudsman Act.

[260] Submission 36, Youthlaw, 6.
[261] More information about the Victorian Ombudsman is available on her website: https://www.ombudsman.vic.gov.au/.

The Ombudsman does not have jurisdiction over police and protective services officers, which are IBAC's province.

The Ombudsman's submission to this Review noted '[m]y reports may be tabled in the Parliament; and those reports have a strong track record of being the catalyst for meaningful change'.[262]

However, the Ombudsman observed her ability to consider human rights issues in complaints is 'not widely known or understood'. She recommended the Charter expressly refer to the role.[263]

A number of submissions also noted the Ombudsman's jurisdiction is not clear in relation to functional public authorities under the Charter.[264] Given the Ombudsman is the primary investigatory body under the Charter, it should clearly cover all public authorities for compliance with human rights under the Charter, except police and protective services officers.

While legally the coverage may already apply in most cases, the Charter should be as accessible and practical to people as possible. I recommend the Charter include an explicit statement about the Ombudsman's jurisdiction over Charter public authorities. Requiring people to wade through multiple definitions of 'authority' and 'public authority' in different Acts does not promote the interests of clarity and accessibility, which are key goals of this Review.

Recommendation 24: The *Ombudsman Act 1973* (Vic) make clear that the Ombudsman can consider human rights issues relating to the administrative actions of all public authorities under the Charter, except police and protective services officers. The Charter should note this jurisdiction.

I note a legally enforceable right, as I propose under the Charter (**Chapter 4**) may limit the Ombudsman's jurisdiction.

The Ombudsman must refuse to deal with a complaint if the complainant has the right to access a legal remedy (sections 15(5) and 16A(5), Ombudsman Act). However, the Ombudsman would retain her broad discretion to investigate these complaints if satisfied 'it would not be reasonable to expect or have expected the complainant to exercise that right' or 'the matter merits investigation to avoid injustice' (sections 15(5)-(6) and 16A(5)-(6), Ombudsman Act).

[262] Submission 47, Victorian Ombudsman, 3.
[263] Submission 47, Victorian Ombudsman, 3.
[264] Submission 48, Gippsland Community Legal Service, 2; Submission 64, Victorian Council of Social Service, 22; Submission 78, Law Institute of Victoria, 8-9; Submission 95, Human Rights Law Centre, 14.

Victorian Ombudsman's jurisdiction

Any person can make a complaint to the Ombudsman about a matter that affects them. The Ombudsman generally expects that the issue has been raised first with the relevant authority. A person can make a complaint about the administrative action of an authority (section 14, Ombudsman Act). The definition of an 'authority' under the Ombudsman Act is different from the definition of a 'public authority' under the Charter. The Ombudsman may enquire into or formally investigate complaints.

The Ombudsman must investigate matters referred by Parliament (other than a matter concerning judicial proceedings), even when the subject matter would otherwise be outside her jurisdiction (section 16, Ombudsman Act). The Ombudsman can also investigate complaints or other matters referred to her by IBAC or another person or body. Further, the Ombudsman can initiate an investigation, which is called an 'own-motion' investigation (section 16A, Ombudsman Act).

The Ombudsman can access information and deal with matters through a cooperative approach or by using her formal powers. These powers allow the Ombudsman to summons any person to attend, provide any document and give evidence on oath or affirmation.

The Ombudsman can consider broader issues arising from an investigation, and is not limited to considering the procedural or legal correctness of an administrative action. Section 23 of the Ombudsman Act provides she can conclude and report if she considers the administrative action is: taken contrary to law; unreasonable, unjust, oppressive or improperly discriminatory; taken for an improper purpose or on irrelevant grounds; based wholly or partly on a mistake of law or fact; or wrong.

When an investigation is finalised, the Ombudsman:

- must provide a report to the relevant agency and the relevant Minister
- may provide a copy of a report to the Premier
- can present her report to Parliament
- if relevant, must inform the original complainant of the result of the investigation.

The Ombudsman makes only recommendations in her reports. That is, she does not have statutory power to compel an outcome or remedy. But she may request information on the steps that have been or will be taken to give effect to a recommendation (section 23(4), Ombudsman Act). The Ombudsman may report to the Governor in Council (and the Parliament) if not satisfied those steps are appropriate (section 23(5), Ombudsman Act).

Relationship with specialist oversight bodies

A role for the Ombudsman to consider compliance with the Charter is consistent with the Charter's framework. It is also consistent with the intent to integrate the Charter into the everyday business of government in Victoria.

IBAC has a function to ensure police and protective services officers have regard to the human rights in the Charter.[265]

The Victorian Auditor-General's Office can consider, in its performance audits, the lawfulness or effectiveness of a public authority's actions.[266] This consideration includes lawfulness under the Charter.

[265] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s 15(3)(b)(iii).
[266] *Audit Act 2004* (Vic) s 15(1).

Other specialist oversight roles, such as the Mental Health Complaints Commissioner, appropriately see their role as being about human rights too. In her submission to the Review, the Mental Health Complaints Commissioner noted her:

> *… critical role in protecting the human rights of people who receive public mental health services … established to provide expertise in dealing with complaints about mental health services and to address the barriers that people with mental illness experience in accessing and participating in complaints processes.*[267]

The same could be said for the Health Services Commissioner, the Disability Services Commissioner, the Privacy and Data Protection Commissioner, and the Freedom of Information Commissioner. All deal with human rights in their day-to-day work.

My recommended dispute resolution role for the Commission would provide a central contact for people and would fill gaps. But it should not replace efforts to integrate the Charter into bodies with specialist roles. If, for example, a person being treated by a public mental health service makes a complaint with a human rights element to the Mental Health Complaints Commission, then the Commission should be able to deal with the rights element in the context of that complaint. This is, the person should not need a separate complaint to the Victorian Equal Opportunity and Human Rights Commission.

Government complaint-handling bodies have good referral mechanisms between themselves, and the voluntary dispute resolution by the Commission will allow a respondent public authority to choose not to participate if they are dealing with the matter elsewhere. These issues are readily resolved in practice.

The Mental Health Complaints Commissioner's submission described how this referral may occur now:

> *… the [Mental Health] Act enables the Commissioner to consult with other persons or bodies, such as Health Services Commissioner, in order to coordinate complaints that straddle the mental health and general health sectors.*
>
> *The Commissioner may also refer complaints or accept referrals from other bodies to simplify the processes for people making complaints.*[268]

The Ombudsman also noted if the Commission were given a dispute resolution jurisdiction in relation to human rights, her office and the Commission would appropriately refer Charter matters to each other in some circumstances:

> *For example, a complaint may not be suitable for conciliation if it raises systemic issues in public administration, for which there is no readily identifiable individual remedy. In such a case, it may be preferable for the complaint to be dealt with by my enquiry or formal investigation powers. Equally, conciliation may be more appropriate to assist parties reach a mutually acceptable outcome orientated at addressing an individual interest or loss.*[269]

[267] Submission 29, Mental Health Complaints Commissioner, 2-3.
[268] Submission 29, Mental Health Complaints Commissioner, 4.
[269] Submission 47, Victorian Ombudsman, 4.

During consultation, one public official spoke of human rights concerns being taken through multiple jurisdictions. Another considered this practice does not pose a difficulty:

> *we might categorise the complaint as one thing or another, but generally you can deal with the range of issues where the person ends up.*
>
> Meeting participant, July 2015

The Commission should be able to decline to provide dispute resolution if another jurisdiction would more appropriately deal with the matter, and refer it to that other jurisdiction.

One practical issue is the various laws have confidentiality and secrecy provisions that limit the information agencies can be share. In their current form, these provisions are a barrier to effective regulation and the resolution of jurisdictional questions. Here are two examples:

- Section 26A of the Ombudsman Act means an Ombudsman officer cannot disclose any information they acquired in their duties, except for the performance of the duties and functions of the Ombudsman, or other limited grounds specified in the Act. This section can limit officers' ability to share trends and issues with other agencies.

- The secrecy provision in section 176 of the Equal Opportunity Act means the Victorian Equal Opportunity and Human Rights Commission cannot confirm with the Victorian Ombudsman whether its dispute resolution procedure is addressing a discrimination complaint (which can also raise the obligations of a public authority to act compatibly with the right to equality under the Charter), unless the Commission first obtains the consent of the complainant and the respondent.

In her submission to the Review, the Ombudsman noted:

> *To effectively work in this common ground, it would be essential for my office and the Commission to be able to share information about our respective functions under the Charter. Presently the confidentiality provisions in the Ombudsman Act and the Equal Opportunity Act [which sets out the Commission's complaint handling functions] are so restrictive as to prevent this...*
>
> *A less restrictive confidentiality provision in the Ombudsman Act would allow my office to do other very useful work to assist authorities in demonstrating best practice in public administration, including in relation to human rights. For example, I am seeking to develop the digital capability to provide authorities with de-identified data on themes and trends, based on the complaints my office has received, to assist them to improve administrative practices.*[270]

The Assistant Privacy and Data Protection Commissioner, Tony Nippard, supported this kind of information sharing in his submission:

> *The PDPA [Privacy and Data Protection Act]—the primary legislation governing privacy and information sharing in Victoria—provides a useful model in relation to information sharing. The PDPA attempts to balance the public interest in the free flow of information with the public interest in protecting the privacy of personal information … [T]he confidentiality provisions in the Ombudsman Act 1976 and the Equal Opportunity Act 2010 should be amended to facilitate information sharing in relation to statutory functions under the Charter, where appropriate.*[271]

[270] Submission 47, Victorian Ombudsman, 5-6.
[271] Submission 94, Assistant Commissioner for Privacy and Data Protection, 4.

Recommendation 25: All relevant public sector oversight bodies should have the ability to consider human rights issues that arise within their jurisdiction, for example, the Mental Health Complaints Commissioner should continue to be able to consider human rights issues that relate to public mental health service providers. Mechanisms should be established to enable referral and appropriate information sharing between complaint-handling and oversight bodies. The Charter should note these roles.

Human rights complaints relating to police and protective services officers

Some submissions to the Review noted the lack of independent investigation of complaints of police misconduct that involve alleged Charter breaches.[272] This issue is one of practice rather than jurisdiction, which clearly sits with IBAC:

> *This raises concerns that need to be addressed through changes to the IBAC Act, including: the effectiveness of investigation of such complaints; the perception by complainants of investigation by a non-independent body of such complaints with human rights so that human rights complaints against police might not be investigated independently.*
>
> Law Institute of Victoria, Submission 78

Youthlaw noted this practice of referring matters to Victoria Police for internal investigation is:

> *…counter to established principles of international human rights law. In 2014, in* Horvath v Australia*, the United Nations Human Rights Committee (UNHRC) found that the International covenant on Civil and Political Rights requires State parties to investigate allegations of violations by police members promptly, thoroughly and effectively through an independent and impartial body.*[273]

The Victorian Court of Appeal recently found section 10(b) of the Charter, that provides protection from cruel, inhuman or degrading treatment, does not include an implied right to an independent investigation. However, the Court found IBAC is obliged to properly consider relevant human rights in relation to a complaint when deciding whether to refer a complaint of police misconduct to the Chief Commissioner of Police for investigation.[274]

An independent avenue for complaint handling, investigation and oversight is a critical part of the regulatory model that I outlined above.

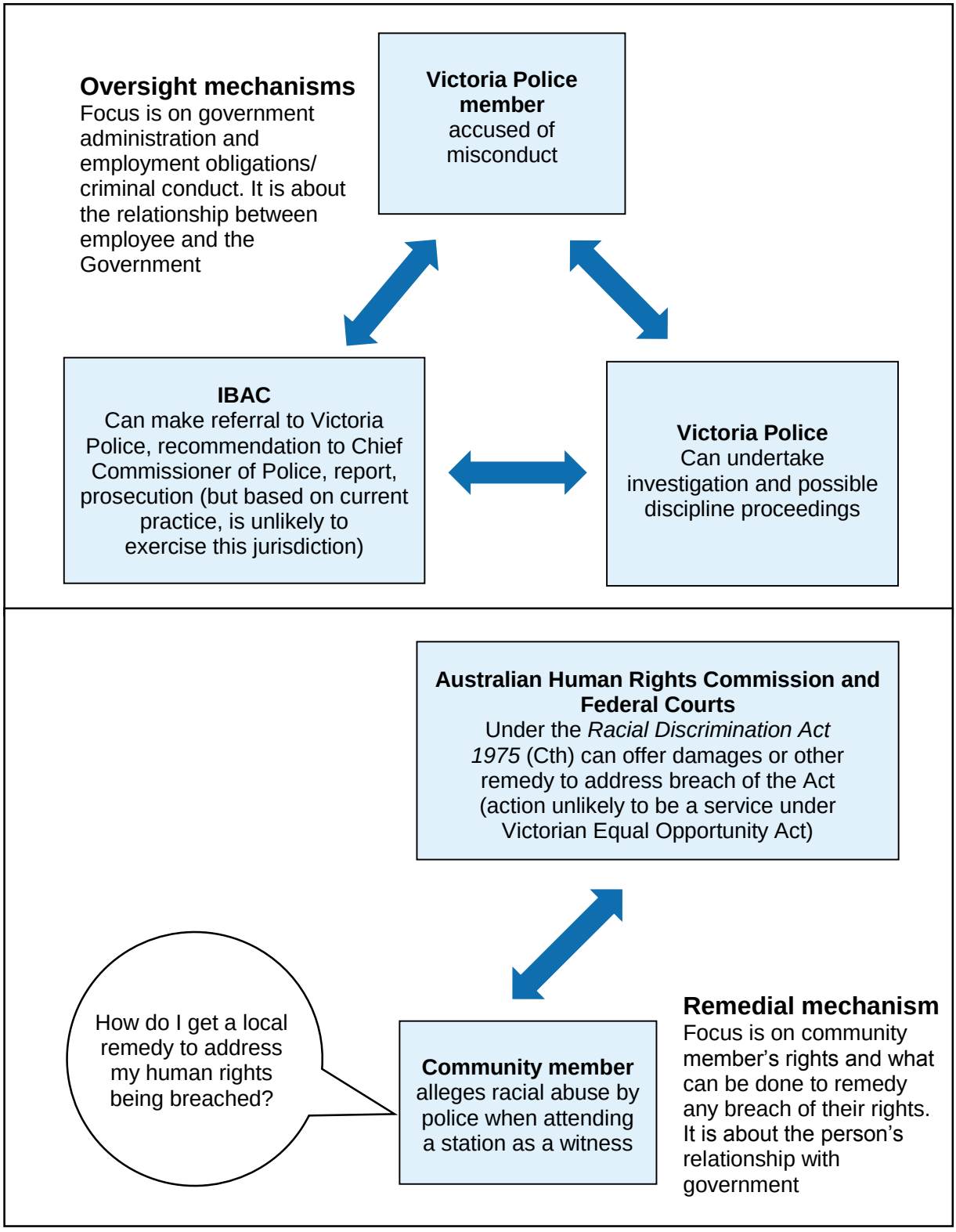
Consider the example of an Aboriginal man who feels he was racially abused when he attended a police station as a witness. He can go:

- to IBAC, which has jurisdiction but is unlikely to choose to exercise its significant powers for this kind of issue, or
- via the Australian Human Rights Commission to the federal courts (which are inaccessible to many people) with a complaint under the *Racial Discrimination Act 1975* (Cth), or
- to Victoria Police, which he thinks did not treat him fairly.

[272] For example: Submission 36, Youthlaw, 5; Submission 78, Law Institute of Victoria, 8.
[273] Submission 36, Youthlaw, 5.
[274] *Bare v Independent Broad-based Anti-corruption Commission* [2015] VSCA 197 (29 July 2015).

This man, and other complainants with similar human rights issues, would benefit from an independent body being able to consider their complaint locally and in an accessible way.

Figure 7: Current paths for allegation of racial abuse by police from someone attending a police station as a witness (section 8 equality right issue)



One way of addressing this issue is to broaden the work of IBAC. This change of practice would be warranted for serious allegations of a breach of the right to life, or for the protection against cruel, inhuman and degrading treatment. Earlier this year, the media reported a case of the Commission investigating accusations of the use of excessive force against a vulnerable person.[275]

However, I note IBAC has similar staff capacity to the former Office of Police Integrity, but with much broader jurisdiction to cover public sector corruption.[276] The Government should ensure IBAC has capacity to investigate allegations of serious human rights abuses by police and protective services officers.

Recommendation 26: The Victorian Government ensure the Independent Broad-based Anti-corruption Commission has capacity to investigate allegations of serious human rights abuses by police and protective services officers.

IBAC's powers to investigate and report cannot provide a remedy for the individual whose rights have been breached. Further, asking it to exercise its extensive investigative powers in all cases would not, in my view, be the most effective and practical tool to address human rights complaints against police, such as the racism example mentioned above. I recommend the Victorian Equal Opportunity and Human Rights Commission's dispute resolution function (outlined above) cover police and protective services officers.

A final comment about IBAC is that it may commence or continue to investigate a matter despite any civil proceedings related to that subject matter (section 70, IBAC Act):

> *A significant number of young people who approach Youthlaw report incidents of police abuse of powers, assaults by police and harassment. In our experience over 12 years, young people rarely complain about police mistreatment once they are informed of the process for the complaint to the handled. Understandably they are reluctant to complain directly at their local station or to Victoria Police Professional Standards Command because of fear of repercussions from police they have been mistreated by, and a lack of confidence in police investigating police. Young people are also put off by hearing of their friends and others dissatisfaction with the police internal complaint process. In cases where young people have attempted to contact the Office of Police Integrity (OPI) or IBAC, in order to avoid lodging a complaint directly with Victoria Police, the OPI or IBAC has frequently refused to take on the complaint.*
>
> Youthlaw, Submission 36

[275] Richard Willingham, Tammy Mills and Rania Spooner, 'IBAC Investigates Allegations of Excessive Force by Ballarat police', *The Age* (online), 7 April 2015, accessed on 1 August 2015 http://www.theage.com.au/victoria/ibac-investigates-allegations-of-excessive-force-by-ballarat-police-20150407-1mfumk.html.

[276] Independent Broad-based Anti-corruption Commission, *Annual Report 2013-14* (2014) 31; Office of Police Integrity, *Annual Report Financial Year Ended 30 June 2011* (2011) 47.

The role of the Independent Broad-based Anti-corruption Commission

IBAC is an anti-corruption agency that reports to Parliament.[277] It is responsible for identifying and preventing corruption across the public sector and police misconduct. The *Independent Broad-based Anti-corruption Commission Act 2011* (IBAC Act) obliges it to ensure police and protective services officers have regard to human rights (section 15(3)(b)(iii), IBAC Act).

A person may make a complaint to IBAC, which may decide to refer the complaint to another agency, dismiss the complaint, make more enquiries or investigate the complaint. It has extensive powers to assist its investigations, including the power to compel the production of documents and objects, and to apply for a court order to search premises and seize documents and objects.

If there is evidence of serious corrupt conduct or police misconduct, IBAC may:

- bring criminal proceedings for an offence relating to any matter arising out of the investigation
- refer any matter under investigation to a prosecutorial body such as the Office of Public Prosecutions
- refer matters to another entity (including the public body that was the subject of the investigation) for consideration of disciplinary or other action
- make recommendations about matters arising out of the investigation to the principal officer of the body, the responsible Minister or the Premier
- publish reports
- produce risk and prevention strategies and resources.

If serious corrupt conduct or police misconduct is not found, IBAC may: make no finding, take no action, or recommend preventative action when systemic issues and organisational corruption risks are identified.

In its 2013-14 Annual Report, IBAC reported it:

- received 2,567 complaints/notifications
- assessed 4,860 allegations (3,551 relating to sworn police personnel)
- commenced 24 new investigations
- conducted 79 reviews of Victoria Police matters
- completed 15 investigations from the previous year.

[277] More information about IBAC is available on its website: http://www.ibac.vic.gov.au/.

Chapter 4

Remedies and oversight—the role of the courts

Chapter 4 Remedies and oversight—the role of the courts

Term of reference 2(b): Clarifying the provisions regarding legal proceedings and remedies against public authorities

Overview

This term of reference looks at clarifying the provisions that deal with what should happen if a person's rights are breached.

The law can provide many avenues for remedy for that person. At the simplest level, a remedy can be found by making a complaint to someone who can investigate it or try to resolve the complaint by agreement. A remedy can also be found by having someone else (whether a statutory agency, a court or a tribunal) decide whether there has been a breach of Charter rights and make a public statement on its decision. Other remedies that might be available, both by agreement and through litigation, include an explanation or an apology, an injunction to stop an ongoing breach of Charter rights, damages (monetary compensation) for any loss or injury caused, and systemic remedies such as training and changes to policies.

Sections 38 and 39 of the Charter are relevant to this term of reference. Section 38 of the Charter provides that it is unlawful (with some exceptions) for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

Section 39 of the Charter provides that if a person may seek any relief or remedy for an act or decision of a public authority on grounds other than the Charter, then that person may also seek relief or remedy on a ground of unlawfulness arising because of the Charter. The section also provides that a person is not entitled to damages for a breach of the Charter.

The Review received many submissions about the remedies provisions in the Charter. Overwhelmingly, I heard the current provisions are unclear and complicated, and too often do not provide any remedy for a person whose human rights have been breached. Many people are concerned that this diminishes the Charter.

I recommend the Charter be amended so a person who claims that a public authority has acted incompatibly with their human rights, in breach of section 38 of the Charter, can either apply to the Victorian Civil and Administrative Tribunal for a remedy or rely on the Charter in any legal proceedings. The amendment should be modelled on section 40C of the *Human Rights Act 2004* (ACT).

If the Tribunal finds a public authority has acted incompatibly with a Charter right, it should have power to grant any relief or remedy that it considers just and appropriate, excluding the power to award damages. If the Charter is raised in another legal proceeding, the court or tribunal should be able to make any order, or grant any relief or remedy, within its powers in relation to that proceeding. The Charter should be amended to clarify that people can seek judicial review of a public authority's decision on the ground of Charter unlawfulness alone.

> *The Charter is an asymmetrical document: it speaks loudly about the principles of human rights but it speaks very softly with respect to enforcement.*
>
> **Meeting participant, April 2015**

> *It is contradictory to speak, as does s. 8(3), of "**effective** protection against discrimination" (emphasis added) when there is no practical means available to invoke the protection itself. In the absence thereof s. 8(3) and other Charter rights … are rendered uncertain, aspirational and ineffective.*
>
> Malcolm Harding, Submission 20

> *The Charter is currently seen by some in the community as a law without any consequences. There is a feeling reported by many in the community that some public authorities do not feel the need to incorporate human rights into their policies and planning because there are no repercussions for not doing so.*
>
> *The absence of effective remedies has also led to some disappointment and disillusionment within the community about the Charter. Most people's understanding of the legal system includes an expectation that where there is a law, there will be a corresponding remedy and method to enforce it. When they understand this is missing from the Charter, [people] reported becoming disillusioned, or feeling that the government was not really taking human rights seriously.*
>
> Victorian Council of Social Service, Submission 64

> *Although these grand statements about the importance of human rights to the Victorian community are appropriate and affirm the status of these rights as fundamental to human dignity, the lack of an effective remedy for the breach of human rights cannot be reconciled with its projected importance.*
>
> Liberty Victoria, Submission 96

The intention for remedies when the Charter was drafted

The Attorney-General's May 2005 Human Rights Statement of Intent for a Human Rights Charter in Victoria preferred a focus on preventing and mediating disputes rather than litigation. It expressed a wish not to create new individual causes of action based on human rights breaches. The Human Rights Consultation Committee found the community at that time shared that preference for practical outcomes:

> *Community members stressed the need for a system that is simple to use and navigate. People were less interested in big court cases and the possibility of damages than in getting the problem fixed.*[278]

The Committee recommended an approach that allowed the Charter to work with existing remedies under Victorian law. It proposed allowing people to seek judicial review of a decision or a declaration that a public authority had breached the Charter. These options would provide a limited remedy that could require the public authority to reconsider its decision or action on human rights grounds.

[278] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 116.

The Committee also recommended excluding damages and other forms of monetary compensation as possible remedies, both to reflect the community's preference for a remedy that fixes the problem, and to avoid imposing potentially significant additional costs on government.

Section 39 of the Charter is headed 'Legal Proceedings'. Section 39(1) provides:

> *If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.*

Section 39 excludes damages as a remedy for breach of the Charter:

> *(3) A person is not entitled to be awarded any damages because of a breach of this Charter.*
>
> *(4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.*

The Explanatory Memorandum for the Charter explains section 39 does not create a new or independent right to relief or a remedy. So, if a public authority has acted incompatibly with a Charter right, or has failed to properly consider a relevant Charter right in making a decision, then the Charter does not allow a person to bring a legal action against the public authority for that Charter breach alone. If the person may seek relief or a remedy on the basis of a separate, non-Charter ground, then they may also seek that relief or remedy on the basis of the Charter breach. That is, a Charter claim can 'piggy back' an existing legal claim.

Raising a breach of Charter rights in legal proceedings

Since the Charter commenced, section 39 has been criticised as an 'irremediable' remedies provision[279] that is 'drafted in terms that are convoluted and extraordinarily difficult to follow'.[280] The uncertainty surrounding this section has centred on whether a person seeking a remedy for a Charter breach must establish an entitlement to a remedy on other grounds, whether section 39(1) is no more than a standing requirement, or whether a remedy is available at some point between these two extremes.[281]

The current position is that a person can obtain a remedy for breach of a Charter right by bringing a proceeding that could have been brought in the same court or tribunal on other grounds—in other words, by 'piggy backing' a Charter argument on another claim. A person who can seek a relief or remedy for an act or decision can do so on the ground that it was incompatible with a Charter right, or that the decision maker failed to properly consider relevant rights, and so was unlawful under section 38(1).

[279] Jeremy Gans, 'The Charter's Irremediable Remedies Provision' (2009) 33 *Melbourne University Law Review* 105.
[280] *Director of Housing v Sudi* (2011) 33 VR 559 (6 September 2011) [214] (Weinberg JA).
[281] Mark Moshinsky QC, 'Bringing Legal Proceedings Against Public Authorities for Breach of the *Charter of Human Rights and Responsibilities*' (2014) 2 *Judicial College of Victoria Online Journal: Human Rights Under the Charter: The Development of Human Rights Law in Victoria* 91, 96; Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008) 249-250.

The relief or remedy must be one that the court or tribunal has jurisdiction to grant.[282] It appears the person need only have standing to seek the relief or remedy in question; the person does not have to establish an entitlement to that relief or remedy on other grounds.[283] But this position is not settled or certain and has not been decided by an appellate court.[284]

In relation to damages, while section 39(3) of the Charter precludes an award of damages for breach of a Charter right only, section 39(4) provides for the Charter to supplement an existing claim for damages. Section 38 may provide the element of unlawfulness required for some torts such as misfeasance in public office, trespass and false imprisonment. If the other elements of those torts are established, then damages may be awarded. Similarly, the Victorian Civil and Administrative Tribunal may be able to award damages or compensation for breach of a Charter right in a claim made under legislation such as the *Equal Opportunity Act 2010* (Vic) or the *Privacy and Data Protection Act 2014* (Vic).

Again, this position is not settled or certain. Arguably, section 39(3) precludes any award of damages on the ground of Charter unlawfulness, even when damages might be awarded on another ground of unlawfulness. In no case has damages or compensation been awarded for breach of a Charter right. The competing constructions of section 39(3) have not yet been judicially considered.

In its 2011 review of the Charter, the Scrutiny of Acts and Regulations Committee (SARC) considered whether the Charter should include further provision for proceedings that may be brought, or remedies that may be awarded, in relation to public authority acts or decisions that are unlawful under the Charter. The Committee noted a number of submissions to its inquiry had recommended the Charter include an independent cause of action for breaches of human rights. It rejected this option because it considered that it would give too much discretion to courts and tribunals.

SARC also noted numerous submissions that claimed section 39 is unclear, unworkable and impractical. Having rejected the option of an independent cause of action, it instead recommended section 39 be replaced with a provision barring the provision of relief or remedies for breach of section 38 unless another statute expressly provides for the relief or remedy. This recommendation was not implemented.

Resolving the uncertainty caused by section 39 of the Charter

As noted, the meaning of section 39 of the Charter is uncertain, as is whether it provides a remedy for breach of a Charter right. The existing case law, particularly the Court of Appeal's decision in *Director of Housing v Sudi*,[285] is not easy to understand or apply.

Further, a remedy is available only to those who already have another legal claim. Because Charter issues must be tacked on to an existing claim, they are usually a second or third string argument. So, most proceedings in which the Charter has been raised are decided on non-Charter grounds. This outcome involves duplicated effort and has led to a perception that the Charter is not worth raising because it adds nothing to existing causes of action.

A number of submissions to the Review highlighted the difficulties of seeking a remedy, which can be overwhelming for those without legal representation:

[282] *Director of Housing v Sudi* (2011) 33 VR 559 (6 September 2011).
[283] *Medical Practitioners Board v Sabet* (2008) 20 VR 414 (12 September 2008) [104]–[105]; *PJB v Melbourne Health* (2011) 39 VR 373 (19 July 2011) [297]-[303]; *Director of Public Prosecutions v Debono* [2013] VSC 407 (1 February 2013) [85]-[86]; *Goode v Common Equity Housing* [2014] VSC 585 (21 November 2014) [25]-[39]; *Burgess v Director of Housing* [2014] VSC 648 (17 December 2014) [213]-[214].
[284] The issue was discussed but not decided by Justice Tate in *Bare v IBAC* [2015] VSCA 197, [392]-[395].
[285] (2011) 33 VR 559 (6 September 2011).

> *The requirement for a piggy-back cause of action can mean that significant resources (including legal costs, court time and scarce pro bono resources) are spent on:*
>
> - *resolving preliminary jurisdictional questions, rather than focusing on the real issue in dispute (that is, whether a public authority has breached a person's human rights);*
> - *bringing judicial review proceedings in the Supreme Court, rather than in a more accessible forum such as VCAT;*
> - *arguing potentially 'weaker' claims, when the stronger claim arises from a breach of the Charter.*
>
> Law Institute of Victoria, Submission 78

> *I had no recourse—I've only just found out that to raise a Charter issue it has to be backed onto another legal argument—that's ridiculous—as are the words "Supreme Court" when discussing options—that's not equitable, that's scary.*
>
> Lisa Peterson, Submission 14

> *The struggle in and of itself to have human rights breaches addressed, in addition to the original human rights breach, is extremely distressing for an individual, already disempowered by the system. It can lead individuals to giving up the quest to have human rights breaches effectively addressed. This is a completely inappropriate outcome.*
>
> Communication Rights Australia, Submission 12

Given the limited and uncertain operation of section 39, no relief or remedy is available for some public authority acts or decisions that are incompatible with human rights and unlawful under section 38. For example, a private corporation or a community organisation may be a functional public authority under the Charter, but the Supreme Court does not have jurisdiction to review its decisions.[286]

There is also uncertainty about whether section 39 enables judicial review of a decision only on Charter grounds. Following the Court of Appeal's decision in *Bare v IBAC*,[287] a decision that is unlawful under section 38 is highly unlikely to be invalid and affected by jurisdictional error. However, unlawfulness under section 38 of the Charter is an error within jurisdiction, and it is unclear whether review of a decision can be sought on this ground alone.[288] This uncertainty could be resolved by Parliament, rather than left for consideration by the courts.

[286] The principle in *R v Panel on Take-overs and Mergers, Ex parte Datafin Plc* [1987] QB 815 has not yet been adopted in Australia: see *Mickovski v Financial Ombudsman* (2012) 36 VR 456 (17 August 2012) [31]-[32].
[287] [2015] VSCA 197 (29 July 2015). Chief Justice Warren held at [145]-[153] that non-compliance with section 38(1) did not invalidate a decision. Although Justices Tate and Santamaria did not decide the question, each made observations that strongly suggest section 38(1) unlawfulness does not give rise to jurisdictional error: Tate JA at [380]-[396] and Santamaria JA at [600], [617]-[626].
[288] As discussed by Justice Tate in *Bare v IBAC* [2015] VSCA 197, [392]-[395].

When judicial review is available, it is not an accessible remedy for most people. In Victoria, only the Supreme Court can carry out judicial review.[289] This means a public housing tenant faced with an application to the Tribunal for a possession order must, separately, apply to the Supreme Court for judicial review of the Director's decision to make the application while also obtaining a stay of the Tribunal proceeding. This is quite unrealistic in most cases, and is a barrier to access to justice. Further, in the exceptional case in which a tenant can litigate in both the Tribunal and the Supreme Court, the justice system and the public authority concerned must bear the cost of the same dispute being contested in two places:

> *While the legal profession is generous with its commitment to pro bono, the suggestion that the Supreme Court is an accessible forum for social housing tenants facing eviction into homelessness who have questions about the Charter compatibility of their eviction, has proven to be optimistic. The Supreme Court is a complex, daunting and inaccessible forum for both social housing tenants and social landlords. The current reliance on it to determine Charter unlawfulness has reduced accountability for human rights compliance; slowed down conversations regarding Charter compliant practices; and diminished the protection for tenants against convictions that fail to give proper consideration to human rights.*
>
> Justice Connect Homeless Law, Submission 79

Example: public housing tenants and the Charter

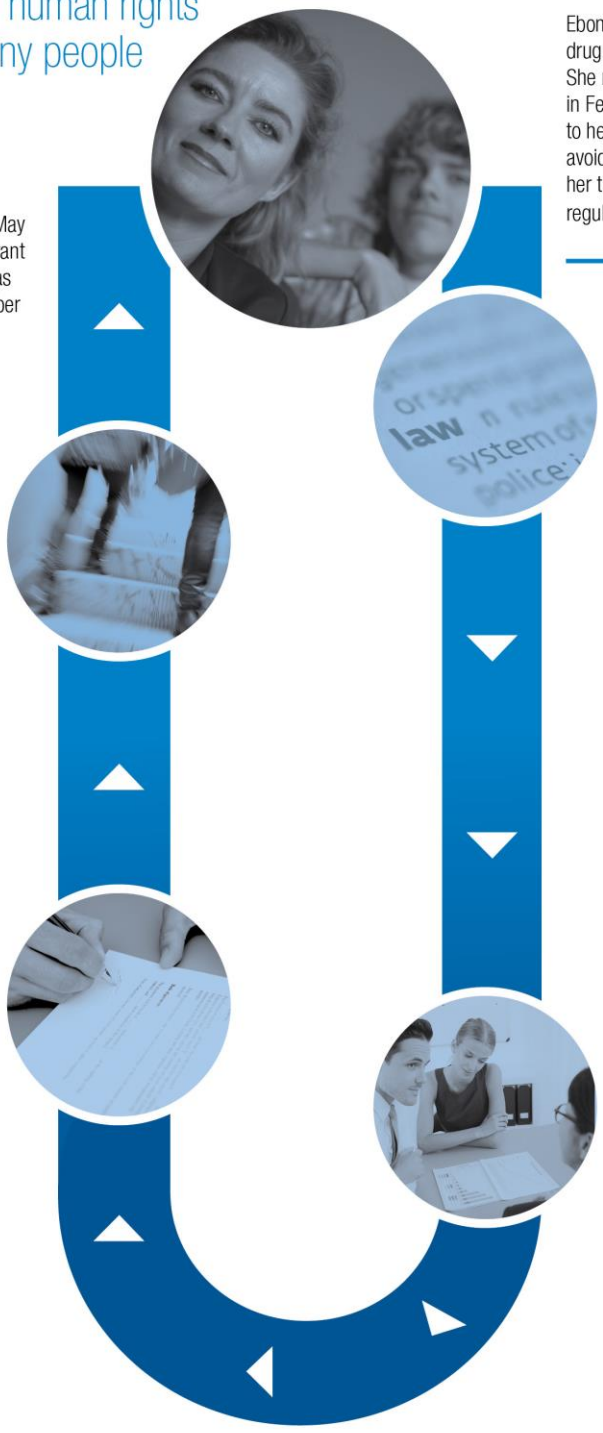
In *Director of Housing v Sudi*[290] the Court of Appeal considered a case in which the Director of Housing had applied for a possession order under the *Residential Tenancies Act 1997* (Vic). Mr Sudi lived at the premises with his young son. He claimed the Director's decision to evict him was incompatible with his right under section 13(a) of the Charter, not to have his privacy, family or home unlawfully or arbitrarily interfered with. Justice Bell found the decision was unlawful and dismissed the application.

The Director successfully appealed. The Court of Appeal found section 39 of the Charter did not enable the Tribunal to undertake a collateral review[291] of the Director's decision to apply for a possession order. The only way to challenge the Director's decision was to seek judicial review in the Supreme Court. This decision means a public housing tenant faced with an application for a possession order must, separately, apply to the Supreme Court for judicial review, while also obtaining a stay of the Tribunal proceeding.

Burgess v Director of Housing is an example (see flowchart on next page).[292] Homeless Law noted 'while Burgess is a powerful judgment in terms of its determination of the Director's failure to give a proper consideration to Ms Burgess and her son's Charter rights in making eviction decisions, it is also a "near miss" in that what was later deemed to be an unlawful eviction very nearly went ahead'.

[289] The Supreme Court derives this power from its inherent jurisdiction, the Victorian Constitution and the *Administrative Law Act 1978* (Vic): *Director of Housing v Sudi* (2011) 33 VR 559, 563-564 [16]-[17] (Warren CJ); Justice Emilios Kyrou, 'Victorian Administrative Law Update' (Paper presented at the Australian National University, 13 November 2009) [7].
[290] *Director of Housing v Sudi* (2011) 33 VR 559.
[291] 'Collateral review', as distinct from judicial review, involves a challenge to a decision that is not the main purpose of the proceedings but is incidental to the proceedings: *Director of Housing v Sudi* (2011) 33 VR 559, 597-598 [221]-[224] (Weinberg JA). The Tribunal could have had this kind of review jurisdiction, but such jurisdiction had not been conferred it by the Charter, the VCAT Act or the Residential Tenancies Act.
[292] [2014] VSC 648 (17 December 2014).

Burgess v Director of Housing:
The pathway to raise human rights is inaccessible to many people



Ebony's story

Ebony was 34 years old and had battled drug dependence, depression and anxiety. She moved into the public housing property in February 2006. Her home was important to her recovery, compliance with parole, avoidance of homelessness and stability for her teenage son who was doing his VCE and regularly stayed at the property.

1. Tenancy interrupted due to drug charges associated with addiction
Ebony was on remand for 10 months before pleading guilty and being sentenced.

2. Notice to vacate issued
Notice to vacate for no reason given - related to Ebony's period in prison being longer than the six month temporary absence usually permitted (3 August 2012). Application for possession order made (7 December 2012).

3. Ebony returns home
Ebony was released on parole. Regular drug screenings showed no evidence of any current drug use, attending counselling and supported with intensive case management by Flat Out (18 December 2012).

4. Conversation about her tenancy
Ebony met with two staff from Frankston Housing Office to talk about damage to the property from squatters while she was in prison and the existing no reason notice to vacate. Macaulay J found 'Ms Burgess left the office believing that her task was to organise support letters and to try to get the house cleaned up' (21 December 2012).

5. Individual circumstances explained
Letters from parole officer and Flat Out to Director of Housing and High Risk Tenancy Unit about Ebony's circumstances (December/January).

6. Told to leave property
Director of Housing issued notices to vacate (31 January 2013). VCAT dismissed application for possession because 14 days' notice was not given (18 March 2013).

7. Legal documents served
Fresh notices to vacate for illegal use issued (22 March 2013). Director of Housing applied to VCAT for a possession order (9 April 2013).

8. Raising human rights – opportunity for dispute resolution
Letters negotiating on the basis of the Charter and asking for consideration of alternatives to eviction; support letters (April 2013). Response indicated Charter issues won't be considered by the public authority unless proceedings brought in the Supreme Court (19 April 2013).

9. Rushing to the Supreme Court before locks are changed
VCAT made a possession order (13 May 2013). Reasons for decision dated 10 June 2013. Frankston Office applied for a warrant of possession on 18 June 2013, VCAT issued it on that date. Police let Ebony know the warrant would be executed the next day. Justice Connect made an urgent application for judicial review and the Court stayed the execution of the warrant (21 June 2013).

10. Ebony allowed to stay
Hearing in the Supreme Court (12-14 May 2014). Decision declaring that the warrant was of no legal force and effect and was unlawful under the Charter (17 December 2014).

I accept the Victorian Equal Opportunity and Human Rights Commission's submission that the confusing and limited availability of remedies under the Charter has held back the development of a human rights culture:

> *Not having clear, accessible and enforceable remedies attached to the Charter creates a disincentive for compliance as there are no obvious consequences of a breach. Many public authorities, particularly government departments, work from a strong risk-management framework that will prioritise organizational 'risks' that carry the heaviest sanctions … From this perspective, human rights compliance is not a high priority.*
>
> Victorian Equal Opportunity and Human Rights Commission, Submission 90

To embed a human rights culture in Victoria, the remedies that are available to protect Charter rights must be clear and those remedies must be accessible to people who need them (as discussed in **Chapters 1 and 3**). Other jurisdictions with human rights laws, along with many submissions to the Review, provide models for doing so:

> *Such a change is likely to further encourage public authorities to be accountable for their decisions and actions ... It will also serve to enhance the reputation of the Charter as equal to other legislation in Victoria.*
>
> Assistant Commissioner for Privacy and Data Protection, Submission 94

Example: Victoria Police report—*Equality is not the same*

The risk management focus of public sector agencies means legal proceedings can be the catalyst for culture change. For example, in February 2013 on settlement of litigation in the Federal Court alleging racial profiling within Victoria Police, the Chief Commissioner agreed to invite comment on and examine the policy of Victoria Police on field contacts (including the collection of data concerning field contacts), and cross-cultural training in Victoria Police. In launching the report, then Chief Commissioner Key Lay APM noted '[w]hilst I'm confident Victoria Police as an organisation does not racially profile, I'm equally confident that some of our members have actually engaged in that process … There were some indications within the report that some of our structures, some of our members … don't even understand they're acting with any form of bias when in fact they are'.[293]

This work led to a three-year action plan of change within the organisation. In the report, Victoria Police noted:

As the case that prompted this review shows, and as our own internal desire to continuously improve requires, we must always seek to examine and update our approaches to validate that they remain relevant to the needs and expectations of the day … As a result of this activity, we have a clear direction on how we will proceed to strengthen community trust and confidence in these two areas.[294]

[293] Chief Commissioner Ken Lay APM, quoted in 'Police Pledge on racial bias', *The Age Online,* 31 December 2013, accessed 9 July 2015 http://www.theage.com.au/victoria/police-pledge-on-racial-bias-20131230-303b1.html.
[294] Victoria Police, *Equality is Not the Same* (2013) 2.

A direct claim under the Charter

A large number of submissions to the Review proposed amending the Charter to include a stand alone cause of action, so a person who claims their Charter rights have been breached can seek a remedy directly, rather than having to piggy back another legal claim.[295] Some of these submissions directed my attention to the remedies provisions in human rights legislation in the United Kingdom and the Australian Capital Territory.

One model for the provision of remedies is the model used in the United Kingdom. The *Human Rights Act 1998* (UK) gives effect to rights and freedoms guaranteed under the European Convention on Human Rights. Section 6(1) of the Act provides it is unlawful for a public authority to act in a way that is incompatible with a Convention right. Section 7(1) provides:

> *A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—*
>
> *(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or*
>
> *(b) rely on the Convention right or rights concerned in any legal proceedings,*
>
> *but only if he is (or would be) a victim of the unlawful act.*

A one-year limitation period applies to proceedings brought under section 7(1)(a), which may be extended if doing so would be equitable in a particular case. Under section 7(1)(b), 'legal proceedings' includes (a) proceedings brought by or at the instigation of a public authority, and (b) an appeal against the decision of a court or tribunal.

Section 8 sets out the remedies that can be ordered in relation to an unlawful act. Generally, a court or tribunal can grant any relief or remedy, or make any order, that is within its powers and that it considers just and appropriate.[296] Awards of damages are restricted: they may be awarded only if, in all the circumstances, it is necessary to afford just satisfaction to the person concerned.[297] In the United Kingdom damages have not been awarded frequently, and have been fairly modest.[298]

---

[295] Submission 7, Dr Liz Curran; Submission 8, Professor Rosalind Dixon and Professor George Williams AO; Submission 12, Communication Rights Australia; Submission 14, Lisa Peterson; Submission 20, Malcolm Harding; Submission 24, Dr Kate Seear, Kristen Wallwork and Dr Claire Spivakovsky; Submission 36, Youthlaw; Submission 39, Peninsula Community Legal Centre; Submission 42, Environmental Justice Australia; Submission 44, Leadership Plus; Submission 45, Community Housing Federation of Victoria; Submission 46, Disability Advocacy Victoria; Submission 47, Victorian Ombudsman; Submission 48, Gippsland Community Legal Service; Submission 54, Victorian Bar; Submission 64, Victorian Council of Social Service; Submission 70, Disability Discrimination Legal Service; Submission 74, Council to Homeless Persons; Submission 75, Tenants Union of Victoria; Submission 76, Office of the Public Advocate; Submission 77, Victorian Gay & Lesbian Rights Lobby; Submission 78, Law Institute of Victoria; Submission 79, Justice Connect Homeless Law; Submission 90, Victorian Equal Opportunity and Human Rights Commission; Submission 91, Federation of Community Legal Centres; Submission 93, Victoria Legal Aid; Submission 94, Assistant Commissioner for Privacy and Data Protection; Submission 95, Human Rights Law Centre; Submission 96, Liberty Victoria; Submission 98, Victorian Aboriginal Legal Service.

[296] *Human Rights Act 1998* (UK) s 8(1).

[297] *Human Rights Act 1998* (UK) s 8(3).

[298] See for example *Dobson v Thames Water Utilities* [2009] EWCA 28 [41]-[46]; *R (Faulkner) v Secretary of State for Justice* [2013] 2 AC 254; [2013] UKSC 23.

Closer to home, the *Human Rights Act 2004* (ACT) includes a remedies provision that is modelled on section 8 of the UK Human Rights Act. Its section 40C(2) provides:

> *The person may—*
>
> *(a) start a proceeding in the Supreme Court against the public authority; or*
>
> *(b) rely on the person's rights under this Act in other legal proceedings.*

As in the United Kingdom, only a person who claims to be a victim of an action that is incompatible with human rights may start a proceeding. There is a one year limitation period, which may be extended by the Court. Unlike the United Kingdom, the ACT Human Rights Act excludes damages as a remedy. Section 40C(4) empowers the Supreme Court to 'grant the relief it considers appropriate except damages'.

This provision has not been extensively litigated. Despite some landmark decisions,[299] there has not been a flood of applications to the Supreme Court in reliance on the freestanding cause of action created by section 40C(2)(a).

These remedies provisions provide a model that could supplement the remedies that are currently available under the Victorian Charter. Under this model, a person whose human rights have been breached could either bring a proceeding using the direct cause of action, or rely on their rights in other legal proceedings. It would resolve the confusion and uncertainty that surrounds section 39, by providing a direct right of action for anyone seeking a remedy for a breach of their human rights.

At the same time, this model would preserve the flexibility of section 39 and would continue to allow people to raise Charter rights in any legal proceeding in which they are relevant. The Charter can already be raised in a wide range of legal proceedings, from a judicial review proceeding in the Supreme Court, to a bail application in the Magistrates' Court, to an objection to evidence in a criminal trial. When the Charter is raised in these ways, the court or tribunal can make any order that it could otherwise make in the proceeding:

- In a judicial review proceeding, a decision can be set aside because it is incompatible with human rights protected by the Charter,[300] or because the decision maker has not properly considered relevant rights.[301]
- When the Charter is raised in a bail application, the court can grant bail on conditions that are informed by the Charter.
- A court can exclude evidence that is adduced in a criminal trial if it was obtained in a manner incompatible with the right to privacy.[302]

[299] *Hakimi v Legal Aid Commission (ACT)* (2009) 195 A Crim R 275 (no absolute right to be represented in criminal proceedings by lawyer of own choice); *Eastman v Chief Executive Officer of Department of Justice and Community Safety* (2010) 172 ACTR 32 (right to humane treatment when deprived of liberty—rehabilitation, medical treatment, specific work); *R v Nona* (2012) 6 ACTLR 203 (application for stay of criminal proceedings due to delay in prosecution).
[300] For example, *PJB v Melbourne Health* (2011) 39 VR 373 (19 July 2011).
[301] For example, *Bare v IBAC* [2015] VSCA 197 (29 July 2015).
[302] See *Director of Public Prosecutions v Kaba* [2014] VSC 52 (18 December 2014).

I note Victoria Police's concerns that:

- it would be a fundamental shift for the Charter to incorporate a separate cause of action
- the inclusion of a separate cause of action may undermine well-established precedents
- a major strength of the Charter is its emphasis on proactive policy making and judicial interpretation, which lead to decisions that are consistent with human rights and to negotiated outcomes rather than adversarial contests
- the introduction of a separate cause of action would create a significant increase in civil litigation, and the resources needed to manage this increase would be better spent on proactive community programs and training.[303]

These are important points, and I have considered them carefully. I accept it would be a departure from the original conception of the Charter to include a direct cause of action. But the confusing and limited remedies provision in section 39 of the Charter is undermining its effectiveness. Providing for human rights without corresponding remedies sends mixed messages to the public sector and to the community about the importance of those rights. Further, the Charter is based on a flawed regulatory model that does not include an ability to enforce the standards that it sets, as a last resort (as I note in my discussion of the regulatory model in **Chapter 3**).

I am also concerned the current model leads to contortions in litigation just to get a Charter question before a court or tribunal, even when the Charter is 'piggy backed' onto a claim that is not successful.[304] It seems absurd to require people to make unsuccessful arguments on other grounds before they can raise Charter grounds. This situation also creates complex jurisdictional and procedural questions.

I am not convinced the introduction of a separate cause of action would significantly increase civil litigation. While making remedies more accessible is likely to result in some increase in litigation, it should also reduce unnecessary litigation that occurs because the current remedies provision is obscure. This latter litigation has been largely unproductive, in terms of promoting and protecting human rights. A simpler remedies provision, together with enhanced human rights education and the monitoring and alternative dispute resolution mechanisms discussed in **Chapter 3**, will enable the parties to a human rights dispute to focus on practical outcomes, rather than abstract legal disputes.

I am also encouraged by the experience in other jurisdictions, and under other Victorian legislation that protects human rights,[305] that has not involved a deluge of litigation. A direct cause of action was introduced in the Australian Capital Territory in 2009. In that year the number of cases that mentioned the Human Rights Act increased markedly, but the proportion of cases involving human rights issues has since reduced to pre-2009 levels.[306]

[303] Submission 105, Victoria Police, 2-3.
[304] For example *Goode v Common Equity Housing Limited* (Human Rights) [2013] VCAT 2188 (19 December 2013); *Goode v Common Equity Housing* [2014] VSC 585 (21 November 2014).
[305] Such as the *Equal Opportunity Act 2010* (Vic) and its predecessors, the *Racial and Religious Tolerance Act 2001* (Vic), the *Privacy and Data Protection Act 2014* (Vic) and its predecessor the *Information Privacy Act 2000* (Vic), and the *Health Records Act 2001* (Vic).
[306] ACT Human Rights Commission, *Look Who's Talking: A Snapshot of Ten Years of Dialogue under the Human Rights Act 2004* (2014) 8-9.

Three further issues need particular consideration:

- First, what is the appropriate court or tribunal within the Victorian justice system to hear and determine claims made under the Charter?

- Second, should damages or compensation be a remedy that can be awarded against a public authority that has acted incompatibly with a person's human rights?

- Third, who should have standing to bring an action?

In addition, we need to clarify whether a person may seek judicial review of a decision on the ground only that it is unlawful under section 38(1) of the Charter.

a. What is an appropriate forum to consider Charter disputes?

Many submissions identified the Victorian Civil and Administrative Tribunal as the appropriate forum for claims under the Charter, and I agree with that view. The Tribunal has a number of features that make it well suited to hear and determine claims that a public authority has acted incompatibly with human rights.

Established in 1998, the Tribunal was designed to be a low-cost, accessible and independent tribunal. Many people who bring a dispute to the Tribunal do not have lawyers. The Tribunal provides a range of supports for litigants in person, and the Tribunal members are experienced in conducting hearings in which one or more of the parties are self-represented. Parties to disputes at the Tribunal generally bear their own legal costs, and an unsuccessful party is not usually ordered to pay the other party's costs.[307]

The Tribunal is a more accessible, and less costly, forum than the Supreme Court. Further, it has more experience than any other Victorian court or tribunal in dealing with Charter arguments. Since the Charter commenced in 2008 over 100 matters decided at the Tribunal have involved Charter arguments, across all four of the Tribunal's divisions.

In its review jurisdiction, the Tribunal conducts merits review of various government decisions.[308] When it conducts a merits review, the Tribunal is itself a public authority under the Charter, so is obliged to properly consider human rights in reaching its decision. Further, the Tribunal also has an original jurisdiction to decide claims made under a wide range of Victorian legislation.[309] Its original jurisdiction includes legislation that gives effect to human rights, such as the Equal Opportunity Act, the Racial and Religious Tolerance Act, and the Privacy and Data Protection Act. The Tribunal's Human Rights Division hears and determines these claims.

The four Tribunal divisions (Civil, Administrative, Residential Tenancies and Human Rights) have specialist lists. Common to all the Tribunal's jurisdictions are the procedural rules set out in the *Victorian Civil and Administrative Act 1998* (Vic) and the *Victorian Civil and Administrative Tribunal Rules 2008* (Vic). These rules can be applied flexibly to the range of disputes that people bring to the Tribunal. So, a Tribunal member could hear a residential tenancies matter and a related Charter dispute at the same time.

The Tribunal also conducts alternative dispute resolution through compulsory conferences and mediations, and routinely offers alternative dispute resolution to parties via its Human Rights Division. This function would usefully supplement the voluntary dispute resolution

[307] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109.
[308] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 42.
[309] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 41.

function that I recommend for the Victorian Equal Opportunity and Human Rights Commission in relation to Charter disputes.

The Supreme Court exercises a supervisory jurisdiction over the Tribunal in two ways. The President of the Tribunal can refer a question of law to the Supreme Court for decision.[310] Parties can also appeal a decision of the Tribunal to the Supreme Court on a question of law.[311] In my view, a supervisory role is more appropriate for the Supreme Court, rather than it being a primary decision maker in Charter matters.

In summary, I propose the Tribunal be given original jurisdiction to hear and determine claims that a public authority has acted incompatibly with human rights protected under the Charter. This function would fit well with the Tribunal's existing Human Rights Division, and should be modelled on the jurisdiction conferred under the Equal Opportunity Act.

The Tribunal's powers to summarily dismiss matters that are vexatious or misconceived,[312] or that would be more appropriately dealt with in another court or tribunal,[313] are well suited to dispose of Charter claims that clearly lack substance, or that should be resolved in legal proceedings that are already on foot.

Example: the Victorian Civil and Administrative Tribunal's consideration of the Charter in a discrimination case

In *Slattery v Manningham City Council,*[314] the Tribunal considered a discrimination claim against Manningham City Council by an applicant who had multiple disabilities. The Council had banned the applicant from entering any building owned, occupied or managed by the Council following the applicant's disruptive behaviour at council meetings and aggressive behaviour towards council staff in the context of those meetings. The ban prevented the applicant from not only attending council meetings but also from taking his grandchildren to the pool, visiting public libraries and using public toilets.

The Tribunal found the applicant's behaviour was, to a significant extent, a manifestation of his disabilities and that the ban amounted to direct discrimination based on his disability in breach of the Equal Opportunity Act. The Tribunal also considered it had jurisdiction to consider the Charter unlawfulness claim, because the lawfulness of the public authority's decision was a question before it under an existing cause of action under the Equal Opportunity Act.

The Tribunal found the decision also breached the applicant's rights to participate in public life, to freedom of expression and to enjoy his human rights without discrimination. It found the limit on the applicant's rights was not justified because less restrictive means were available to achieve the purpose of the ban (that is, to protect safety of council employees).

The Tribunal ordered the Council to pay Mr Slattery $14,000 and revoke the ban as a remedy for the discrimination. It also made a declaration that Mr Slattery's human rights had been breached, and ordered the Council to provide Charter training for its councillors, Chief Executive Officer and Director.[315]

[310] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 96.
[311] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148.
[312] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 75.
[313] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 77.
[314] [2013] VCAT 1869 (30 October 2013).
[315] *Slattery v Manningham City Council* [2014] VCAT 1442 (23 October 2013).

b. Should damages be available for a breach of Charter rights?

As discussed, a range of legal remedies are available for acts or decisions that are incompatible with human rights:

- A decision can be set aside, and a new decision then made that properly considers human rights.
- An injunction can be granted to stop a public authority from continuing to act in a way that is incompatible with human rights.
- Evidence that was obtained in breach of the right to privacy, for example, can be excluded from a trial.
- An order can be made to require a public authority to take positive steps to remedy a breach, or to prevent a similar breach happening again.

The question is whether these remedies are sufficient, or whether the remedies available under the Charter should also include damages (financial compensation). Submissions to the Review expressed various views on this matter.

Elizabeth O'Shea of Maurice Blackburn Lawyers proposed remedies under the Charter should include both compensatory damages and pecuniary penalties, similar to the compliance regime that exists under the *Fair Work Act 2009* (Cth) and other Commonwealth legislation. She considered compensation and penalties, addition to providing effective remedies, compensation and penalties would promote access to justice and human rights:

> *Private enforcement has a central role to play in creating a human rights culture, especially among public authorities. Harnessing the power of the private legal profession to agitate claims arising from breaches of the Charter will be invaluable to ensuring human rights are genuinely respected and enforced. This will not happen until the Charter offers plaintiffs the opportunity to seek damages, and in situations where that would not address the conduct of the public authority, pecuniary penalties.*
>
> Elizabeth O'Shea, Maurice Blackburn Lawyers, Submission 53

The Law Institute of Victoria also suggested remedies should include damages, but as a remedy of last resort rather than first resort.[316]

The Victorian Bar proposed a more cautious approach to the remedy of damages:

> *[The] Victorian Bar does not recommend that s 39(1) be amended at this time so to give rise to an entitlement to damages for a breach of s 38(1). Among its members there are some who advocate for a right to damages, whether subject to a threshold or limit, or left to the justice of the case. The Bar considers that this should be the subject of future consideration once there has been sufficient time for a body of jurisprudence in relation to s 39, amended in the manner proposed, to develop.*
>
> Victorian Bar, Submission 84

[316] Submission 78, Law Institute of Victoria, 78.

This caution was shared by Lisa Peterson,[317] who suggested financial restitution should be considered in a further review in four years, after public authorities have had some experience of a direct cause of action.

As noted, the UK Human Rights Act includes damages as an option in its remedies, while the ACT Human Rights Act does not.

Damages are available in similar areas of law in Victoria. For example, under the Equal Opportunity Act, the Victorian Civil and Administrative Tribunal can award damages in discrimination claims to compensate for any loss, damage or injury suffered by the applicant as a result of the unlawful discrimination.[318] In the past five years, damages awarded by the Tribunal in discrimination cases have been between $1,000 and $16,000. In its privacy jurisdiction, the Tribunal may order payment of up to $100,000 as compensation for any loss or damage suffered.[319] It has had this jurisdiction since 2001, but has hardly ever ordered payment of compensation for a breach of privacy.[320]

While this experience suggests public authorities have little to fear if damages were a remedy under the Charter (and the amounts involved are too small to incentivise the private legal profession to pursue Charter litigation), it also suggests awards of damages play only a minimal role in achieving compliance with equal opportunity and privacy legislation in Victoria.

Despite good arguments for making damages a remedy available for a breach of human rights, I do not recommend this step at this stage. For now, the focus should remain on practical outcomes that protect and promote human rights, and these outcomes do not need to include financial compensation.

In summary, the introduction of a direct cause of action under the Charter is a significant step; together with the other measures recommended by the Review, it would enhance the Charter's ability to deliver human rights outcomes. Making damages a remedy under the Charter should be considered only as an incremental step once the direct cause of action is established and there is experience of it in operation. In **Chapter 8**, I recommend a further review of the Charter. That review should consider the inclusion of damages as a remedy.

c. Who should have standing to claim a breach of Charter rights?

The Charter protects human rights, and only human beings have human rights.[321] Remedies under the Charter should be available to any human being who claims a public authority has acted, or is proposing to act, incompatibly with their human rights. If a person cannot seek a remedy (perhaps because the person has a disability or because the person is a child), then another person should be able to do so on their behalf.

Further, because remedies under the Charter should be available to persons who are, or will be, affected by a breach of their human rights, they should not be available to corporations, interest groups, or interested persons who are not directly affected by a breach.

[317] Submission 14, Lisa Peterson.
[318] *Equal Opportunity Act 2010* (Vic) s 125(a)(ii).
[319] *Privacy and Data Protection Act 2014* (Vic) s 77(1)(a)(iii), which replaced the *Information Privacy Act 2000* (Vic) s 43(1)(a)(iii); *Health Records Act 2000* (Vic) s 78(1)(a)(iv).
[320] The only award of compensation reported on AustLII is *Venning v Chew* [2015] VCAT 714 (1 June 2015), in which the applicant was awarded $4,000 compensation for injury to her feelings.
[321] Charter, s 6(1).

Finally, Charter remedies are designed to achieve practical outcomes, and I do not recommend the inclusion of damages (financial compensation) as a remedy. For these reasons, the right to make a claim using the direct cause of action under the Charter should not survive a person's death.[322] The individual cause of action is designed to be a remedy to the individual concerned when they are living. Other mechanisms (such as a coronial, or an investigation by the Independent Broad-based Anti-corruption Commission or Ombudsman investigation) can address the significant practical and public policy interests of ensuring public authorities act compatibly with human rights more generally.

d. May a person seek judicial review for Charter unlawfulness?

The direct cause of action that I recommend would supplement the ability to rely on Charter unlawfulness in any legal proceeding. However, as I noted, it is unclear whether unlawfulness under the Charter is enough, or whether some other (at least arguable) ground of unlawfulness must exist:

> *VLA agrees that section 39 is unnecessarily complex and presents a barrier to using the Charter in meritorious human rights cases. This complexity is particularly felt in judicial review proceedings—one of the most common ways of holding public authorities to account—and means that time is spent on considering the availability and merit of non-Charter grounds rather than on the actual Charter rights issues that should be the focus of litigation.*
>
> *For example, in the Forbath case … VLA relied on a ground of lack of procedural fairness as well as the Charter in the judicial review application. Had there not been a viable ground in relation to procedural fairness, arguably Mr Forbath could not have sought redress under the Charter although it was patently clear that his Charter rights had not been taken into account in the decision to evict him. It is hard to see how the strength of a non-Charter ground of judicial review provides a rational basis on which to determine whether Charter rights can be protected through judicial review.*
>
> Victoria Legal Aid, Submission 93

Victoria Legal Aid proposed amending section 39 of the Charter to make it clear that a breach of the Charter can constitute a standalone ground of judicial review, without the need for a non-Charter ground of unlawfulness. The Law Institute of Victoria and the Victorian Equal Opportunity and Human Rights Commission made submissions to the same effect.[323]

I agree that the availability of judicial review of a decision on Charter grounds should not depend on the claimant having another, non-Charter ground of review. This application of section 39 leads to arbitrary results: a person who happens to have an arguable non-Charter ground of review can have a decision set aside because it is incompatible with human rights, while a person without a non-Charter ground cannot. It also leads to people arguing other grounds of review unnecessarily, as a gateway to reach their Charter arguments, which can waste the time and resources of the Supreme Court and the litigants.

[322] Claims under Part III of the *Wrongs Act 1958* (Vic) would not be affected.
[323] Submission 78, Law Institute of Victoria, 22 and recommendation 18; Submission 90, Victorian Equal Opportunity and Human Rights Commission, 70-71 and recommendation 19.

In 2005 the Human Rights Consultation Committee proposed a remedies provision for the Charter that would have allowed judicial review on Charter grounds alone.[324] The wording of section 39 might have been intended to achieve that result, and some judges have interpreted section 39 in that way.[325] I perceive no benefit from the alternative interpretation of section 39, and recommend the Charter be amended to make it clear that judicial review is available on Charter grounds alone.

Recommendation 27: The provisions and process for obtaining a remedy under the Charter be clarified and improved by:

(a) amending the Charter to enable a person who claims a public authority has acted incompatibly with their human rights, in breach of section 38 of the Charter, to either apply to the Victorian Civil and Administrative Tribunal for a remedy, or rely on the Charter in any legal proceedings. The amendment should be modelled on section 40C of the *Human Rights Act 2004* (ACT).

The Tribunal's jurisdiction to determine whether a public authority has breached section 38 of the Charter should be similar to its jurisdiction in relation to unlawful discrimination under the *Equal Opportunity Act 2010* (Vic). If the Tribunal finds that a public authority has acted incompatibly with a Charter right, it should have power to grant any relief or remedy that it considers just and appropriate, excluding the power to award damages.

(b) if the Charter is raised in another legal proceeding, the court or tribunal should retain the ability to make any order, or grant any relief or remedy, within its powers in relation to that proceeding. It should remain the case that a person is not entitled to be awarded any damages because of a breach of the Charter, in accordance with existing section 39(3) of the Charter.

(c) amending the Charter to make it clear that a person who claims that a decision of a public authority is incompatible with human rights, or was made without proper consideration of relevant human rights, can seek judicial review of that decision on the ground that the decision is unlawful under the Charter, without having to seek review on any other ground.

[324] Clause 40 of the draft Bill annexed to the Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005).
[325] See, for example, *Goode v Common Equity Housing* [2014] VSC 585 (21 November 2014) [25]-[39].

Chapter 5

Interpreting and applying the law

Chapter 5 Interpreting and applying the law

Chapter 5 addresses some of the more technical legal questions about the Charter's operation. It considers:

- the role of human rights in statutory construction
- the role of the general limitations clause in section 7(2)
- the declaration of inconsistent interpretation by the Supreme Court
- the notification provision which requires that the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission be notified about Charter proceedings in superior courts so that they can consider intervening in a case.

Term of reference 2(c): Clarifying the role of human rights in statutory construction

Overview

Section 32(1) of the Charter requires '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.

An interpretive clause is a standard feature of human rights laws in the United Kingdom, New Zealand and the Australian Capital Territory. The basic principle is that of compatibility: a law is compatible with human rights obligations if it meets the standard set by the Charter. If it does not meet the standard, it should be interpreted as far as possible to be compatible.

This principle does not prevent the Parliament from passing laws that are incompatible with human rights. But when a law is open to different interpretations, an interpretation that is compatible with human rights should be preferred.

Although this idea behind section 32 is a simple one, uncertainty and debate surrounds how to apply it. Parliament should resolve the current confusion, particularly about whether and how section 32 works with the test in section 7(2) for justifiable limits on rights.

I recommend amending section 32(1) of the Charter to require statutory provisions to be interpreted, as far as possible, in the way that is most compatible with human rights. Where a choice must be made between possible meanings that are incompatible with rights, the provision should be interpreted in the way that is least incompatible with human rights. The amendment should make it clear that section 7(2) should underpin the assessment of which interpretation is most compatible, or least incompatible, with human rights. Further, the Charter should set out the steps for interpreting statutory provisions in a way that is compatible with human rights, to ensure clarity and accessibility.

> *Having the issue clarified will save time and costs of litigation. It will provide certainty to those persons and bodies who have been conferred a discretion by statute, as well as to persons whose human rights may be affected by the exercise of the discretion. It will also provide the courts and tribunals with clarity in interpreting legislation compatibly with human rights.*
>
> Bruce Chen, Submission 5

> *The lack of clarity around the operation of section 7(2), and the uncertainty that this has created for public authorities in relation to the way that they should interpret legislation, is undesirable.*
>
> Victorian Ombudsman, Submission 47

> *This uncertainty creates challenges in practice for lawyers seeking to use the Charter in statutory interpretation particularly in lower courts where time is more limited. …*
>
> *We therefore note that the Charter review provides a much-needed opportunity to make the relationship between section 32 and section 7 clear.*
>
> Victoria Legal Aid, Submission 93

Requirement for human rights—compatible interpretation of legislation

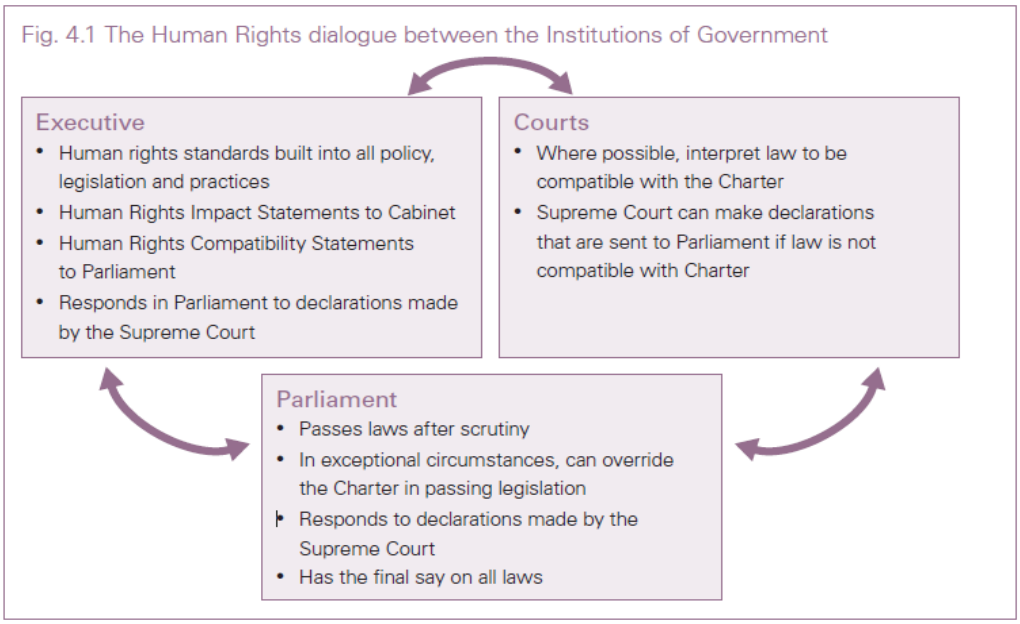
When first considering a human rights charter, the Government made clear its intention to preserve parliamentary sovereignty. The Attorney-General's May 2005 Human Rights Statement of Intent said:

> *The Government is concerned to ensure that the sovereignty of Parliament is preserved in any new approaches that might be adopted to human rights. In the Westminster system of government, a government is accountable through Parliament for its policies and actions. The community judges the record of a government at each election when it elects a new Parliament. A government should be able to pass laws and make policies that affect human rights on the basis that it will be accountable for those actions through the ballot box.*

While the Attorney-General envisaged courts would have an important role in interpreting the law and enforcing rights and obligations, it did not support a model that enabled courts to strike down legislation that was inconsistent with human rights.

In 2005 the Human Rights Consultation Committee proposed a dialogue human rights model in which each of the institutions of government would have a role.

Under the model, the courts' primary role in this model is to interpret legislation.[326]



The Committee proposed an interpretive role for the courts that was consistent with the preservation of parliamentary sovereignty, under which:

> *… the final say on the law remains in the hands of Parliament while allowing a court to act, where appropriate, to remove any ambiguity that might lead to violations of the Charter. An interpretive provision assumes that the State Government would only seek to deliberately legislate in violation of the Charter through a statement of incompatibility issued by the Attorney-General ... It can prevent the Charter being violated accidentally through ambiguous wording or misapplication by a government body.*[327]

What does the law say now? Interpretation under section 32 of the Charter

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

(3) This section does not affect the validity of—

(a) an Act or provision of an Act that is incompatible with a human right; or

(b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

[326] The diagram is from Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 68, Figure 4.1.
[327] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 82.

The Charter also provides for referral to the Supreme Court of a question of law that relates to the application of the Charter or the interpretation of a statutory provision in accordance with the Charter. It requires notice of such proceedings to be given to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission (Division 3 of Part 3).

Instead of having power to strike down a law that is incompatible with human rights, the Supreme Court was given the power to issue a declaration of inconsistent interpretation (as I discuss under term of reference 2(g) below). Such a declaration does not affect the validity of the law, but it triggers a consideration of the law by the Attorney-General and by Parliament.

As an example, the Charter's interpretive provision was applied in *Re an application under the Major Crimes (Investigative Powers) Act 2004*.[328] In that case Chief Justice Warren applied section 32(1) of the Charter to interpret a provision of the *Major Crimes (Investigative Powers) Act 2004* (Vic) that removed protections against self-incrimination, to ensure a derivative use immunity always operated in relation to compelled testimony.[329] This interpretation of the provision was consistent with the right to a fair hearing and the right not to be compelled to testify against oneself or confess guilt. The alternative interpretation would not have been compatible with those rights.

The contentious application of section 32

The meaning and operation of section 32 of the Charter have been highly contentious and much litigated. The two issues that attract most attention are:

- whether section 32 is a special rule of interpretation that allows the courts to rewrite a provision so it is compatible with human rights
- the role, if any, of the justification analysis in section 7(2) and at what stage that analysis should be undertaken.

The first of these issues has been firmly resolved in the negative. The second remains contentious and should be resolved by legislation.

When the Charter was first enacted, there were two main approaches to the interpretive obligation. One approach gave the broadest possible operation of section 32, saying that it permits a provision to be interpreted in a manner that departs from the intention of Parliament to arrive at a rights consistent interpretation.[330] This approach gives only a limited role to section 7(2), with a justification analysis to be undertaken only after the most rights compatible meaning of the provision has been ascertained.[331]

The other approach was a more confined view of section 32, saying it is an ordinary rule of construction that does not allow courts to rewrite a provision. Under this approach, the justification analysis under section 7(2) is to be undertaken at an early stage in the interpretive process.[332]

---

[328] (2009) 24 VR 415.
[329] A 'direct use' immunity serves to protect the individual from having compelled incriminating testimony used directly against them in a subsequent proceeding. A further step or protection is a 'derivative use immunity'. This immunity insulates an individual from having compelled incriminating testimony used to obtain other evidence against them. *Re an application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, 422 [26].
[330] Applying the approach taken in the United Kingdom by the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, discussed in the Court of Appeal's judgment in *R v Momcilovic* (2010) 25 VR 436, [44]-[49].
[331] Applying the approach taken by Chief Justice Elias in dissent in *R v Hansen* [2007] 3 NZLR 1, discussed by the Court of Appeal in *Momcilovic* at 466, [108]-[109].
[332] Applying the six step process adopted by Justice Tipping in *R v Hansen* [2007] 3 NZLR 1 [92], discussed by Justice Tate in 'Statutory Interpretive Techniques under the Charter: Three Stages of the *Charter* – Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in

Victorian Court of Appeal approach in Momcilovic

In *R v Momcilovic*[333] the Court of Appeal resolved these issues as follows: Section 32(1) does not create a 'special' rule of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question.[334]

The section 7(2) justification analysis is to be undertaken at the end of the interpretive process, using the following method:[335]

- Step 1: Ascertain the meaning of the relevant provision by applying section 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984* (Vic).

- Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the Charter.

- Step 3: If so, apply section 7(2) of the Charter to determine whether the limit imposed on the right is justified.

Applying this approach, the Court of Appeal held it was not possible to interpret the relevant provision (which reversed the onus of proof in relation to a drug offence) consistently with the presumption of innocence in section 25(1) of the Charter. It concluded that there was no reasonable and demonstrable justification for this limitation of the section 25(1) right, and it made a declaration of inconsistent interpretation under section 36 of the Charter.[336]

High Court decision in Momcilovic

The High Court granted special leave to appeal from the Court of Appeal's decision, and allowed the appeal. Its reasons for the decision were given in six separate judgments, and are not easy to understand or apply.

There was a clear decision from the High Court on the first issue for section 32: the majority held the task imposed by section 32(1) of the Charter is not outside the scope of ordinary principles of statutory interpretation and does not confer a legislative function on courts.[337]

There was no agreement on the question of the relevance of section 7(2) in interpreting a provision in accordance with section 32(1). Three justices (Chief Justice French and Justices Crennan and Kiefel) held section 7(2) does not inform the interpretive process under section 32(1),[338] while four justices (Justices Gummow, Hayne, Heydon and Bell) held it does.[339] However, Justice Heydon found both sections 7(2) and 32 to be invalid, so his reasoning was not decisive.

Momcilovic?' (2014) 2 *Judicial College of Victoria Online Journal: Human Rights Under the Charter: The Development of Human Rights Law in Victoria* 43, 55-56.

[333] (2010) 25 VR 436 (Maxwell P, Ashley and Neave JJA).

[334] *R v Momcilovic* (2010) 25 VR 436, [35], [74]-[77], [92]-[104].

[335] *R v Momcilovic* (2010) 25 VR 436, [35], [105]-[110].

[336] The text of the declaration is set out at [157] of the Court of Appeal's reasons.

[337] *Momcilovic v The Queen* (2011) 245 CLR 1, [51] (French CJ), [146(vi)] (Gummow J, Hayne J agreeing at [280]), [545], [566] (Crennan and Kiefel JJ), [683]-[684] (Bell J).

[338] *Momcilovic v The Queen* (2011) 245 CLR 1, [35] (French CJ) and [572]-[574] (Crennan and Kiefel JJ).

[339] *Momcilovic v The Queen* (2011) 245 CLR 1 [168] (Gummow J, Hayne J agreeing at [280]), [427] (Heydon J), [683] (Bell J).

In *Noone v Operation Smile (Aust) Inc*[340] the Court of Appeal noted the High Court's decision in *Momcilovic* had not resolved the issue. With no majority in the High Court, Justice Nettle considered it was appropriate to adhere to the approach taken by the Court of Appeal in *Momcilovic*—that is, section 7(2) is to be considered only after the statutory provision in question is interpreted in accordance with section 32(1).[341] Chief Justice Warren and Justice Cavanough acknowledged this possibility but left open the question.[342]

The relationship between section 32(1) and section 7(2) has not since been clarified. In *Slaveski v Smith,*[343] the Court of Appeal again noted the disparity of views in the High Court but found it unnecessary to decide whether the Court of Appeal was bound to follow its own decision in *Momcilovic* unless satisfied that it is clearly wrong.[344] Three further Court of Appeal decisions (*WBM v Chief Commissioner of Police,*[345] *Victoria Police Toll Enforcement v Taha*[346] and *Nigro v Secretary to the Department of Justice*[347]) have not resolved this stalemate.

Given this uncertainty a person interpreting Victorian law does not know whether to:

- look for compatibility with the human rights in sections 8 to 27 of the Charter, without considering whether any limitations on those rights are reasonable limitations, justifiable in a free and democratic society, or

- look for compatibility with human rights, considering the limitations clause in section 7(2) as part of the test of 'compatibility'.

> *Momcilovic has produced uncertainty about the scope of this important aspect of the Charter. This is a major barrier to the effectiveness of the instrument, especially since one of the primary objects of the Charter is to provide a clear and well understood means of interpreting Victorian statutes in line with human rights guarantees.*
>
> **Professor Rosalind Dixon and Professor George Williams AO Submission 8**
>
> [The decision] … *also contributed to confusion around the law ... The decision was complex, and produced six separate judgments with conflicting views as to how the Charter should be applied in practice. This created the impression that the Charter is a difficult piece of law and that there was no agreement around its application. This discouraged advocates from raising the Charter in court, and led ordinary people to feel that its meaning was impenetrable.*
>
> **Victorian Equal Opportunity and Human Rights Commission Submission 90**

Since the High Court's decision in *Momcilovic*, some consensus has emerged on the basic approach to interpretation under section 32. In *Slaveski v Smith* the Court of Appeal referred to Chief Justice French's approximation of section 32(1) to the principle of legality, and set out its approach:

[340] (2012) 38 VR 569 [27]-[29] (Warren CJ and Cavanough AJA) and [140]-[142] (Nettle JA).
[341] At [142].
[342] At [30]-[31].
[343] (2012) 34 VR 206.
[344] *Slaveski v Smith* (2012) 34 VR 206 at [22] (Warren CJ, Nettle and Redlich JJA).
[345] (2012) 230 A Crim R 322; [2012] VSCA 159 at [122] (Warren CJ, Hansen JA agreeing at [133]) cf [201] (Bell AJA).
[346] [2013] VSCA 37 (4 March 2013) [214] (Tate JA).
[347] (2013) 304 ALR 535; [2013] VSCA (16 August 2013) [88].

> *Consequently, if the words of a statute are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. Exceptionally, a court may depart from grammatical rules to give an unusual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.*[348]

Later in its reasons the Court of Appeal held:

> *We earlier referred to the way in which an Act of the Victorian Parliament is to be construed in light of s 32 of the Charter. As noted, s 32 applies in the same way as the principle of legality with a wider field of application. It does not authorise a process of interpretation which departs from established understandings of the process of construction. Although it may serve as a guide as to which of two possible constructions is to be preferred, it does not allow the reading in of words which are not explicit or implicit in a provision, or the reading down of words so far as to change the true meaning of a provision.*[349]

A differently constituted Court of Appeal reinforced this approach in *Nigro v Secretary to the Department of Justice*:

> *Section 32(1) is not to be viewed as establishing a new paradigm of interpretation which requires courts, in the pursuit of human rights compatibility, to depart from the ordinary meaning of the statutory provision and hence from the intention of the parliament which enacted the statute. Accordingly, as was observed in* Slaveski v Smith*, the court must discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction essayed in* Project Blue Sky*. The statute is to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality is applied. The human rights and freedoms set out in the Charter incorporate or enhance rights and freedoms at common law. Section 32(1) thus applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.*[350]

However, it may be an over-simplification to view section 32(1) as merely a statutory codification of the principle of legality. In *Victoria Police Toll Enforcement v Taha*, Justice Tate held that in *Momcilovic* there was:

> *… recognition that compliance with a rule of interpretation, mandated by the Legislature, that directs that a construction be favoured that is compatible with human rights, might* ***more stringently*** *require that words be read in a manner 'that does not correspond with literal or grammatical meaning' than would be demanded, or countenanced, by the common law principle of legality* [emphasis added].[351]

[348] *Slaveski v Smith* (2012) 34 VR 206 [24].
[349] *Slaveski v Smith* (2012) 34 VR 206 [45].
[350] (2013) 304 ALR 535; [2013] VSCA (16 August 2013) [85].
[351] *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [190], quoting Gummow J in *Momcilovic v The Queen* (2011) 245 CLR 1 [170].

The need for legislative clarification

The Centre for Comparative Constitutional Studies submitted that 'only the High Court can properly clarify this point'.[352] Other submissions suggested the matter needs legislative intervention.[353]

> *The interpretive obligation placed upon courts was modified from that set out in the* Human Rights Act 1998 *(UK) so as to indicate that Australian courts should not go so far as to follow the approach taken in the United Kingdom in cases such as* Ghaidan v Godin-Mendoza *[2004] 2 AC 557. On the other hand, it was equally intended that this provision enable courts to go beyond existing Australian interpretive methods so as to ensure greater consistency between Victorian statutes and human rights standards …*
>
> *Section 32(1) … should be altered to establish that the interpretive exercise under section 32(1) is distinct, and more robust, than what is applied in regard to the principle of legality and the ordinary principles of interpretation.*
>
> **Professor Rosalind Dixon and Professor George Williams AO**
> **Submission 8**

In its 2011 review, the Scrutiny of Acts and Regulations Committee (SARC) reported just days after the High Court's decision in *Momcilovic.* Its observations on section 32 reflected the ongoing uncertainty about the provision.

At the outset, SARC observed if the Court of Appeal was correct that section 32(1) is an ordinary rule of interpretation that does not involve reasonable limits analysis under section 7(2), then section 32 'appears to have generated lengthy and complex legal disputes about its meaning, while adding very little to the existing common law on statutory interpretation'. It also observed section 32(1) sheds little light on the significant disputes over the provision's meaning. SARC considered, no matter how the High Court resolved the meaning of section 32(1), the Victorian Parliament should determine the correct approach and set it out expressly and clearly in the Charter in a manner that is accessible to local users.[354]

I agree Parliament should clarify the meaning of section 32(1). Interpretation of legislation is not something that is done only by courts and tribunals: public officials must also interpret the statutory provisions with which they work; members of the public need to understand laws that apply to them; and lawyers should be able to advise on the meaning of a provision. Everyone involved in interpreting legislation needs clear guidance from the Charter to give effect to Parliament's direction that laws are to be interpreted compatibly with human rights.

With two reservations, I think the Court of Appeal's approach to section 32(1) in *Slaveski v Smith* and *Nigro* is a workable one. The obligation to interpret statutory provisions compatibly with human rights is simply one of the techniques of statutory construction to be used in working out the meaning of a provision.

First, characterising section 32(1) as a codification of the common law principle of legality is an oversimplification. The section goes further than that, being a direction by the Victorian Parliament that its laws should be interpreted compatibly with the Charter's rights. Further, while having a wider operation than the principle of legality, section 32(1) should apply more strongly, as a rule of construction prescribed by Parliament.

---

[352] Submission 92, Centre for Comparative Constitutional Studies, 4.
[353] For example, Submission 78, Law Institute of Victoria, 24.
[354] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 115.

My second reservation is about how to choose the meaning that 'best accords with the human right in question', or that 'least infringes Charter rights'. This choice is simple when it is between a meaning that limits a right and one that does not. But how to choose between two meanings that are both compatible with human rights, or between several meanings that all limit relevant rights, or when a meaning promotes one right but limits another?

Section 32(1) gives no help with these choices, an issue noted in submissions:

> *[The] Momcilovic interpretation dictates that the utility of s 32 is exhausted once a law cannot be interpreted in accordance with the absolute version of those rights. This would surely be the case in most instances where those rights were at issue, as they are unlikely to be at issue where they are merely engaged rather than limited. This interpretation of the relationship between ss 7 and 32 undermines the extensive potential remedial value of s 32.*
>
> *Let us explore this issue with a hypothetical. Let us assume that there is a statute authorizing the quarantining, by decision of Government Department X, of an area on health grounds. Clearly, such a measure cannot be interpreted so that it is compatible with absolute freedom of movement (s 12). Section 32 is then exhausted without any consideration of whether the quarantine decision is reasonable and proportionate in relation to freedom of movement. And yet, the law might have been capable of a good or at least better human rights interpretation if s 7 could have been taken into account at the s 32 interpretation stage*
>
> Castan Centre for Human Rights Law, Submission 26

> *From a doctrinal perspective, it is impossible to identify an interpretation that 'least infringes' a Charter right without: first, considering the scope of the rights and the legislation, and establishing whether the legislation limits a right; and secondly, considering whether the limitation is reasonable and demonstrably justified … How can an interpretation that 'least infringes' a Charter right be identified, without any discussion of the scope of the rights said to be 'breached' … [H]ow can an interpretation that 'least infringes' a Charter right be identified without undertaking some form of limitations analysis like s 7(2), particularly the less restrictive legislative means assessment under s 7(2)(e).*
>
> Dr Julie Debeljak, Submission 71

In addressing this issue, it should also be possible to clarify the role of section 7(2) in interpreting laws. The first stage of the interpretive process—that is, determining the possible meanings of a provision—can be done without resort to section 7(2). The next stage—that is, choosing between possible meanings—can be done using the analysis in section 7(2). For example, when two possible meanings of a provision both limit rights, the preferable meaning is the one that is the least restrictive in achieving the purpose of the provision.

Section 7(2) also has a role if the Supreme Court is considering making a declaration that a provision cannot be interpreted compatibly with human rights, under section 36 of the Charter. At this final stage, the Supreme Court should determine whether the relevant limit on human rights is reasonable and demonstrably justifiable, by referring to the factors in section 7(2). As the Court of Appeal held in *Momcilovic*, the party seeking to justify a limitation of a human right under section 7(2) bears the burden of adducing evidence of the justification.[355] If a limit is justifiable under section 7(2), then it will not be incompatible with human rights (see my discussion below on the meaning of compatibility with human rights).

[355] *R v Momcilovic* (2010) 25 VR 436 [143]-[146].

In my view, the Charter should set out these separate stages of the interpretive process (**Figure 8**). Doing so would remove the mystery and confusion of how to interpret law compatibly with human rights protected by the Charter, and give guidance to everyone involved in interpreting laws.

I propose amendments to section 32 that build on the approach taken by the Court of Appeal in *Slaveski v Smith* and *Nigro*, with the following clarifications:

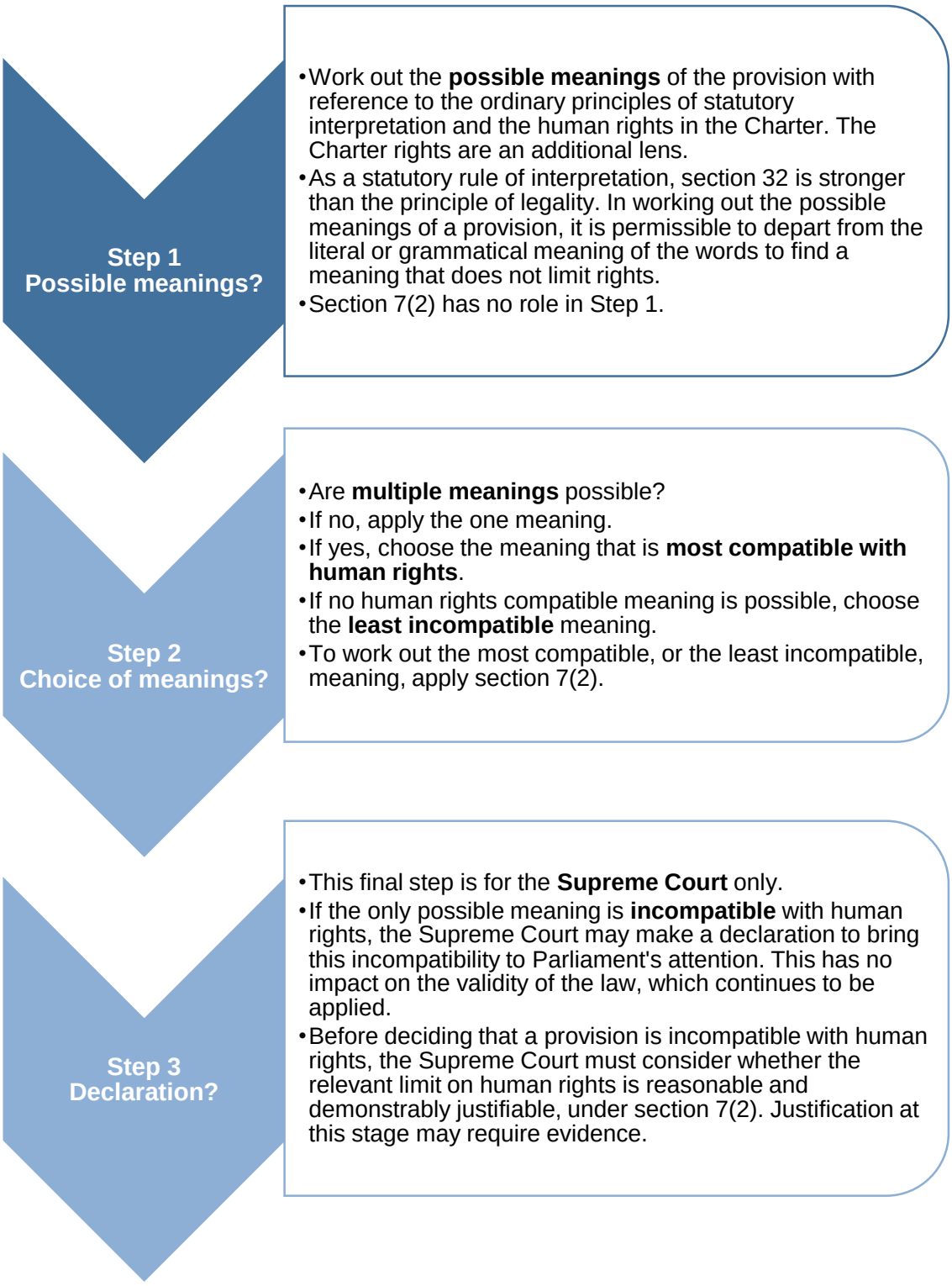
- Section 32 is a stronger rule of interpretation than the principle of legality, because it is a direction from Parliament to interpret its laws compatibly with human rights. So, in considering the possible meanings of a statutory provision, it is permissible to depart from the literal or grammatical meaning of the words in the provision.

- If a provision has more than one possible meaning, the preferred meaning is the one that is most compatible, or least incompatible, with human rights. Section 7(2) should be used to work out which meaning is most compatible, or least incompatible, with human rights.

- Before the Supreme Court makes a declaration that a statutory provision cannot be interpreted compatibly with human rights, it must first determine whether any limit on human rights is reasonable and demonstrably justifiable under section 7(2). At this stage the party seeking to justify the limitation bears the burden of adducing evidence to demonstrate the justification.

- As discussed in the following section of the Report, I also recommend amendments that clarify the key relationship between justifiable limits under section 7(2) and the concept of compatibility with human rights.

Figure 8: Proposed model for statutory interpretation



Recommendation 28: Section 32 of the Charter be amended to:

(a) require statutory provisions to be interpreted, so far as it is possible to do so consistently with their purpose, in the way that is most compatible with human rights

(b) require, where a choice must be made between possible meanings that are incompatible with human rights, that the provision be interpreted in the way that is least incompatible with human rights

(c) make it clear that section 7(2) applies to the assessment of the interpretation of what is most compatible, or least incompatible, with human rights

(d) set out the steps for interpreting statutory provisions compatibly with human rights, to ensure clarity and accessibility.

Term of reference 2(d): Clarifying the role of the proportionality test in section 7(2), in particular as it relates to statutory construction and the obligations of public authorities

Overview

Human rights are not absolute and need to be balanced against each other and competing public interests. The Charter achieves this balance through section 7(2), which provides human rights may be subject under law to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The following factors are to be considered in deciding whether a limit on a right is reasonable: the nature of the right, the importance of the limit's purpose, the nature and extent of the limit, the relationship between the limit and its purpose, and any less restrictive means available to achieve that purpose.

The Review heard concerns that section 7(2) is too complex and not well understood. This issue is best addressed by education to further embed a human rights culture in the public sector, so a proportionality analysis becomes second nature.

While the concept of compatibility with human rights is central to the Charter, it is not defined or used consistently, and it is not clear that it incorporates the proportionality test in section 7(2). I recommend the Charter be amended to define 'compatibility' and 'incompatibility' to make it clear that an action that does not limit a human right, or that limits a human right in a way that is reasonable and demonstrably justifiable in the terms of section 7(2), is compatible with human rights. These terms should be used consistently throughout the Charter, in relation to the scrutiny of legislation (sections 28 and 30), the interpretation of legislation (sections 32, 36 and 37) and the obligations of public authorities (section 38). Further, section 7 should be excluded from the definition of 'human rights' in the Charter.

The internal limitation on the freedom of expression in section 15(3) should be repealed, so the proportionality test in section 7(2) can be applied as the common test in the Charter to balance competing rights and interests.

The general limitations clause in section 7(2)

In general, human rights are not absolute and need to be balanced against each other and against other competing public interests. Human rights law achieves this balance in two ways. One way is an expressed limitation within rights as done in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights. The other way is a general limitations clause, which is the approach taken in Canada, New Zealand, South Africa and the Australian Capital Territory.

The Charter uses both mechanisms to balance rights. The general limitations provision in section 7(2) applies to all human rights in the Charter. In addition, the Charter sets specific limits within some rights, such as the special duties and responsibilities attached by section 15(3) to the right of freedom of expression.

Section 7(2) of the Charter provides all rights may be subject under law to 'such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.

The Human Rights Consultation Committee recommended the inclusion of specific factors for determining whether a limit is reasonable and demonstrably justifiable, noting an unstructured limitations provision could be difficult to apply.[356] In keeping with this recommendation, section 7(2) of the Charter sets out five key considerations:

> *(a) the nature of the right; and*
>
> *(b) the importance of the purpose of the limitation; and*
>
> *(c) the nature and extent of the limitation; and*
>
> *(d) the relationship between the limitation and its purpose; and*
>
> *(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*

In his second reading speech for the Charter, the Attorney-General explained the role of the Charter's general limitations clause:

> *Part 2 reflects that rights should not generally be seen as absolute but must be balanced against each other and against other competing public interests. Clause 7 is a general limitations clause that lists the factors that need to be taken into account in the balancing process. It will assist courts and government in deciding when a limitation arising under the law is reasonable and demonstrably justified in a free and democratic society. Where a right is so limited, then action taken in accordance with that limitation will not be prohibited under the charter, and is not incompatible with the right.*[357]

The Charter also incorporates specific limits on, or qualifications to, the rights set out in Part 2. I discuss these limits below.

The general limitations provision in section 7(2) has two basic requirements: lawfulness and 'proportionality'. The requirement in section 7(2) that any limitation on human rights be 'under law' is a straightforward but significant one. In *Director of Public Prosecutions v Kaba*, Justice Bell held that the police acted without lawful authority when, having stopped the vehicle in which Mr Kaba was a passenger, they repeatedly asked him for his name and address, and so could not satisfy the legality component of the limitations test in section 7(2).[358] It followed that the police had acted incompatibly with human rights and unlawfully under section 38(1).

For the proportionality requirement, Justice Bell, sitting as President of the Victorian Civil and Administrative Tribunal, made the following general points in the early decision of *Kracke v Mental Health Review Board*:

> *First, the test is whether the limitation is reasonable and demonstrably justified in a free and democratic society based on the values of the Charter. This requires a global judgment and not a mechanical, check-list approach. The specific factors are given to help in making that judgment. They are inclusive and other criteria may be considered.*

[356] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 47-48.
[357] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls, Attorney-General)
[358] [2014] VSC 52 (18 December 2014) [467].

> *Secondly, the test reflects the concept of proportionality as articulated in the international jurisprudence, which assists us in understanding how a general limitation provision of this kind operates and, in particular, how the specified factors in s 7(2) fit into the general proportionality analysis.*
>
> *Thirdly, under s 7(2) the specified factors are taken into account according to their nature and are not simply thrown into a general balance. The first and second are foundational and, once applied, remain fixed in the analysis. After the values protected by the right are identified, and the purpose of the limitation is seen to be important enough to justify its imposition, the proportionality of the limitation can be assessed against the other factors.*[359]

Is section 7(2) too complex?

In its 2011 review of the Charter, SARC concluded the list of factors in section 7(2) was unhelpful and inaccessible, and should be reformulated in simpler terms. It considered that 'such a lengthy and convoluted test for reasonable limits is unsuitable for Victoria's Charter', because reasonable limits analyses had to be performed throughout government and by all public authorities.[360]

The Committee recommended section 7(2) be redrafted 'to state the test for limiting rights in plain language that is accessible to Victorians without reference to comparative jurisprudence, and to remove or reduce the list of factors that must be considered when applying this test'.[361]

The then Victorian Government sought legal advice on this recommendation before responding. The recommendation has not been implemented.

Some submissions to the Review expressed concern about the clarity of the proportionality test in section 7(2):

> *In its current form, s 7 is challenging for non-legal personnel to understand and apply, and also reads as both cumbersome and repetitive—particularly within a primarily policy-making context. A key example is the test which requires consideration of whether a limitation is … 'demonstrably justified in a free and democratic society based on human dignity, quality and freedom'. This is a very complex consideration to expect an everyday policy maker in local government to understand and then confidently apply.*
>
> City of Darebin, Submission 53

> *There is insufficient guidance for public servants to put into operation this clause of the Charter. As a public authority that is called upon to consider the Charter many times each day, OPA recommends that the wording in section 7 be simplified to facilitate its practical application.*
>
> Office of the Public Advocate, Submission 76

[359] (2009) 29 VAR 1; [2009] VCAT 646 (23 April 2009) [133]-[135].
[360] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 91.
[361] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) recommendation 13.

These concerns were not reflected in my consultations with, and submissions from, other public authorities. There was broad acceptance that human rights are generally not absolute, that balancing rights with each other and with other public interests can be a difficult and complex exercise, and that the Charter should give guidance on how to undertake that balancing. One Council reflected on the need for better understanding of this provision, based on its experience during two recent public consultations:

> *In both instances, community members appear well informed about their rights and confident to assert them; but less understanding of Council's endeavours to impose reasonable limits in order to balance a variety of competing interests and objectives. …*
>
> *Opportunities to enhance the effectiveness of the Charter may come from calling on the Victorian Equal Opportunity & Human Rights Commission to provide more balanced information and resources, educating the community about their rights and their capacity to assert them, as well as what can be viewed as reasonable limitations.*
>
> Boroondara City Council, Submission 61

As I discuss elsewhere in this Report, the Charter and the rights that it protects embody values about the relationship between the Government and the people of Victoria. These rights can conflict with each other, and may sometimes have to give way to other public interests.

The Charter should give guidance on how to resolve these conflicts. I agree with the Victorian Equal Opportunity and Human Rights Commission's view that section 7(2) 'provides a clear and effective framework for considering the limits that may be placed on human rights, having regard to competing public interests and policy objectives'.[362] That consideration should be guided by the values that the Charter seeks to protect, as well as the factors listed in the provision.

In summary, I do not recommend any amendment to section 7(2). But I accept that the provision could be better understood, both by the public and by those who have to apply it. Improved understanding is best addressed through the education measures that I recommend in **Chapter 2**. As a human rights culture becomes more firmly embedded in Victoria's public sector, the proportionality analysis required by section 7(2) should become second nature.

Compatibility with human rights

The concept of compatibility with human rights is central to the Charter. It appears in the following provisions:

- sections 28 and 30, which deal with scrutiny of legislation;
- sections 32, 36 and 37, in relation to the interpretation of legislation[363]
- section 38, which concerns the obligations of public authorities.

[362] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 75.
[363] Although sections 36 and 37 use the words 'consistently' and 'inconsistent' rather than 'compatibly' and 'incompatible'.

Although compatibility is a central concept, it is not defined or explained anywhere in the Charter:

> *Despite the notion of 'human rights compatibility' being so important to the Charter, the Charter does not itself explain what it is for something (such as a statutory provision or a public authority's conduct) to be compatible (or incompatible or inconsistent) with human rights (or, indeed, a human right). This gap means that users of the Charter (whether they be judges, public servants, or members of Parliament) have to look elsewhere for guidance as to what the Charter is actually asking them to do when striving for compatibility with human rights.*
>
> *… The Charter itself should make this important point clearer and should not require its users to be conversant with case law and the international jurisprudence of human rights … The Charter should be a document that makes more effort than most statutes to speak to ordinary people.*
>
> Dr Steven Tudor, Submission 34

In relation to the scrutiny of legislation and the obligation of public authorities to act compatibly with human rights, section 7(2) is broadly accepted as shaping what is 'compatible' with human rights. A measure that limits a right will be compatible with human rights if it is reasonable and demonstrably justifiable in terms of section 7(2).

A section 7(2) justification analysis has been undertaken in a number of the decided cases on the section 38 obligation for public authorities to act compatibly with human rights. An example is the analysis of the Victorian Civil and Administrative Tribunal decision to appoint an administrator for 'Patrick' in *PJB v Melbourne Health.*[364] The decision was found to unreasonably limit Patrick's human rights to equality, to freedom of movement and choice of where to live, and against unlawful and arbitrary interference with privacy and home.[365] As a result, the appointment was incompatible with human rights.

The Victorian Equal Opportunity and Human Rights Commission neatly summarised the case law in its submission:

> *In* Sabet v Medical Practitioners Board *(2008) 20 VR 414 at [108], Justice Hollingworth considered whether the relevant public authority had imposed any limitation on the relevant right and whether the limitation was reasonable and justified having regard to section 7(2)179. This approach was followed by Justice Bell in* Patrick's Case *[2011] VSC 327 at [304]-[306] where he found that judicial review of a public authority's decision in accordance with section 38 of the Charter required consideration and application of the proportionality test. Most recently in Victoria, Justice Bell has held in* DPP v Kaba *that "in relation to the concept of incompatibility of human rights, sections 7(2) and 38(1) must be read and applied together". Perhaps most significantly, a majority of the High Court in* Momcilovic *found that section 7(2) was relevant to an assessment of compatibility under section 38(1).*[366]

[364] (2011) 39 VR 373 [335]-[359].
[365] In sections 8(3), 12 and 13(a) of the Charter respectively.
[366] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 78. Footnotes omitted.

The Review received a number of submissions that addressed the role of section 7(2) in determining whether a public authority had acted incompatibly with human rights, in contravention of section 38:

> *If s 7(2) applies to s 38, public authorities would be permitted to act and make decisions that limit human rights (as long as those limits are reasonable and can be justified). If s 7(2) does not apply to s 38, public authorities would only be permitted to limit human rights where they are specifically authorised by law to do so (under s 38(2)). This would arguably impose a much higher standard on decision-makers, especially where they are exercising discretionary power.*
>
> Law Institute of Victoria, Submission 78

On the other hand, the Human Rights Law Centre submitted '[s]ection 7(2) should have no role to play in relation to either interpreting the Charter consistently with human rights … or the actions of public authorities under the Charter'.[367]

For interpreting legislation, the role of section 7(2) in interpreting provisions in a way that is compatible with human rights has been a vexed question. As I have discussed, three members of the High Court in *Momcilovic* held section 7(2) had no part to play in the interpretive process.[368] Chief Justice French went further and held the argument for consistent construction of the term 'compatible with human rights' might be accepted, but does not require the test for compatibility to include section 7(2).[369]

Two features of the Charter text might have added to this confusion. Some debate about whether the concept of compatibility incorporates section 7(2) relates to section 3(1) defining the term 'human rights' to mean 'the civil and political rights set out in Part 2'. Part 2 of the Charter contains section 7, as well as the specific rights set out in sections 8 to 27. The location of the general limitations provision in Part 2 has created uncertainty about whether it falls within the definition of human rights,[370] or whether it is part of an introductory provision that includes a statement on when limits may apply to the human rights in the following sections.

The other problematic feature is the use in sections 36 and 37 of the words 'consistently' and 'inconsistent' rather than 'compatibly' and 'incompatible'. While courts and others are directed to interpret legislation in a way that is **compatible** with human rights, when this is not possible the Supreme Court may make a declaration of **inconsistent** interpretation. This variation in terminology is confusing.

I concluded that the concept of compatibility with human rights should continue to underpin the Charter, but can be clarified and used more consistently. The original notion of the Charter as a law that protects human rights, but allows for them to be balanced against competing rights and other public interests, is a compelling one. It is also consistent with the approach taken in comparable human rights laws internationally. The Charter should explicitly link 'compatible' and 'incompatible' with the test for proportionality in section 7(2).

[367] Submission 95, Human Rights Law Centre, 28.
[368] *Momcilovic v The Queen* (2011) 245 CLR 1 [36] (French CJ), [574]-[576] (Crennan and Kiefel JJ).
[369] *Momcilovic v The Queen* (2011) 245 CLR 1 [32] (French CJ).
[370] *Momcilovic v The Queen* (2011) 245 CLR 1 [168] (Gummow J).

I recommend the Charter be amended to include a definition or explanation of compatibility, so it is clear that an act, decision or statutory provision is compatible with human rights when:

- there is no limit on a human right, or
- there is a limit on a human right that is reasonable and demonstrably justifiable in terms of section 7(2).

The terms 'compatible' and 'incompatible' should be used consistently throughout the Charter, including sections 36 and 37. At the same time, section 7 (particularly the general limitations provision in section 7(2)) should be excluded from the Charter's definition of 'human rights'.

Reference to civil and political rights in the definition of 'human rights'

For completeness, I note the definition of human rights in section 3 of the Charter refers to the 'civil and political rights set out in Part 2'. This definition draws on the distinction in international law between civil and political rights on the one hand, and economic, social and cultural rights on the other.

The distinction is not useful in the context of the Charter and could lead to confusion about the definition. The Charter contains a range of economic, social and cultural rights, including cultural rights in section 19 and property rights in section 20. For clarity, the definition of human rights in section 3 should simply refer to 'the rights set out in the Part 2' of the Charter.

Recommendation 29: The Charter define the concepts of 'compatibility' and 'incompatibility' to make it clear that an act, decision or statutory provision is compatible with human rights when it places no limit on a human right, or it limits human rights in a way that is reasonable and demonstrably justifiable in terms of section 7(2). The Charter should use the two terms consistently, in relation to scrutiny of legislation (sections 28 and 30), the interpretation of legislation (sections 32, 36 and 37) and the obligations of public authorities (section 38).

Recommendation 30: Section 7, containing the general limitations clause, be excluded from the Charter's definition of 'human rights' and the definition of 'human rights' refer to all the rights in Part 2, not only the civil and political rights.

The burden of proof when limiting a human right

It is reasonably well settled that the person seeking to justify a limit on a human rights bears the burden of demonstrating that the limit is reasonable and justifiable. To do so, the person generally has to refer to evidence.

This has been the approached taken in Victoria for both making a declaration of inconsistent interpretation under section 36,[371] and meeting the requirement in section 38 that a public authority must not act in a way that is incompatible with human rights.[372]

[371] *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 [147]-[148]; *R v Momcilovic* (2010) 25 VR 436 [143]-[146]—citing the leading Canadian decision of *R v Oakes* [1986] 1 SCR 103, 138.
[372] *PJB v Melbourne Health* (2011) 39 VR 373 [310], citing *R v Oakes* [1986] 1 SCR 103, 138.

The Fitzroy Legal Service submission noted the scrutiny of legislation for compatibility with human rights may also require consideration of evidence and policy objectives for the balancing exercise envisioned by section 7(2).[373] It seems reasonable to expect that statements of compatibility prepared by Ministers for Parliament will articulate the evidence base and the policy objectives that justify a measure that limits human rights (see my discussion in **Chapter 5** on scrutiny of legislation).

There is no need to amend the Charter in relation to this issue. It is well understood that a person who seeks to justify a limit on human rights bears the burden of demonstrating why the limit is justifiable.

Internal limitations on human rights

The rights protected by the Charter are based on the rights in the ICCPR, which does not have a general limitations provision. The ICCPR deals with limitations on a right-by-right basis:

- **Absolute rights.** Some ICCPR rights are not subject to any limitations, and are known as 'absolute rights'.[374]

- **In-built qualifiers on the scope of rights.** Many ICCPR rights have inbuilt limitations that qualify the nature and scope of the right. They are inherently limited regardless of whether another person's rights are in conflict or there is a broader community interest in limiting the right. These provisions do not rely on the limitation having a purpose or on the need to balance the right against something else. For example, article 9 of the ICCPR guarantees a right not to be subjected to arbitrary arrest or detention. This question of 'arbitrary' qualifies the scope of the right.

- **Internal limitations.** Other ICCPR rights include a limitation clause that allows the right to be limited by law for a purpose such as public safety. An example is article 19(3), which allows restrictions on freedom of expression to respect the rights and reputations of others and to protect national security, public order, or public health or morals.

Section 7(2) of the Charter is modelled on the general limitations provisions in the New Zealand Bill of Rights Act, the Canadian Charter of Rights and Freedoms and the South African Bill of Rights. But each of those three instruments contains fewer internal limitations on the rights they protect than does the ICCPR.

As well as the general limitations provision in section 7(2), the Charter has limits or qualifications on the rights set out in sections 8 to 27. These are:

- Section 9—Right to life—the protection against being deprived of life is limited to arbitrary deprivation of life.

- Section 11—Freedom from forced work—the protection against forced or compulsory labour in section 11(2) is subject to an exception in section 11(3) for certain forms or work or service, including work or service required of a person in detention under a lawful court order.

[373] Submission 100, Fitzroy Legal Service, 7.
[374] The ICCPR's absolute rights include the right to be free from torture (article 7), the right not to be subjected to slavery (article 8) and the right to recognition everywhere as a person before the law (article 16). The treatment of absolute rights in the Charter is discussed below.

- Section 13—Privacy and reputation—the protection against interference with privacy, family, home or correspondence is limited to unlawful or arbitrary interference; and the protection against attack on reputation is limited to unlawful attacks.

- Section 15—Freedom of expression—section 15(3) attaches special duties and responsibilities to the right of freedom of expression, and provides the right may be subject to lawful restrictions reasonably necessary (a) to respect the rights and reputation of other persons; or (b) for the protection of national security, public order, public health or public morality.

- Section 20—Property rights—a person must not be deprived of property other in accordance with law.

- Section 21—Right to liberty and security of person—a person must not be subjected to arbitrary arrest and detention, or be deprived of their liberty except on grounds, and in accordance with procedures, established by law.

- Section 22—Humane treatment when deprived of liberty—the right of persons held on remand to be segregated from persons convicted of an offence is subject to the qualification 'except where reasonably necessary'.

- Section 24—Fair hearing—the right to a fair and public hearing is qualified by section 24(2), which permits a court or tribunal to exclude people from a hearing if permitted to do so by a law other than the Charter.

A number of submissions to the Review raised issues that arise from the 'hybrid' model of limitations adopted in the Victorian Charter:

> *There are two issues to consider here. The first is the selective nature of including internal limitation provisions, and the second is whether both internal and external limitations provisions are needed.*
>
> Dr Julie Debeljak, Submission 72

> *In particular, there is some confusion as to how to interpret the internal limits on account of the Charter adopting the internal limitations modelled on the ICCPR rights in some instances, but not in others. For example, the right to freedom of expression in the Charter (section 15) recognises limitations on the right for the protection of national security, public order, public health or public morality, which is modelled on Article 19(2) of the ICCPR. However, the right to peaceful assembly and freedom of association in the Charter (section 15) contains similar internal limitations at international law, but are not expressly included in the Charter. This inconsistency results in confusion for both those applying and interpreting the Charter rights in Victoria.*
>
> Victorian Equal Opportunity and Human Rights Commission
> Submission 90

The Victorian Equal Opportunity and Human Rights Commission submitted the Charter should more consistently adopt internal limitations from international law. In my view there is some force to this submission in relation to section 15(3) of the Charter. It is difficult to see why the right to freedom of expression should be subject to both the specific internal limit in section 15(3) and the general limit in section 7(2). Section 7(2) allows every limit on freedom of expression that section 15(3) might, by referring to a broader range of considerations. For example, laws that restrict tobacco advertising on public health grounds could readily be justified under section 7(2) of the Charter using a standard proportionality analysis.[375]

I recommend the internal limitation to the freedom of expression in section 15(3) be repealed, for clarity and consistency.

Recommendation 31: The internal limitation on freedom of expression in section 15(3) be repealed, so the general limitation provision in section 7(2) can be applied as the Charter's common test to balance competing rights and interests.

Absolute rights

A number of the human rights protected by the ICCPR are not qualified in any way and are considered to be 'absolute'. They include the right to be free from torture, freedom from slavery and servitude, and the right to recognition everywhere as a person before the law. Article 4 of the ICCPR also identifies rights that cannot be suspended in emergency situations. These 'non-derogable' rights include the right to life, protection from torture, freedom from slavery, and freedom of religious belief. There is an overlap between rights that are not qualified and rights that may not be derogated under the ICCPR, although the two groups are not identical.

Several submissions noted rights that are absolute in international law should have that status in the Charter:

> *Those rights which are absolute at the international level should be recognized as absolute in the Charter and excluded from the operation of the general limitations clause in s 7. These include the right to be free from torture and cruel, inhuman and degrading treatment or punishment, and the right to be free from slavery and servitude. No civilized society should ever be required to qualify such rights.*
>
> Castan Centre for Human Rights Law, Submission 26

> *The HRLC is also concerned that the current drafting of the Victorian Charter leaves open the possibility of absolute rights bring limited pursuant to section 7(2), which would be strictly prohibited under international law.*
>
> Human Rights Law Centre, Submission 95

Dr Julie Debeljak and the Australian Christian Lobby also called for the exclusion of certain absolute or non-derogable rights from the limitations provision in section 7(2).[376]

[375] In 2005, the Human Rights Consultative Committee considered retaining the internal limitation on the freedom of expression was important 'to avoid situations such as occurred in Canada, where freedom of expression in tobacco advertising was upheld by the courts, even though it was contrary to the interests of public health': Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 44. This scenario would not arise in Victoria, given corporations do not have human rights under the Charter, and the Charter does not give courts the power to strike down laws.

[376] Submission 72, Dr Julie Debeljak, 41-43; Submission 87, Australian Christian Lobby, 3.

These submissions are based on the ICCPR, which does not contain a general limitations provision. However, the Charter's general limitations provision was modelled on those found in the human rights laws of Canada, New Zealand and South Africa. Each of those limitations provisions applies to all of the rights protected by the relevant law.[377]

In summary, I do not think some of the Charter rights should be excluded from the application of section 7(2). The Charter's structure is consistent with other human rights laws that contain a general limitations provision. Further, section 7(2)(a) of the Charter directs attention to the nature of the right being limited. The fact that a right is absolute or non-derogable under international law is consideration when deciding whether a limit on the right is justifiable.

Term of reference 2(g): The effectiveness of the declaration of inconsistent interpretation provision under section 36

Overview

Section 36 of the Charter allows the Supreme Court to issue a declaration of inconsistent interpretation if the Court finds a statutory provision cannot be interpreted consistently with a human right.

The declaration is sent to the Government and the Minister responsible for the provision must prepare a written response within six months, for tabling in Parliament and publication in the Government Gazette. A declaration does not affect the validity of the law.

Section 36 facilitates the Supreme Court's participation in the dialogue model of human rights protection established by the Charter. It enhances the scrutiny of laws and, together with section 37, provides for government accountability for a law's compatibility with human rights.

I recommend section 36 be retained, but the Charter would benefit from consistent language in the related provisions of sections 32(1), 36 and 37. So, I recommend amending sections 36 and 37 to change 'declarations of inconsistent interpretation' to 'declarations of incompatible interpretation'. I found no policy reason for using different terminology.

Why the Charter includes a declaration of inconsistent interpretation

If the Supreme Court or Court of Appeal considers a statutory provision cannot be interpreted in a manner that is compatible with a human right in the Charter, then section 36(2) provides the Court with discretionary power to make a declaration of inconsistent interpretation. Section 36 is linked to the Charter's obligation in section 32(1) to interpret provisions in a way that is compatible with human rights, because it is a declaration by the Court that no such interpretation is possible.

A declaration of inconsistent interpretation does not mean a statutory provision is invalid or unlawful. Nor does it grant any remedy to a person whose rights might be limited by the provision. Rather, the declaration acts as a notice from the judiciary to the Parliament that the provision is incompatible with a human right set out in the Charter, so Parliament can consider the issue. The Parliament may decide to change the law or do nothing. The Charter does not require any particular response from the Parliament, which retains supremacy and the ability to enact laws that are incompatible with human rights.

[377] *The Constitution Act 1982*, Part 1 – Canadian Charter of Rights and Freedoms, section 1; *Constitution of the Republic of South Africa 1996*, section 36; *New Zealand Bill of Rights Act 1990*, s 5.

The former Attorney-General, the Hon Rob Hulls MP, stated in the second reading speech for the Charter:

> *These provisions ensure that there is transparency and parliamentary accountability in the way the government responds to such findings by the court. This is consistent with the dialogue model of human rights that seeks to address human rights issues through a formal dialogue between the three branches of government while recognising the ultimate sovereignty of Parliament to make laws for the good government of the people of Victoria.*[378]

Process for a declaration of inconsistent interpretation

1. Court attempts to interpret a legislative provision compatibly with human rights in accordance with section 32 of the Charter and considers no human rights compatible interpretation is available (or no human rights compatible interpretation is available that is also consistent with the provision's purpose).
2. Court considers making a declaration of inconsistent interpretation under section 36.
3. Court must notify the Attorney-General and the Commission of the proposed declaration, and they have a right to intervene and make submissions about the Charter.
4. Court makes the declaration. It must provide a copy to the Attorney-General, who must provide a copy to the Minister responsible for the provision.
5. Within six months of receiving the declaration, the Minister responsible for the provision must prepare a written response to the declaration, table it in Parliament and publish it in the Government Gazette.

In this way, the declaration is a mechanism by which Parliament is alerted to the effects of a statutory provision and prompted to scrutinise and explain these effects. Unlike a constitutional Bill of Rights (as found in the United States and Canada), the Charter does not create a power for the Court to strike down provisions that are incompatible with rights.

Only one declaration of inconsistent interpretation has been made

In 2010 the Victorian Court of Appeal made a declaration under section 36(2) in *R v Momcilovic*[379] that section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) could not be interpreted consistently with the Charter (section 25 to be presumed innocent). This declaration was not referred to the Attorney-General, because it was the subject of an appeal. The High Court result in *Momcilovic* may be one reason why the Supreme Court has not readily used the power to make declarations.

[378] Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General).
[379] (2010) 25 VR 436.

What the High Court said about section 36 in *Momcilovic v The Queen*

In 2011 in *Momcilovic v The Queen*,[380] the High Court held the Court of Appeal should not have made the declaration of inconsistent interpretation and set it aside: by Justices Gummow, Hayne and Heydon on the basis that section 36 was invalid, and by Justices Crennan and Kiefel on the basis that it was inappropriate to make a declaration in a criminal proceeding because it tended to undermine a conviction while serving no purpose to the accused.[381]

The Court considered whether section 36 is constitutionally valid and whether it is an exercise of judicial, executive, or legislative power. Four of the seven High Court Justices held section 36 is valid, and does not offend the institutional integrity of the Supreme Court or its ability to exercise federal jurisdiction. However, the Court's decision has not definitively removed uncertainty about the constitutional validity of the provision.[382] In addition, Chief Justice French held section 36 could not apply in the exercise of federal jurisdiction.[383] Justice Bell appeared to agree with this reasoning.[384]

Retaining the power to make a declaration of inconsistent interpretation

As a statutory human rights instrument, under which the Parliament remains supreme and the courts cannot invalidate incompatible legislation, the Charter establishes a dialogue model of human rights protection. The Parliament communicates with the courts through the legislation it passes, and (rarely) by making an override declaration. The courts communicate with the Parliament by interpreting legislation compatibly with human rights and, when that interpretation is not possible, by the Supreme Court making a declaration of inconsistent interpretation. Submissions to this Review noted the importance of this ongoing dialogue.[385]

Without the express power in the Charter to make a declaration of inconsistent interpretation, the Court could still find a statutory provision cannot be interpreted compatibly with a Charter right, and then state this finding in its reasons. But sections 36 and 37 of the Charter trigger ministerial and parliamentary examination of the offending provision that would not otherwise occur in this formal and public way. This examination closes the circle in a model under which the Court cannot invalidate statutory provisions.

In light of these considerations, I recommend provisions relating to the declaration of inconsistent interpretation (sections 36 and 37 of the Charter) be retained.

However, the different use of 'consistency' in section 36 and 'compatibility' in other parts of the Charter is confusing and unnecessary. An inability to interpret a provision 'compatibly' with human rights under section 32 may lead the court to make a declaration of 'inconsistent' interpretation under section 36. Submissions to this Review recommended sections 36 and 37 be amended to use the 'compatibility' wording of section 32(1), given the close interaction of these provisions.[386]

[380] (2011) 245 CLR 1.
[381] *Momcilovic v The Queen* (2011) 245 CLR 1 [605] (Crennan and Kiefel JJ).
[382] Submission 92, Centre for Comparative Constitutional Studies.
[383] *Momcilovic v The Queen* (2011) 245 CLR 1 [100] (French CJ).
[384] *Momcilovic v The Queen* (2011) 245 CLR 1 [661] (Bell J).
[385] Submission 7, Dr Liz Curran; Submission 26, Castan Centre for Human Rights Law.
[386] Submission 34, Dr Stephen Tudor, 6-7; Submission 78, Law Institute of Victoria, 33; Submission 90, Victorian Equal Opportunity and Human Rights Commission, 92; Submission 92, Centre for Comparative Constitutional Studies, The University of Melbourne, 3, 6-7; Submission 104, Jamie Gardiner, 1, 3.

Dr Steven Tudor noted:

> *Section 36 (concerning declarations of inconsistent interpretation) is meant to work very closely with s 32 (the requirement to interpret legislation in a way that is compatible with human rights). In effect, s 36 allows the court to make a declaration when it is unable to give effect to s 32. Given that s 36 is meant to be so closely connected to s 32, it is regrettable that the language of s 36 is at variance with that of s 32 in relation to a key point.*
>
> Dr Steven Tudor, Submission 34

I agree with these suggestions and can identify no sound policy reason for using the different language. Sections 36 and 37 should use the words 'incompatible' and 'compatibly' instead of 'inconsistent' and 'consistently'.

Some submissions also suggested the Charter be amended to define 'compatible with human rights' and 'incompatible with human rights'.[387] I agree and note earlier how the Charter should define what it means to be compatible with human rights.

Recommendation 32: Sections 36 and 37 of the Charter be amended to use the words 'declaration of incompatible interpretation' and 'cannot be interpreted compatibly with a human right', for consistency with terminology used in related sections, including section 32.

In submissions and consultations for this Review, a number of people argued the declaration should be strengthened, and some suggested a declaration of incompatible interpretation should make the offending provision invalid. However, this change is not possible in the Australian constitutional context. A narrow majority of the High Court found section 36 to be constitutionally valid in *Momcilovic v The Queen*.[388] However, if section 36 were to confer a power on the Court to invalidate legislation for incompatibility or even to trigger invalidity (in essence, a legislative power), then the section would certainly be found to be constitutionally invalid.

[387] Submission 34, Dr Stephen Tudor, 1, 8; Submission 104, Jamie Gardiner, 1, 3-4.
[388] *Momcilovic v The Queen* (2011) 245 CLR 1 [605] (Crennan and Kiefel JJ), [661] (Bell J) and [97] (French CJ).

Term of reference 2(h): The usefulness of the notification provision

Overview

The Attorney-General and the Victorian Equal Opportunity and Human Rights Commission have a right to intervene in court or tribunal matters that raise Charter issues (sections 34 and 40). The notification provision in section 35 supports these intervention roles by alerting the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission to relevant cases in the Supreme and County Courts.

Concerns have been raised that the notification procedure—or at least perceptions about the procedure—may create barriers to raising the Charter in court proceedings, particularly in criminal matters.

The intervention roles have usefully supported the development of Charter case law and the right to intervene in all relevant matters should remain. However, I recommend:

- removing the notice requirement in the County Court to address perceptions about barriers in criminal proceedings
- allowing a judicial officer or tribunal member to require notice at their discretion in a matter of general importance or otherwise in the interests of justice
- clarifying that proceedings do not have to be adjourned while a notice is issued
- allowing a judicial officer or tribunal member to place conditions on interventions to help with case management
- encouraging the Attorney-General and Commission to publish and promote guidance on how they will consider notifications and their positions on costs as interveners.

Requirement to give notice to the Attorney-General and the Commission under the Charter in some legal proceedings

Section 35 of the Charter requires a party to a court proceeding to give notice in the prescribed form[389] to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission if:

> *(a) in the case of a Supreme Court or County Court proceeding, a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or*
>
> *(b) in any case, a question is referred to the Supreme Court under section 33.*[390]

Section 36(3) of the Charter also requires notice to be issued if the Supreme Court is considering making a declaration of inconsistent interpretation. These notice requirements ensure the Attorney-General and the Commission are aware of cases in superior courts, where decisions can be made that set precedent for how the law is applied.

[389] The prescribed form for notices is set out in the *Charter of Human Rights and Responsibilities (General) Regulations 2007* (Vic). A copy of the template form is available on the Victorian Equal Opportunity and Human Rights Commission's website: http://www.humanrightscommission.vic.gov.au/index.php/the-role-of-the-commission-under-the-charter/interventions/section-35-notice.

[390] Section 33 of the Charter provides for a party or a court or tribunal to refer to the Supreme Court a question of law related to the Charter's application or to the interpretation of a statutory provision in accordance with the Charter.

The notice provision does not apply in other courts or to tribunals. Further, notice to the Attorney-General is not needed if the State is a party to the proceeding, or to the Commission if it is a party to the proceeding (subsection 35(2)).

The prescribed form for notices under section 35 requires the party who raises the Charter to state:

- specifically the question arising
- the facts and explain how a question of law arises that relates to either the application of the Charter or to the interpretation of a statutory provision in accordance with the Charter
- the court's relevant directions, if any, in relation to the proceedings and provide details of the next directions/hearing date.

The Commission's submission noted it:

> *… provides guidance material on its website along with material to assist parties to prepare the notice, including a word template of Form 1 from the Regulations, and details about how to provide the notice to the Attorney-General or Commission (contact names, fax and email details).*[391]

From the full commencement of the Charter in 2008 to 31 May 2015, the Commission estimated that it received section 35 notices in 267 proceedings.[392] It also observed most of the notices it receives are for proceedings in the Supreme Court or the County Court, but it sometimes receives voluntary notices in proceedings in other courts or at the Victorian Civil and Administrative Tribunal. The Commission may also become aware of matters in other ways and intervene without notice.

When it receives a section 35 notice, the Commission considers whether to intervene in accordance with its guidelines. The information in the notice, as well as any other material provided, helps the Commission identify matters of importance and informs its decision of whether to intervene. The Commission noted:

> *… [a]lthough section 35 does not require proceedings to be adjourned pending service of the notification or to await a response from the Attorney-General or the Commission, the Commission is nevertheless conscious not to cause or contribute to undue delay to proceedings where it receives a notice.*
>
> *The Commission's response time to a notice depends on the case and takes into account all information and time constraints in the circumstances … The Commission frequently receives notification in matters where it is required to respond on an urgent basis and, where it does intervene, to comply with short time frames for the filing of submissions and hearing of the proceedings.*
>
> Victorian Equal Opportunity and Human Rights Commission
> Submission 90

At the time of making its submission to this Review, the Commission had intervened in 47 proceedings. The Attorney-General had intervened in 33. Eighteen of these interventions were in the same case. By far the majority of cases proceed without an intervention by the Attorney-General of the Commission.

[391] Submission 90, 94.
[392] Submission 90, 94.

The Law Institute of Victoria's Charter case audit estimated there were 336 reported decisions on the Charter between 26 September 2006 and 31 December 2014 and this estimate does not account for the full range of unreported cases, such as may occur in the Magistrates Court.[393]

Supreme Court Practice Note

The Supreme Court *Practice Note No 3 of 2008* is also part of the overall framework that surrounds the section 35 notice requirement. It states the Attorney-General and the Commission should generally be provided with 14 days' notice of a Charter matter, noting adjournments are at the discretion of the judicial officer hearing the matter. This Practice Note helps ensure Charter issues are raised without delay.

Streamlining the notification process

Questions have been raised about the operation of the Charter's notification requirement. In 2008, Justice Bongiorno said:

> *Compliance with this provision [section 35] would, of necessity involve delay—perhaps considerable delay—which in the context of an application such as this would be at least inconvenient and perhaps even intolerable.*
>
> *Section 35 of the Charter contains no severance provision, nor does it contain any urgency exception such as are found in s 78B of the Judiciary Act 1903 (Cth) … The section needs to preserve a residual discretion in the judge to relieve a party from giving notice where to do so would unduly disrupt or delay a proceeding or for other good reason. This is, for obvious reasons, particularly important in criminal proceedings.*[394]

The Human Rights Law Centre echoed this concern in its submission to this Review, recommending the section 35 notice requirements be repealed or 'amended to provide courts and tribunals with a discretion to relieve a party from giving notice where to do so would unduly disrupt or delay a proceeding or for other good reason'.[395] Similarly, Liberty Victoria submitted:

> *… the notice provision should be abolished apart from when the Supreme Court of Victoria is contemplating making a declaration of inconsistent interpretation. If the Charter is to become accepted as a normal part of the legislative landscape, then notice should not be required in most cases … Judicial officers should retain the power to direct parties to give notice if deemed necessary in individual cases.*[396]

The views of some others have changed over time. For example, the Law Institute of Victoria 'has changed its position on s 35 because we understand that removing the requirement to notify would make it difficult for the Commission or Attorney-General to identify important cases and to assess when to intervene when appropriate'.[397] The Law Institute of Victoria went on to say:

[393] Law Institute of Victoria, Charter case audit: http://www.liv.asn.au/For-Lawyers/Submissions-and-LIV-projects/Charter-Case-Audit, accessed 27 June 2015.
[394] *R v Benbrika (No 20)* (2008) 18 VR 410 [17]-[18].
[395] Submission 95, Human Rights Law Centre, 32.
[396] Submission 96, Liberty Victoria, 12-13.
[397] Submission 78, Law Institute of Victoria, 34.

> *It may be that s 35 leads to perceived, rather than actual delay. We understand that the main source of delay in proceedings arises not from the notification itself, but where the Attorney General and/or the Commission exercise their right to intervene (under ss 34 and 40) (particularly if the notice has been sent late in proceedings). The issue of delay would therefore be better addressed through changes to the intervention provisions, rather than the notice provision.*[398]

The Victorian Bar also noted:

> *… after some initial problems caused by lack of awareness of the need to notify, the requirement then became generally understood and was taken into account as part of the Court timetable before matters were set down, with the result that notification was not then operating in practice to delay the progress of matters to a full hearing.*
>
> *Ideally, as the Bar noted in 2011, in addition to facilitating the exercise of the intervention power, the notice requirement served a useful role in requiring parties to identify and elucidate Charter matters at an early stage in litigation.*
>
> *In the Bar's experience, no difficulty arises with respect to notification under ss 35(1)(b) or 36(3) and the Bar does not expect any difficulty to arise, as in each case, notification would add no delay and would be warranted by the significance of the proceedings.*[399]

However, my discussions for this Review highlighted a need for greater understanding of the notification procedures and what happens as a result of them. What has become commonplace for some judges and practitioners, is still a novelty to others. For example:

- the Supreme Court *Practice Note No 3 of 2008* contributes to a general impression that the Charter can be raised only with 14 days' notice
- confusion sometimes arises about when a notice needs to be issued and who is responsible for doing so
- there are different views on whether proceedings have to be adjourned to wait for a reply to a notice
- there is not a good appreciation that the Commission and Attorney-General have responded within a matter of hours when urgency requires it.

As suggested by Dr Liz Curran and the Law Institute of Victoria, perceptions about delay caused by the notice requirement should be addressed through information and education for legal practitioners and the courts and tribunals.[400] The Attorney-General and the Commission are best placed to provide this information about their own functions, with support from the courts and tribunals and professional bodies.

General education about the Charter in the legal sector (see **Chapter 1**) would also help people to identify potential Charter issues in their cases as early as possible.

[398] Submission 78, Law Institute of Victoria, 34 (footnotes omitted).
[399] Submission 54, Victorian Bar, 19.
[400] Submission 7, Dr Liz Curran, 13; Submission 78, Law Institute of Victoria, 35.

This education process should be supported by clarity in the Charter. As a human rights instrument, the Charter should be as clear and accessible as possible. For this reason, it would be helpful to include a note in section 35 of the Charter stating:

- notice is not required in courts and tribunals other than the Supreme Court
- proceedings do not need to be adjourned while notice is given or until a reply is received, and the judicial officer has discretion in the running of proceedings.

The Supreme Court Practice Note should be amended to reflect any changes to the law. It would be useful for the County Court to develop its own practice note to make clear and accessible the procedures for relying on the Charter in its jurisdiction.

Courts and tribunals can also clarify the role of interveners in individual cases through general case management techniques such as timetabling, placing appropriate conditions on interventions (such as the matters that may be addressed or the length of written submissions), and making clear the costs position of interveners. Sections 34 and 40 of the Charter should reflect the power of judicial officers and tribunal members to use these techniques, so the role of intervener is clear to people using the Charter. This change would go a long way to addressing the concerns about delay, which focused more on the intervention than the initial notification procedure.

The Victorian Equal Opportunity and Human Rights Commission's guidelines help educate people about the notification procedure. It would be useful too for the Attorney-General to publish information on how he will respond to Charter notices so people have a better idea of what to expect when they initiate a notice. These guidelines should be available to the public and promoted with the legal profession.

The Tenants Union of Victoria suggested a mechanism for increased accountability would be to make all filed notices under section 35 publicly available.[401] The Commission's annual report on the operation of the Charter would be the appropriate place for reporting notices received and interventions undertaken each year.

Notification in criminal proceedings

Specific concerns were raised about notification in criminal proceedings, with Liberty Victoria describing the notice provision in section 35 as one of the 'most significant barriers to Charter litigation in the criminal jurisdictions'.[402]

The Victoria Bar observed reports from the Criminal Bar Association that:

> *… the notice provision in s 35 of the Charter has had a significant chilling effect, especially in criminal cases in the County Court of Victoria. In practical terms, the effect is created or compounded by funding and briefing practices that often result in criminal law barristers often being briefed late (very shortly before the hearing). In those circumstances there are obvious problems if Charter arguments are only identified a day or so before hearing. Notification of the Charter issue is likely to result in an adjournment, with consequent loss of the fixture. This creates concern, especially if the applicant is held in custody pending the hearing.*[403]

[401] Submission 75, Tenants Union of Victoria, 29.
[402] Submission 96, Liberty Victoria, 12.
[403] Submission 54, Victorian Bar, 19.

Victoria Law Aid also noted:

> *… consistent feedback from VLA practitioners that the notice and intervention functions serve as a disincentive to raising Charter arguments. There is a perception that preparing and serving notices, combined with possible adjournment and additional time required to accommodate intervening parties can extend and delay proceedings. In our experience, particularly criminal matters, sometimes practitioners will be reluctant to raise Charter arguments for this reason, particularly in circumstances where a client is in custody. While the possibility of delay may be more perception than reality, the disincentive it creates is real and should be addressed.*[404]

Section 35 of the Charter should be amended to remove the notice requirement for County Court matters, to address concerns about possible barriers to raising the Charter in first instance criminal proceedings. A discretion should remain for a judicial officer of tribunal member to require a notice for any proceedings in which they consider the Charter issue to be of general importance or notice to be otherwise in the interests of justice.

I agree with the Victorian Equal Opportunity and Human Rights Commission that important questions on the Charter's application can and do arise in the County Court. The Commission noted it has 'intervened [to date] in three County Court proceedings in which significant Charter questions arose: *In the matter of the Adoption Act, AB and VEOHRC and DHS and Separate Representative of J*, *DPP v KW,* and *R v Fenech, Murone and Fenech*'.[405] However, removing the notice requirement from the County Court will remove a barrier to raising the Charter in that Court, and replacing it with a discretion to require notice to be given, combined with a right to intervene, still allows for the involvement of interveners in significant matters.

Costs of interveners

Some submissions noted the uncertainty of costs of interveners was also a barrier to raising the Charter in proceedings. For example, the Law Institute of Victoria said:

> *… it may be a significant barrier to access to justice that potential litigants wishing to rely on the Charter may be liable to pay the costs of the Attorney-General or Commission intervening in their case. The LIV understands that the Commission's policy is not to seek costs and it expects in turn that costs will not be sought against it where it has conducted its role as an intervener reasonably. However, the LIV is not aware that the Attorney-General has an equivalent policy. The* [previous] *Attorney-General has successfully sought costs against an individual litigant in a Charter case [Magee v Delaney [2012] VSC 419]. In* Bare v Small*, the Attorney-General refused to agree not to seek costs against Mr Bare in the event that his appeal was dismissed.*[406]

It would help to clarify expectations if the Victorian Equal Opportunity and Human Rights Commission and the Attorney-General were to publish their positions on costs when acting as interveners. One of the chilling effects of the intervention roles could be removed if interveners bear their own costs.

---

[404] Submission 93, Victoria Legal Aid, 15.
[405] Submission 90, 96, footnotes reproduced here: *In the matter of the Adoption Act, AB and VEOHRC and DHS and Separate Representative of J,* Unreported, County Court of Victoria, Judge Pullen, 6 August 2010; *DPP v KW*, Unreported, County Court of Victoria, Judge Mullaly, 2 May 2011. This decision was overturned on appeal in *WK v The Queen*. See summary of this case in the Commission's submission to the Four Year Review, 169; *R v Fenech, Munroe and Fenech*, Unreported, County Court of Victoria, 2010.
[406] Submission 78, Law Institute of Victoria, 36.

Recommendation 33: Section 35 of the Charter be amended to remove the notice requirement for proceedings in the County Court and to give a judicial officer or tribunal member power to require a notice to be issued for a Charter issue of general importance or when otherwise in the interests of justice (at their discretion). Further, an explanatory note should be added to section 35 to make clear that proceedings do not have to be adjourned while notice is issued and responded to. The Attorney-General and the Commission should retain their right to intervene in all proceedings.

Recommendation 34: Sections 34 and 40 of the Charter be amended to explicitly give a judicial officer or tribunal member power to place conditions on interventions to support case management. Conditions may include, for example, timetabling, setting how the interveners may participate in proceedings, and confining the matters that submissions may address.

Recommendation 35: The Attorney-General and the Victorian Equal Opportunity and Human Rights Commission publish guidance on how they will consider and process Charter notifications and their cost policies as an intervener (when they do not already do so). The Attorney-General and the Commission should make this guidance available to the public and promote it in the legal sector.

Chapter 6

Firming the foundations—more effective Parliamentary scrutiny

Chapter 6 Firming the foundations—more effective Parliamentary scrutiny

Term of reference 1(c): The effectiveness of the scrutiny role of the Scrutiny of Acts and Regulations Committee

Overview

The Scrutiny of Acts and Regulations Committee of Parliament (SARC) has a human rights scrutiny role. It must consider any Bill introduced into Parliament, and report to Parliament on whether the Bill is incompatible with the human rights in the Charter. To assist this role, members of Parliament are required to table statements of compatibility when introducing Bills into Parliament. SARC may also report to Parliament on human rights incompatibility of statutory rules and legislative instruments.

Concerns have been raised about the timeframe for human rights scrutiny being too short and not allowing for public participation. Some submissions also criticised the variable quality of statements of compatibility and noted a lack of transparency in the scrutiny of statutory rules and legislative instruments for human rights compatibility.

SARC has played a key role in monitoring and reporting on the human rights compatibility of new legislation. It should continue this role. However, to improve the effectiveness of human rights scrutiny, I recommend:

- the Government considering how to allow more time for human rights scrutiny when a Bill raises significant human rights issues
- encouraging SARC to send out notices of Bills before it and refer to submissions in its reports to Parliament
- resolving confusion about SARC's current functions, including clarifying that it may report on Acts and provisions of Acts after they have passed (in limited circumstances)
- improving the quality and consistency of statements of compatibility
- enhancing transparency in the process for human rights scrutiny of statutory rules and legislative instruments, and
- making councils subject to the Charter when they make local laws.

Why human rights scrutiny is important

The Charter gives SARC a human rights scrutiny role. In recommending the creation of the Charter in 2005, the Human Rights Consultation Committee recommended SARC be given a human rights scrutiny function to facilitate robust parliamentary debate 'by providing a clear statement to Parliament about a Bill's consistency with the Charter'.[407]

[407] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 76.

In addition to imposing human rights obligations on public authorities and requiring laws to be interpreted compatibly with human rights as far as possible, parliamentary scrutiny is one of the main ways in which the Charter protects human rights. It informs Parliament's role in the dialogue model of human rights protection that the Charter establishes between the Parliament, the Executive Government and the courts.

Parliament is sovereign and may intentionally pass legislation that is incompatible with human rights. But the requirement for a statement of compatibility to accompany all Bills is a safeguard to ensure that any legislative departure from the human rights in the Charter is reasoned and explained. The role of parliamentary human rights scrutiny is essential in the Victorian context, because the Charter does not permit courts to strike down legislation for being incompatible with human rights. The mechanism for the Supreme Court to make a declaration of inconsistent interpretation refers incompatible legislation back to Parliament as the ultimate decision maker.

A guiding principle of the Review is to make the human rights protection in the Charter more effective. For the Charter to be effective in the parliamentary context, scrutiny should inform members of Parliament about the human rights impacts of Bills before them and influence parliamentary debate, with the aim of ensuring that new laws are as rights compatible as possible. To achieve this outcome, the scrutiny of legislation should be timely, transparent and consistent.

Human rights scrutiny also has a largely unseen impact on laws during the drafting process, before they reach Parliament (or the Governor in Council, in the case of Regulations). Effective scrutiny by SARC educates the public service about how it should conduct human rights analysis, and the risk of adverse comments from SARC encourages proper consideration of human rights at an early stage.

SARC's functions

SARC has a range of scrutiny functions under the Charter, the *Parliamentary Committees Act 2003* (Vic), the *Subordinate Legislation Act 1994* (Vic) and other Acts. It is a Joint Investigatory Committee of the Victorian Parliament, made up of members from both Houses of Parliament. SARC has seven members (with a Government majority) and is chaired by a Government member of Parliament.[408]

[408] The Parliamentary Committees Act provides that Joint Investigatory Committees must consist of between five and ten members, with at least one member each from the Legislative Assembly and the Legislative Council: s 21. In previous years, SARC had nine members. It has been constituted by seven members since 2011.

The functions of the Scrutiny of Acts and Regulations Committee

Under section 17 of the Parliamentary Committees Act, SARC considers any Bill introduced into Parliament and reports to Parliament on whether the Bill directly or indirectly:

- trespasses unduly on rights or freedoms
- makes rights, freedoms or obligations dependent on insufficiently defined administrative powers or on non-reviewable administrative decisions
- unduly requires or authorises acts or practices that may have an adverse effect on personal privacy or the privacy of health information
- inappropriately delegates legislative power
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- is incompatible with the human rights set out in the Charter.

SARC's functions under the Parliamentary Committees Act are supplemented by a Charter requirement (section 30) for SARC to consider any Bill introduced into Parliament and report to Parliament on whether the Bill is incompatible with human rights.[409]

Section 28 of the Charter requires a member of Parliament who introduces a Bill to provide, at the same time as tabling the Bill, a statement of compatibility that states how a Bill is compatible with the human rights in the Charter, or the extent of any incompatibility with those human rights. Statements of compatibility inform SARC's human rights scrutiny function.

Under the Subordinate Legislation Act,[410] SARC may also scrutinise statutory rules and legislative instruments[411] for human rights compatibility. When statutory rules and legislative instruments are made, they are accompanied by an explanatory memorandum and a range of certificates. A human rights certificate, indicating whether the rule or instrument limits a human right, is required unless one of several narrow exemptions applies.[412] If the Minister certifies that a human right is limited, then the human rights certificate must include an analysis under section 7(2) of the Charter.

Committees with similar human rights scrutiny functions operate in the United Kingdom and the Australian Capital Territory, which also have parliamentary human rights models. The Australian Parliament has also established the Parliamentary Joint Committee on Human Rights (the Federal Committee), which examines and reports on Bills for compatibility with the human rights in seven core human rights treaties to which Australia is a party. Unlike the Victorian SARC, the Federal Committee is separate from the federal Scrutiny of Bills Committee and the Regulations and Ordinances Committee. Its creation was one of the outcomes of the National Human Rights Consultation in 2009.

[409] See *Parliamentary Committees Act 2003* (Vic) s 17(fa).
[410] And section 17(d) of the *Parliamentary Committees Act 2003* (Vic).
[411] Most statutory rules are made by the Governor in Council. Legislative instruments include particular declarations, directions, notices and bylaws. These may be made by the Governor in Council, Ministers or boards, for example. The *Subordinate Legislation (Legislative Instruments) Regulations 2011* (Vic) prescribe particular instruments to be legislative instruments.
[412] *Subordinate Legislation Act 1994* (Vic) ss 12A, 12D.

SARC's approach to human rights incompatibility

If SARC is satisfied that a Bill does not limit any human rights in the Charter, or that any limitations are sufficiently justified in the statement of compatibility, then SARC usually comments that the Bill is compatible with the rights in the Charter. If SARC identifies a potential limit on a human right that the statement of compatibility does not adequately explain, then it may seek further information from the member of Parliament introducing the Bill or refer questions to Parliament for consideration. SARC may also receive submissions or hold public hearings on Bills,[413] although it rarely does the latter.

Reluctance to assess compatibility

SARC is cautious about commenting on the incompatibility of Bills with human rights and assessing (under section 7(2) of the Charter) whether limitations of rights are justified.[414] Engaging in a section 7(2) analysis may sometimes involve evaluating policy considerations, which SARC considers to be beyond its functions. Professor Jeremy Gans, who is the Human Rights Adviser to SARC, has noted:

> *Scrutiny committees operate by distinguishing between principle (which is appropriate for reporting) and policy (which isn't and which threatens to undermine the independence of a committee). The problem is that many human rights obscure—and perhaps even obliterate—that very distinction.*[415]

This tension arises for SARC in its role under the Charter to report to Parliament on whether a Bill is incompatible with human rights. This legal question under the Charter requires consideration of whether any limitation on a right is reasonable and demonstrably justified in accordance with section 7(2). If the limitation is not reasonable and justified, then the Bill is incompatible with human rights. In Professor Gans' view, the section 7(2) test for deciding whether a limitation is reasonable and demonstrably justified 'risks turning SARC into a government policy scrutiny committee'.[416]

[413] *Parliamentary Committees Act 2003* (Vic) ss 27, 28(8).
[414] SARC will sometimes engage in such discussion. See, for example, SARC's Alert Digest on the Corrections Amendment (Parole) Bill 2014, which related to Julian Knight's parole. SARC considered whether equivalent New South Wales provisions would be less rights restrictive than those in the Bill: Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* No 3 of 2014, 11 March 2014, 6-7.
[415] Jeremy Gans, 'Scrutiny of Bills under Bills of Rights: Is Victoria's Model the Way Forward?' (Paper presented at the Australia–New Zealand Scrutiny of Legislation Conference: Scrutiny and Accountability in the 21st Century, Parliament House, Canberra, 6–8 July 2009), available at http://www.aph.gov.au/About_Parliament/Senate/Exhibitions_and_Conferences/sl_conference/paper.
[416] Jeremy Gans, 'Scrutiny of Bills under Bills of Rights: Is Victoria's Model the Way Forward?' (Paper presented at the Australia–New Zealand Scrutiny of Legislation Conference: Scrutiny and Accountability in the 21st Century, Parliament House, Canberra, 6–8 July 2009), available at http://www.aph.gov.au/About_Parliament/Senate/Exhibitions_and_Conferences/sl_conference/paper. Whether SARC's terms of reference permit it to consider matters of policy, and the extent to which a section 7(2) analysis requires an assessment of policy matters, was raised in SARC's review of the Police Integrity Bill 2008: Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Report on the Police Integrity Bill 2008: Minority Report* (2008) 37-38.

Culture of parliamentary committees

In recent years, seeking information from members of Parliament and referring questions to Parliament have been SARC's mechanisms for indicating possible incompatibility with the Charter.[417] That is, SARC does not usually state that a provision is or may be incompatible with a Charter right.[418] In 2014 it raised questions about the human rights compatibility of 21 Bills by writing to the responsible Minister, referring a question to Parliament, or both. In the first half of 2015, SARC raised questions about the human rights compatibility of six Bills.[419]

Some submissions to this Review expressed concerns that SARC makes decisions on party political lines.[420] But such a division on party lines is not reflected in SARC's Alert Digests, which only very rarely contain dissenting minority reports.[421] SARC's approach to incompatibility—that of referring questions to Ministers and the Parliament—has allowed it to reach consensus reports on most Bills. However, I acknowledge that SARC's constitution as a bipartisan committee, with a Government majority and chair, may sometimes result in the perception that comments on Government Bills are less robust. This is a consequence of SARC being constituted by members of Parliament who are also members of political parties, and is a limitation of this model.

How robustly SARC engages in the human rights scrutiny process is also partly guided by the culture of the Committee and the Victorian Parliament. In earlier years, SARC used slightly stronger language about incompatibility with human rights. In 2009 it reported that four Bills 'may be incompatible with' human rights and made the same finding for ten Bills in 2010.[422] However, SARC's more forceful comments did not seem to result in increased human rights debate in Parliament or amendments to Bills. In 2009 then Chair of SARC, Carlo Carli MP, commented:

> *In our experience SARC has had little influence over the content of legislation once the bill has been presented to Parliament. However there is evidence that the Committee's functions and reports influence the drafting of bills. Generally the Committee's experience is that there is reluctance by the executive to amend bills once introduced.*
>
> *The Executive response to SARC is largely based on correspondence with Ministers. Rarely do Minister's [sic] consider charter issues or SARC comments in the parliamentary debate.*[423]

---

[417] See, for example, comments on the Wrongs Amendment (Prisoner Related Compensation) Bill 2015, Scrutiny of Acts and Regulations Committee, *Alert Digest*, No 5 of 2015, 26 May 2015, 11.
[418] Although SARC sometimes makes such a statement. See, for example, SARC's discussion of the Criminal Organisations Control Act and Other Acts Amendment Bill 2014, in which it expressed the view that a provision of the Bill 'may be incompatible' with the Charter protection against self-incrimination in light of a Supreme Court decision: Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest*, No 9 of 2014, 5 August 2014, 15.
[419] As of 1 July 2015. Includes up to Alert Digest No 7 of 2015.
[420] Submission 91, Federation of Community Legal Centres, 9; Submission 100, Fitzroy Legal Service, 7. The Fitzroy Legal Service gave SARC's 2011 review of the Charter as an example of this.
[421] This review identified only one example of a minority report on human rights grounds in an Alert Digest since the Charter's enactment: Alert Digest No 4 of 2013 contained a minority report on the Adoption Amendment Bill 2013. Without a hearing, a minority of SARC could not be satisfied that particular provisions were compatible with the Charter.
[422] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Annual Review 2009* (2009) 5; Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Annual Review 2010* (2011) 5.
[423] Carlo Carli MP, 'Scrutiny and the Charter of Rights and Responsibilities', (Paper presented at the Australia–New Zealand Scrutiny of Legislation Conference: Scrutiny and Accountability in the 21st Century, Parliament House, Canberra, 6–8 July 2009), available at: http://www.aph.gov.au/~/media/Committees/Senate/sl_conference/papers/carli.pdf?la=en.

SARC's approach to incompatibility may be contrasted with that of the UK Joint Committee on Human Rights (UK Committee). In January 2015, the UK Committee reported on the Counter-Terrorism and Security Bill.[424] The report notes provisions that would likely be incompatible with the European Convention on Human Rights and the ICCPR, and recommend amendments. For example, the Bill proposed temporary exclusion orders—which invalidate a British citizen's passport unless they comply with conditions imposed by the Secretary of State—without any judicial oversight. The report recommended an alternative that would be less restrictive of the right of a person not to be arbitrarily deprived of the ability to enter their own country. Following the report, a number of members of Parliament moved amendments to the temporary exclusion order provisions.[425] The work of the UK Committee has also prompted amendments to numerous Bills.[426]

This culture of robust engagement with the mandate of a parliamentary committee is familiar in the United Kingdom and the United States and, to a lesser extent, the Australian Parliament. Performing committee functions in this way can be a proving ground for future political leaders, and this is embraced in overseas institutions.

Meaningful human rights scrutiny by SARC relies on the Committee members, but also on the broader culture of the Parliament, public involvement in the scrutiny process (so it is relevant for members of Parliament) and the engagement and responses of the Executive Government. In Victoria, to enhance the effectiveness of SARC's scrutiny role, the Executive Government, Parliament and SARC are all responsible for facilitating frank engagement with the Charter. For its part, SARC should consider reporting that a Bill 'may be incompatible' or 'is incompatible' with human rights. The Government should continue to respond cooperatively to questions or issues raised by the Committee.

Support for Committee members

SARC also needs support if its members are to engage in robust consideration of whether a Bill is incompatible with Charter rights. Secretariat support is key, particularly given the short timeframes in which SARC must report on Bills. It is a testament to the dedication of the current SARC secretariat that it helps Committee members to produce such timely reports. This is commendable.

To build on this support, human rights education would assist Committee members in their role and build their capabilities for human rights analysis. SARC members, and other Victorian parliamentarians, commented during my consultations that they received no formal induction or training on human rights. While information is available, an education program could be tailored to the needs of parliamentarians. Training should recognise parliamentarians' role under the Charter and should take into account the significant demands on their time, which make it difficult to read detailed briefing materials or attend lengthy training sessions.

[424] Parliamentary Joint Committee on Human Rights, United Kingdom, *Legislative Scrutiny: Counter-Terrorism and Security Bill* (12 January 2015) HL Paper 86, HC 859.
[425] See, for example, http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0075/amend/ml075-I.htm.
[426] Anjali Sakaria and Stephanie Aiyagari, Commonwealth Human Rights Initiative, *The Parliamentary Committee as Promoter of Human Rights: The UK's Joint Committee on Human Rights—A Case Study for Commonwealth Parliaments* (2007) 7; Francesca Klug, *Report on the Working Practices of the JCHR* (July 2006), available as an appendix to the Joint Committee on Human Rights Twenty-Third Report, http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/239/23907.htm.

The SARC secretariat would be best placed to coordinate this training, at the request of SARC. SARC should have discretion over who to invite to deliver this training, which could be a function of the Human Rights Adviser to SARC. The Federal Committee previously invited the Australian Government Attorney-General's Department and the Australian Human Rights Commission to deliver a joint training session. In Victoria, the Department of Justice & Regulation and the Victorian Equal Opportunity and Human Rights Commission have worked together to train graduate recruits to the Victorian public service, drawing on the Commission's adult education skills and the human rights expertise of both the Commission and the department.

Making human rights education more generally available to all parliamentarians on a voluntary basis would help them engage with Charter issues before the Parliament, including in the SARC Alert Digests.

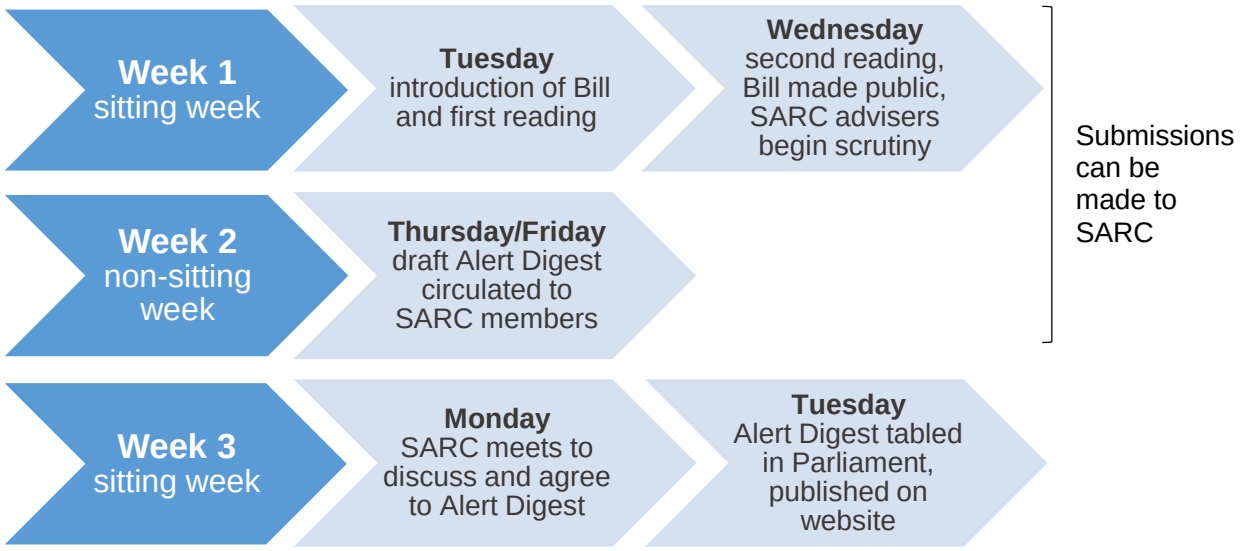
Recommendation 36: The secretariat of the Scrutiny of Acts and Regulations Committee arrange for human rights induction training for members of the Committee and the Victorian Equal Opportunity and Human Rights Commission offer a human rights briefing to all new parliamentarians.

Scrutiny process and timing

For each week that Parliament is sitting, SARC prepares an Alert Digest, which contains a report on the Bills to be considered by Parliament. The Alert Digest includes an assessment of each Bill's compatibility with the human rights in the Charter.

SARC can only begin scrutinising a Bill once it has had its second reading in Parliament, because this is when the Bill is made public. The parliamentary sitting calendar means SARC usually only has two weeks to scrutinise and report on a Bill. The process then begins again as new Bills are introduced.

Figure 9: Timeline for SARC scrutiny of Bills



A Regulation Review Subcommittee of SARC also meets regularly to scrutinise statutory rules and legislative instruments, and consider human rights certificates. However, comments about Regulations are not generally included in Alert Digests.[427] SARC publishes one annual report that includes examples of the human rights compatibility of some statutory rules and legislative instruments. The report lists all statutory rules and legislative instruments scrutinised in the relevant period.

Process for scrutiny of statutory rules and legislative instruments

Once a statutory rule or legislative instrument is made, a copy of it and the accompanying certificates must be laid before each House of Parliament. The statutory rule or legislative instrument and accompanying documents must also be provided to SARC within 10 working days. The tabled certificates are noted on the online Parliamentary Papers Database, but are not publicly available.

Human rights certificates must:

- certify whether, in the opinion of the responsible Minister, the proposed statutory rule or legislative instrument does or does not limit any human right in the Charter, and
- if it certifies that a human right is limited, set out the nature of the human right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve the purpose (that is, apply the test in section 7(2) of the Charter).[428]

The Regulation Review Subcommittee corresponds with the relevant Minister if it is dissatisfied with any aspect of the statutory rule or legislative instrument, or requires clarification. In 2013-14 the Subcommittee wrote to a Minister about only one statutory rule—the *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* (Vic), which declare that the Adult Parole Board, Youth Parole Board and Youth Residential Board are not public authorities under the Charter.[429] The Subcommittee suggested four options to limit these exemptions, which the Attorney-General did not accept. In 2012-13 the Subcommittee also only wrote to a Minister about one statutory rule.[430]

[427] Occasionally, SARC includes comments about a statutory rule in an Alert Digest: for example, Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest,* No 17 of 2013, 10 December 2013, 3-5 (but these comments did not relate to Charter incompatibility).
[428] *Subordinate Legislation Act 1994* (Vic) ss 12A(2), 12D(2). Generally, if a human right is limited and any limitation is not reasonable and demonstrably justified by reference to section 7(2) of the Charter, the act or decision of a public authority, or the legislation, will be 'incompatible' with human rights. But it is not possible for human rights certificates for statutory rules and legislative instruments to contain the same kind of incompatibility analysis as statements of compatibility, because SARC may recommend to Parliament that it disallow a statutory rule or legislative instrument for incompatibility with the human rights in the Charter: *Subordinate Legislation Act 1994* (Vic) ss 21(1)(ha), 25A(1)(c). This means that no statutory rule or legislative instrument should ever be made that is incompatible with human rights.
[429] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Annual Review 2013: Regulations and Legislative Instruments* (2014) 28-29.
[430] The *Local Government (Long Service Leave) Regulations 2012* (Vic): Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Annual Review 2012: Regulations and Legislative Instruments* (2013) 27-29.

If SARC considers a statutory rule or legislative instrument is incompatible with a Charter right, and it is not satisfied with any explanation provided by the Minister, it may report to Parliament recommending the statutory rule or legislative instrument be amended or disallowed.[431] SARC may also recommend a statutory rule or legislative instrument be suspended while Parliament considers its report.[432] SARC has never exercised these powers because a statutory rule or legislative instrument is potentially incompatible with a Charter right.

Improving the process for scrutiny of Bills

Many submissions to this Review recognised the value in SARC scrutinising Bills for human rights compatibility.[433] The Victorian Council of Social Service viewed the SARC process as 'an important avenue for protecting human rights and parliamentary accountability'.[434] The Victorian Equal Opportunity and Human Rights Commission acknowledged SARC's 'significant Charter expertise', as demonstrated in its analysis of human rights issues in Alert Digests.[435]

The Human Rights Law Centre said formal human rights scrutiny processes have:

> *ensured that the needs of all Victorians are more appropriately considered in legislative and policy formulation and that, generally speaking, limitations on rights have only been imposed after careful consideration as to their reasonableness, necessity and proportionality.*
>
> Human Rights Law Centre, Submission 95

Submissions noted good examples of human rights scrutiny. The Victorian Equal Opportunity and Human Rights Commission referred to SARC's extensive analysis of the Criminal Organisations Control Bill 2012.[436] It also noted SARC's Alert Digest for the Children, Youth and Families Amendment (Security Measures) Bill 2013, which used a submission by the Commission to refer a question to Parliament about safeguards and less restrictive measures that the Bill could have included.[437]

The impact of the Charter on Bills before they are introduced into Parliament should not be understated. As noted by the Human Rights Law Centre, preparing statements of compatibility has an impact on how human rights are considered in government processes: departmental officers know they must consider and justify the human rights impacts of proposed legislation as part of the Cabinet process; and Ministers and other members of Parliament know they must make a statement to Parliament about the human rights compatibility of legislation that they introduce.

[431] *Subordinate Legislation Act 1994* (Vic) ss 21(1)(ha), 25A(c). The Regulation Review Subcommittee cannot report to Parliament, so any report to Parliament must be adopted by SARC as a whole.
[432] *Subordinate Legislation Act 1994* (Vic) s 22(1).
[433] Submission 35, Australian Association of Christian Schools, Adventist Schools Australia and Christian Schools Australia; Submission 62, Victorian Trades Hall Council; Submission 64, Victorian Council of Social Service; Submission 78, Law Institute of Victoria; Submission 79, Justice Connect Homeless Law; Submission 90, Victorian Equal Opportunity and Human Rights Commission; Submission 91, Federation of Community Legal Centres; Submission 95, Human Rights Law Centre.
[434] Submission 64, Victorian Council of Social Service, 25.
[435] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 43.
[436] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 43.
[437] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 46.

> *The Charter as a whole is a useful tool in the development of policy for legislation because it is essentially a guarantee that the matters protected by the Charter will be considered … DELWP observes its positive experience in moderating some policy proposals because of intersections with human rights identified during the in-house preparation of the SOC.*
>
> **Department of Environment, Land, Water and Planning, July 2015**

Despite these successes, technical and procedural amendments are needed to enhance human rights scrutiny and increase parliamentary oversight of the human rights impacts of Bills. Submissions raised concerns about the scrutiny process. Some criticised the short timeframes within which SARC must consider Bills. They noted, as a result, the difficulty for the public to engage in the process and the possibly inadequate scrutiny of human rights impacts.[438]

The Human Rights Law Centre referred to Bills being 'rushed through Parliament' and not subjected to scrutiny, even when they raise significant human rights concerns.[439] The Law Institute of Victoria adopted its 2011 submission on this issue, in which it observed:

> *One of the purposes of the Charter is to ensure that human rights are appropriately considered in developing laws: debating Bills in Parliament without adequate time for scrutiny undermines the impact and benefit of the Charter.*[440]

Some submissions considered that making a submission to SARC about a Bill's human rights impacts has little purpose, because SARC does not usually engage with the detail of these submissions or refer to them in its Alert Digests.[441] The reasons for this include SARC's limited time to consider public submissions, its views on their relevance, and its willingness to engage in discussion about the potential human rights impact of legislation or less rights-restrictive alternatives. Further, submissions noted Bills are not usually amended as a result of submissions to SARC.[442]

[438] Submission 7, Dr Liz Curran; Submission 36, Youthlaw; Submission 64, Victorian Council of Social Service; Submission 90, Victorian Equal Opportunity and Human Rights Commission; Submission 91, Federation of Community Legal Centres; Submission 95, Human Rights Law Centre.
[439] Submission 95, Human Rights Law Centre, 15.
[440] Submission 78, Law Institute of Victoria.
[441] Submission 7, Dr Liz Curran, 6; Submission 36, Youthlaw, 7; Submission 64, Victorian Council of Social Service, 25; Submission 90, Victorian Equal Opportunity and Human Rights Commission, 46; Submission 91, Federation of Community Legal Centres, 9.
[442] Submission 7, Dr Liz Curran, 6; Submission 36, Youthlaw, 6; Submission 91, Federation of Community Legal Centres, 9.

Examples: SARC's limited use of submissions

The Victorian Equal Opportunity and Human Rights Commission noted the Children, Youth and Families Amendment (Permanent Care and Other Matters) Bill 2014.[443] The primary aim of the Bill was to make it easier for permanent care arrangements to be made for children who were the subject of child protection interventions. It amended the orders that the Children's Court may make. The Law Institute of Victoria made a submission to SARC, raising concerns that the Bill placed unjustifiable limits on the right to a fair trial and the right to protection of families and children. SARC's Alert Digest said the submission would be considered at a later meeting and found the Bill to be compatible.[444]

Several submissions to this Review also referred to the Summary Offences and Sentencing Bill 2013, about which ten submissions were made to SARC.[445] This Bill increased police powers to require people in public places to 'move on'. Submissions to SARC raised concerns that the safeguards in the Bill were inadequate, and that limits on the rights to peaceful assembly and freedom of association, movement and expression had not been justified. In finding the Bill compatible with the Charter, SARC's Alert Digest did not refer to the content of any of the submissions.[446]

A SARC submission to the original Human Rights Consultation Committee noted that a parliamentary committee could allow for public participation in the human rights scrutiny process.[447] In the view of some submissions received by this Review, such participation has not occurred in practice.

To enhance the process of parliamentary human rights scrutiny, submissions proposed:

- the Government exposing draft Bills for public comment and facilitating greater consultation on Bills before they are introduced into Parliament[448]
- SARC notifying the public of Bills before it, inviting greater public participation in the human rights scrutiny process or requiring a community consultation period when a Bill is before SARC[449]

[443] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 43.
[444] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest*, No 10 of 2014, 19 August 2014, 2.
[445] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 43; Submission 100, Fitzroy Legal Service, 6. Note that submission 79 from Justice Connect Homeless Law considered the debate around this Bill to have had a positive effect on parliamentary debate, even though no changes were made to the Bill.
[446] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest*, No 1 of 2014, 4 February 2014, 26.
[447] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 76.
[448] Submission 36, Youthlaw, 8; Submission 90, Victorian Equal Opportunity and Human Rights Commission, 47.
[449] Submission 36, Youthlaw, 8; Submission 48, Gippsland Community Legal Service, 1; Submission 64, Victorian Council of Social Service, 25; Submission 69, Rosetta Moors, 3-4; Submission 78, Law Institute of Victoria, 11; Submission 90, Victorian Equal Opportunity and Human Rights Commission, 45; Submission 95, Human Rights Law Centre, 15; Submission 98, Victorian Aboriginal Legal Service, recommendation 11. In particular, the Victorian Aboriginal Legal Service recommended SARC should consult Aboriginal community organisations when a Bill engages the cultural rights of Aboriginal people.

- providing more time for scrutiny to allow SARC to engage with public submissions[450] and SARC reporting on the content of submissions it receives[451]
- permitting SARC to request a longer adjournment of debate on a Bill if the Bill raises significant human rights issues[452]
- requiring Ministers to respond to SARC requests before a Bill can be passed or preventing Bills from being passed until SARC has reported on Charter compatibility[453]
- specifying in the Charter that SARC may report on the human rights compatibility of House Amendments to Bills and review the compatibility of existing Acts and subordinate instruments[454] and SARC reporting on amendments to Bills
- forming a special human rights subcommittee of SARC[455]
- transferring the assessment of human rights compatibility to an independent body, such as the Victorian Equal Opportunity and Human Rights Commission.[456]

Providing more time for human rights scrutiny

Many of the criticisms raised in submissions could be addressed by SARC having more time to consider the human rights impacts of Bills. After a Bill's second reading in Parliament, debate is typically adjourned for two weeks (depending on the sitting schedule). This convention is not enshrined in the Victorian Constitution or the standing or sessional orders of either House of Parliament.

At the resolution of either House or the request of the Governor in Council, a Bill or Act can be referred to SARC to conduct a review.[457] However, this power is used for substantive reviews of Bills and Acts rather than to provide brief periods of additional time for the usual scrutiny process.[458] The Government should consider how best to ensure that SARC has sufficient time to scrutinise Bills that raise significant human rights issues. More time could be provided by allowing for longer adjournments on particular Bills. I note that nothing would prevent Parliament from passing a Bill that was before SARC if that was its decision.

Enhancing public engagement in the scrutiny process

More time for the scrutiny process would allow for greater public input. A number of submissions recommended SARC engage more actively with the community and facilitate public input into scrutiny.

[450] Submission 7, Dr Liz Curran, 6; Submission 36, Youthlaw, 8; Submission 90, Victorian Equal Opportunity and Human Rights Commission, 45.
[451] Submission 7, Dr Liz Curran, 6; Submission 43, Stop Smart Meters Australia, 3; Submission 78, Law Institute of Victoria, 11; Submission 90, Victorian Equal Opportunity and Human Rights Commission, 46.
[452] Submission 78, Law Institute of Victoria, 11; Submission 91, Federation of Community Legal Centres, 19.
[453] Submission 48, Gippsland Community Legal Service, 1; Submission 64, Victorian Council of Social Service, 25; Submission 69, Rosetta Moors, 4; Submission 78, Law Institute of Victoria, 11; Submission 95, Human Rights Law Centre, 15.
[454] Submission 101, Koori Caucus of the Aboriginal Justice Forum, 25-26.
[455] Submission 7, Dr Liz Curran, 6; Submission 95, Human Rights Law Centre, 15.
[456] Submission 36, Youthlaw, 8.
[457] *Parliamentary Committees Act 2003* (Vic) s 33.
[458] See, for example, Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Final Report* (2009).

I consider it would be beneficial for SARC to notify the public of the Bills that are before it. As suggested by the Victorian Equal Opportunity and Human Rights Commission, SARC should send updates to people and organisations that register to be on an electronic mailing list.[459] SARC could also consider promoting its work through social media, which is a resource-effective way to reach a wider audience and provide timely alerts to the public. For example, the Australian Parliament tweets about Bills that are before the Federal Committee for consideration. To facilitate public participation in the scrutiny process, SARC should also refer to the content of submissions in its Alert Digests.

Recommendation 37: The process for human rights scrutiny of Bills by the Scrutiny of Acts and Regulations Committee be improved and public engagement in the process be enhanced by:

(a) the Victorian Government considering how best to ensure that the Committee has sufficient time to scrutinise Bills that raise significant human rights issues

(b) the Committee establishing an electronic mailing list to notify individuals and organisations of Bills that it is considering and to invite submissions

(c) the Committee referring to the content of submissions made to it in its Alert Digests on Bills.

Scrutiny of national schemes at the Government's request

In its 2011 review of the Charter, SARC recommended the Victorian Government consider referring amendments to non-Victorian laws that apply in Victoria under national schemes (and Regulations under those laws) to SARC for scrutiny.[460] To facilitate this referral, SARC recommended that statements of compatibility be prepared and tabled for amendments to national uniform legislation schemes, and that human rights certificates be prepared for Regulations made under those schemes.[461]

This referral to SARC would ensure national schemes are scrutinised for human rights compatibility, even when any legislation applying the scheme in Victoria is not amended. The Victorian Government would have discretion to refer amendments to SARC. The purpose of such referrals would be to enable SARC to inform Parliament about changes to national schemes that apply in Victoria, including human rights impacts, not to seek amendments to national schemes.

Recommendation 38: The Victorian Government refer amendments to non-Victorian laws that apply in Victoria under a national scheme, and to Regulations under those laws, to the Scrutiny of Acts and Regulations Committee for consideration.[462]

Technical legislative amendments to improve human rights scrutiny of Bills

SARC's powers and functions are largely adequate for it to engage in effective human rights scrutiny, but some technical legislative amendments should be made for clarity.

[459] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 46-47.
[460] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 96, recommendation 19.
[461] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 96, recommendation 18.
[462] The Charter's application to national schemes is discussed further in Chapter 7 of this Report.

First, under the Charter, the failure of a member of Parliament to prepare and table a statement of compatibility does not affect the validity, operation or enforcement of a Bill that becomes an Act (or any other statutory provision).[463] The Charter should include the same provision for a failure of SARC to report on the human rights compatibility of a Bill.[464]

Second, under section 17(c) of the Parliamentary Committees Act, SARC may consider any Act that was not considered when it was a Bill (within a limited time).[465] This role should be extended to provisions of an Act that were not considered by SARC when the Bill was before Parliament.[466] Such a change would allow SARC to scrutinise provisions that were inserted into a Bill by House Amendments after SARC had considered the Bill for human rights compatibility. Although it would involve reporting on a provision after a Bill had been passed, SARC's Alert Digest has an educative function for departments preparing Bills in future and, if it identifies serious human rights issues, may result in later amendments to the Act.

Third, a minor inconsistency exists between section 17(c) of the Parliamentary Committees Act, which allows SARC to report retrospectively on Acts, and section 30 of the Charter, which provides only for reporting on Bills. The Charter should be amended to make clear that SARC may report on Acts and provisions of Acts after they have passed. This power should be time limited, as it is in the Parliamentary Committees Act.

Recommendation 39: Section 29 of the Charter be amended to specify the Scrutiny of Acts and Regulations Committee's failure to report on the human rights compatibility of any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or any other statutory provision.

Recommendation 40: To ensure that House Amendments can be subject to human rights scrutiny and to make the Charter and the *Parliamentary Committees Act 2003* (Vic) consistent, the Scrutiny of Acts and Regulations Committee should be given clear power to consider and report on provisions of Acts that it did not consider when a Bill was before Parliament (within a limited time).

Getting the balance right in statements of compatibility

The preparation of statements of compatibility can have a significant impact on policy development. A well-considered statement informs parliamentary debate and facilitates greater human rights scrutiny of legislation, both by SARC and the Parliament. A number of submissions discussed the statements' importance in the parliamentary and legislative development processes. The Human Rights Law Centre considered the statements 'play an important role in contributing to change in the Victorian Parliament' and acknowledged their normative value in embedding human rights in government processes.[467]

[463] Charter, s 29.
[464] As recommended by SARC in its 2011 review of the Charter: Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 92, recommendation 14.
[465] SARC may consider and report on an Act within 30 days after the first appointment of the members of SARC at the commencement of each Parliament or within 10 sitting days after the Act receives Royal Assent. For broader retrospective reviews of legislation, the Victorian Parliament or the Governor in Council may also ask SARC to report on any Act. This power is not time limited: *Parliamentary Committees Act 2003* (Vic) s 33. For example, in 2009 SARC reported to Parliament on the exceptions and exemptions to the *Equal Opportunity Act 1995* (Vic) at the request of the Governor in Council.
[466] This was recommended by SARC in 2011 and supported by the Koori Caucus submission: Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 95, recommendation 17; Submission 101, Koori Caucus of the Aboriginal Justice Forum, 25-26.
[467] Submission 95, Human Rights Law Centre, 16.

The Victorian Council of Social Service noted:

> *the important role the tabling of statements of compatibility has played in generating parliamentary debate and enhancing transparency and accountability in policy making and legislative development.*
>
> Victorian Council of Social Service, Submission 64

However, some submissions considered statements of compatibility are inconsistent in their human rights analysis[468] and sometimes inaccessible or too legalistic.[469] Submissions proposed ways to make statements of compatibility more effective. One suggestion was for SARC to provide further guidance in its practice note about preparing statements, to ensure their quality and consistency.[470] Some submissions suggested extending the requirement for statements of compatibility to policy development[471] and to expert reports for the Government and government reviews.[472]

Government departments already have guidance available to them when drafting a statement of compatibility:

- a SARC practice note with guidance on some of the human rights issues on which SARC is likely to comment
- an online human rights portal maintained by the Victorian Government Solicitor's Office, which includes a register of statements of compatibility. The register shows which rights were considered in each statement and provides a link to the SARC Alert Digest for each Bill[473]
- Charter Guidelines for Legislation and Policy Officers, which are also available on the portal. These comprehensive guidelines were prepared in 2008 to help legislation and policy officers identify human rights issues in their work and assess potential limitations on rights. They discuss each right, its scope and the situations in which it might arise
- guidance text in the departmental Cabinet submission template that is used when submitting a draft Bill to Cabinet for approval to introduce it into Parliament
- advice from the Human Rights Unit in the Department of Justice & Regulation, the Victorian Government Solicitor's Office, the Solicitor-General or the private legal profession.

Drawing some of this guidance together and updating it would be useful. The updated guidance material should set out the characteristics of good human rights analysis, including how to apply section 7(2). Also, as I have recommended in **Chapter 1**, the Human Rights Unit should update the Charter Guidelines and place them on the Human Rights Portal (**recommendation 9**). Further, the Department of Justice & Regulation is preparing fact sheets on individual Charter rights. The updated guidelines should incorporate this work.

In consultations for this Review, people suggested the Charter should expressly empower SARC to report on the quality of statements of compatibility. SARC has oversight of all statements and regularly comments on the quality of their analysis in its Alert Digests.

---

[468] Submission 64, Victorian Council of Social Service, 24.
[469] Submission 36, Youthlaw, 7; Submission 64, Victorian Council of Social Service, 24.
[470] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 43.
[471] Submission 75, Tenants Union of Victoria, 16; Submission 102, Victorian Aboriginal Heritage Council, 9 (particularly when developing policies that affect or curtail cultural rights).
[472] Submission 43, Stop Smart Meters Australia, 3.
[473] Victorian Government Solicitor's Office, *Human Rights,* http://humanrights.vgso.vic.gov.au/.

Nothing in the Charter or the Parliamentary Committees Act would prevent SARC from commenting on quality of the statements. The Charter should clarify this role, which would then be a function of SARC under section 17(fa) of the Parliamentary Committees Act.[474]

As recommended by SARC in 2011, the Government should also consider publishing draft statements of compatibility when it releases exposure drafts of Bills for public comment.[475] This process would help identify and resolve human rights issues early, before the Bill is introduced into Parliament. The Government has already done so on occasion.

Recommendation 41: The human rights analysis in statements of compatibility be improved by:

(a) amending section 30 of the Charter to clarify that the Scrutiny of Acts and Regulations Committee may report to Parliament on statements of compatibility

(b) the Victorian Government publishing draft statements of compatibility when exposure drafts of Bills are released for public comment.

Providing centralised human rights advice and oversight of legislative proposals

Technical guidance alone is not the solution to improving the human rights analysis in statements of compatibility. The quality of human rights analysis in statements of compatibility is also driven by leadership and culture within the public service. The public service is guided by the Government's commitment to real engagement with human rights issues.

For example, Jon Stanhope, former Chief Minister and Attorney-General of the Australian Capital Territory observed:

> *My personal experience and observations … confirm that the Human Rights Act has been successful in fostering the growth of a human rights culture in the ACT. Cabinet room discussion, cabinet submissions, ministerial briefings and discussion between officers and within departments are all informed by the Human Rights Act … The existence of the Human Rights Act is a constant presence in the day-to-day business of the ACT Government and that is its great success.*[476]

What Mr Stanhope described involves both leadership and a culture that makes human rights considerations central to the work of government. As Chief Minister and Attorney-General, Mr Stanhope used his central role to send a strong message about how the government would consider human rights issues. In the ACT, the Attorney-General signs off all statements of compatibility, and human rights legal officers in the Department of Justice are consulted early about the human rights impacts of legislation. The combination of these structural and leadership factors can be significant.

[474] Under section 17(fa), SARC's functions include any functions conferred on it by the Charter.
[475] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 82, recommendation 9.
[476] Jon Stanhope, 'Who's Afraid of Human Rights?', *Papers on Parliament No 57*, February 2013, Australian Parliament website, http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/~/~/link.aspx?_id=E4C56EB7581D493BB8BE5B2D1D825100&_z=z.

In Victoria, statements of compatibility are the responsibility of each Minister, which has the effect of dispersing human rights expertise across the Victorian public service.[477] This is a welcome outcome and helps to normalise human rights analysis in the core legislative business of government. However, a centralised advice and oversight function has value, and the Human Rights Unit in the Department of Justice & Regulation provides that function in Victoria. If consulted early enough in the development of legislation, the Unit can assist policy and legislation officers to identify and mitigate potential human rights impacts.

For this system to work, a whole-of-government policy on consulting the Human Rights Unit (whether at the policy proposal or approval-in-principle Cabinet stages) is needed, and the Unit needs capacity to perform this essential function (as I outlined in **Chapter 1**).

Recommendation 42: The Victorian Government facilitate the identification of human rights impacts of legislative proposals and options for addressing them by consulting the Human Rights Unit in the Department of Justice & Regulation at an early stage of developing legislation and drafting statements of compatibility.

Ensuring House Amendments are subject to human rights scrutiny

House Amendments to a Bill are proposed during parliamentary debate (by Government or non-Government members of Parliament). Such amendments can have human rights impacts and will not have been considered by SARC. Multiple sets of House Amendments may be under consideration at the one time, and the proposed amendments may never form part of the Bill. They are often prepared and revised as a matter of urgency.

It is worth considering how to improve human rights scrutiny of such amendments. In its 2011 review, SARC recommended a statement of compatibility should accompany any House Amendments that broaden a Bill's purpose clause.[478] SARC's practice note advises supplementary information should be provided to Parliament on the human rights compatibility of proposed amendments to a Bill when those amendments are unrelated to a Bill's purpose.

> **Example: House Amendments with potential human rights impacts**
>
> Government House Amendments were proposed to the Justice Legislation Amendment Bill 2015 by the Hon Steve Herbert MLC in the Legislative Council. Both Houses agreed to amend the Bill to lower the minimum age for paintballing in the *Firearms Act 1996* (Vic) to 16. The Bill as introduced had made no amendments to the Firearms Act, and its statement of compatibility did not cover these amendments.

[477] The Human Rights Consultation Committee had recommended that Victoria centralise human rights work, but this recommendation was not taken up: Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) recommendation 24.
[478] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 93, recommendation 15.

SARC noted the amendment, while it increased eligibility for paintballing overall, engaged the equality rights of people under the age of 16.[479] While the Charter's requirement for preparation of a statement of compatibility applies only to Bills when they are introduced, and not to House Amendments, the amendments broadened the purpose clause of the Bill and, therefore, may be equivalent to a new Bill. SARC indicated it would write to the Attorney-General seeking information on whether the amendments are compatible with human rights. The Attorney-General's response was included in SARC's next Alert Digest. The Attorney-General considered that the amendment may limit section 8(3) of the Charter, but any limitation was justified.[480]

It would be useful for a member proposing a House Amendment to a Bill to prepare a short statement on the human rights compatibility of their proposed amendments. However, given the urgency of most House Amendments and the potential disadvantages faced by non-Government members of Parliament when moving amendments to Bills, I do not consider the statement should be a legislative requirement. Rather, members of Parliament should be encouraged to provide short statements on the human rights compatibility of their proposed House Amendments, as they currently are by SARC's practice note, when time permits.[481]

Under my proposed recommendation 40, SARC's power to report retrospectively on the human rights compatibility of any provisions that were included in an Act by House Amendment would be clarified. Under its powers in the Parliamentary Committees Act, SARC could write to the member of Parliament who moved the amendments to seek information on their compatibility with human rights.[482]

Recommendation 43: Members of Parliament are encouraged to provide a short statement on the human rights compatibility of their proposed House Amendments to Parliament, when time permits.

Increasing transparency in the scrutiny of statutory rules and legislative instruments

The requirement to prepare human rights certificates and consider human rights in the development of statutory rules and legislative instruments has led to human rights compatible outcomes that may not otherwise have been achieved.

[479] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest*, No 6 of 2015, 9 June 2015, 9.
[480] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest,* No 7 of 2015, 9 June 2015, 9-10.
[481] This proposal accords with the present procedure that no other documents need to be circulated with House Amendments—for example, no explanatory memorandum is required for the amending clauses.
[482] SARC relies on section 17(a) of the Parliamentary Committees Act to write to MPs and refer questions to Parliament.

> [The Charter] *plays a key role in the development of regulatory and legislative proposals. Recent examples include the* Transport (Compliance and Miscellaneous) (Conduct on Public Transport) Regulations 2015 *which included new regulations to support people with disabilities by ensuring that the area around the first door of the first carriage of a metropolitan train is set aside for wheelchair access, requiring seats to be vacated for persons with special needs and recognising the right to bring assistance animals onto public transport property and vehicles.*
>
> **Department of Economic Development, Jobs, Transport and Resources, July 2015**

However, in submissions and consultation for this Review, the process for human rights scrutiny of subordinate legislation was criticised for its lack of transparency. People noted that human rights certificates are not published and SARC reports on the compatibility of subordinate legislation with human rights only once a year. The Victorian Equal Opportunity and Human Rights Commission recommended:

> *There should be greater transparency in the Committee's process for reviewing statutory rules that limit rights. To this end, the Committee should regularly report to Parliament on the compatibility of regulations and there should be a publicly accessible central repository of the human rights certificates that are prepared by Ministers.*
>
> Victorian Equal Opportunity and Human Rights Commission
> Submission 90

Under the Subordinate Legislation Act, SARC 'may' report to Parliament if it considers a statutory rule or legislative instrument is incompatible with the human rights in the Charter.[483] Yet a note to section 30 of the Charter states SARC 'must' do this. The Commission considered that SARC should be required to report to Parliament on all statutory rules it considers are incompatible with human rights.[484] It referred to the Federal Committee as an example of a human rights scrutiny committee that provides more transparent scrutiny of statutory rules. Like SARC, the Federal Committee reviews all legislative instruments,[485] but its report for each sitting week discusses instruments that raise human rights concerns.[486]

SARC's reporting process for the human rights impacts of statutory rules and legislative instruments, and the fact that human rights certificates are not published, means human rights scrutiny of statutory rules and legislative instruments is much less transparent than the scrutiny of Bills. This issue is important, because Regulations can include significant powers that may limit human rights.

[483] Section 21(1).
[484] Submission 90, Victorian Equal Opportunity and Human Rights Commission, recommendation 47.
[485] At the federal level, the term 'legislative instruments' includes Regulations.
[486] See, for example, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report*, 24th Report of the 44th Parliament (23 June 2015).

Examples: Regulations that have human rights impacts

The *Corrections Regulations 2009* (Vic) provide for restraint and strip searches of prisoners and may limit rights to protection from degrading treatment, movement, privacy, liberty and security of the person, and humane treatment when deprived of liberty.

The *Education and Training Reform Regulations 2007* (Vic) (made before the Charter's commencement) permit a member of staff at a government school to 'take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour dangerous to the member of staff, student or any other person'. These Regulations potentially limit rights to movement, liberty and privacy, and may raise the protection of families and children and protection from degrading treatment.

In its early annual reports on Regulations, SARC sometimes published copies of human rights certificates for Regulations that raised human rights issues. In its 2011 review, SARC recommended human rights certificates be made publicly available for subordinate legislation when a regulatory impact statement has been prepared.[487] Regulatory impact statements must be published in the Government Gazette and a daily Victorian newspaper.[488] SARC's intention was seemingly to increase transparency in the scrutiny of Regulations, while minimising the procedural burden of doing so.

However, of the 180 statutory rules made in 2013-14, only 12 were accompanied by regulatory impact statements.[489] Of the 68 legislative instruments made in the same period, only two had regulatory impact statements. Limiting publication of human rights certificates to statutory rules and legislative instruments with regulatory impact statements would result in only a small proportion of human rights certificates being published. Additionally, regulatory impact statements assess subordinate legislation for a different purpose.

In addition to the publication of human rights certificates, human rights scrutiny of subordinate legislation would be more transparent if SARC reported more regularly on the human rights impacts of statutory rules and legislative instruments. At a minimum, the Charter should require SARC to report regularly to Parliament on any statutory rule or legislative instrument about which it has corresponded with the relevant Minister on human rights, or that limits a human right. Such a report could be included with the Alert Digest.[490] Based on SARC's previous annual reviews, there will not be many statutory rules or legislative instruments in this category. The Regulation Review Subcommittee of SARC already meets regularly to scrutinise statutory rules and legislative instruments.

I note the Subordinate Legislation Act provides SARC '*may* report' to each House of Parliament if it considers any statutory rule or legislative instrument laid before Parliament is incompatible with the human rights in the Charter.[491] My recommendation to require SARC to report regularly on certain statutory rules and legislative instruments may require amendment to the Subordinate Legislation Act, under which SARC's reporting on statutory rules and legislative instruments is discretionary. The note to section 30 of the Charter could be removed if this amendment were made.

[487] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 83, recommendation 10.
[488] *Subordinate Legislation Act 1994* (Vic) s 11(1).
[489] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Annual Review 2013: Regulations and Legislative Instruments* (2014) 11, 37.
[490] See, for example, Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest,* No 17 of 2013, 10 December 2013, 3-5 (although these comments did not relate to Charter incompatibility).
[491] *Subordinate Legislation Act 1994* (Vic) ss 21(1)(ha), 25A(c).

Recommendation 44: Human rights scrutiny of statutory rules and legislative instruments be made more transparent and effective by:

(a) publishing all human rights certificates in an online repository maintained by the Scrutiny of Acts and Regulations Committee

(b) amending section 30 of the Charter to require the Scrutiny of Acts and Regulations Committee to consider all statutory rules and legislative instruments and report to Parliament if it corresponds with a Minister about the human rights impact of any statutory rule or legislative instrument or considers the statutory rule or legislative instrument limits human rights.

In consultation for this Review, people also noted the quality of human rights certificates is variable. This variation will likely be improved by exposing subordinate legislation and human rights certificates to more a transparent scrutiny process. Brief instructions for preparing a human rights certificate are included in both the Charter Guidelines for Legislation and Policy Officers and the Victorian Guide to Regulation.[492] The adequacy of these instructions should be reviewed as part of updating the Charter Guidelines.[493]

Ensuring local laws are human rights compatible

The *Local Government Act 1989* (Vic) and a number of other Acts permit councils to make local laws. For example, the *Domestic Animals Act 1994* (Vic) gives councils the power to make laws regulating the ownership of dogs and cats and the *Building Act 1993* (Vic) empowers councils to make laws regulating building work. Local councils are public authorities under the Charter, meaning it is unlawful for a council to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a human right.[494]

But, the Full Court of the Federal Court has held that local councils are not bound by the Charter when making local laws.[495] *Kerrison v Melbourne City Council* was an appeal from a Federal Court proceeding regarding the 2011 Occupy Melbourne protests. In that case, it was argued:

- provisions of a relevant local law[496] are incompatible with the human rights in the Charter to freedom of expression, peaceful assembly and freedom of association

- the making of the local law and actions taken under the local law were unlawful under section 38(1) of the Charter because they were incompatible with those rights.

[492] Department of Treasury and Finance, *Victorian Guide to Regulation: Toolkit 3: Requirements and Processes for Making Subordinate Legislation* (July 2014) 36-37, available at: http://www.dtf.vic.gov.au/Publications/Victoria-Economy-publications/Victorian-guide-to-regulation.
[493] The instructions in the Victorian Guide to Regulation frame the test for subordinate legislation as one of 'compatibility' or 'incompatibility' with human rights, whereas the Subordinate Legislation Act requirements relate to whether any rights are 'limited'. Subordinate legislation that is incompatible with a Charter right can be disallowed by Parliament: *Subordinate Legislation Act 1994* (Vic) ss 21(1)(ha), 25A(1)(c).
[494] Sections 4(1)(e), 38(1).
[495] *Kerrison v Melbourne City Council* [2014] FCAFC 130 (3 October 2014). The Victorian Equal Opportunity and Human Rights Commission noted this in its submission: Submission 90, 56-57.
[496] *Melbourne City Council Activities Local Law 2009* pt 2, which prevented camping in public places and regulated advertising in public places.

Local laws are not statutory rules or legislative instruments under the Subordinate Legislation Act.[497] In the Full Court's view, it was 'an express legislative choice by the Victorian Parliament' to exempt local laws from the requirements that apply to statutory rules and legislative instruments (including the preparation of human rights certificates). The Full Court also held that making a local law could not properly be described as 'acting' or 'making a decision' within the meaning of section 38(1) of the Charter, so the council was not bound by the public authority obligations to act compatibly with human rights or, in making a decision, to give proper consideration to relevant human rights.[498]

Submissions to this Review noted some local councils have incorporated the Charter into their processes for making and reviewing local laws.[499] Local Government Victoria has published *Guidelines for Local Laws*, which advises councils to review draft local laws for Charter compatibility. In its 2012 review of the Charter in local government, the Victorian Equal Opportunity and Human Rights Commission reported that 41 councils had reviewed local laws for Charter compatibility. For example, Whittlesea City Council's review led it to adopt a new law for council meetings that made it easier for people with disabilities to ask questions.[500] Further, 38 councils have guidelines in place for drafting new local laws to ensure Charter compliance.[501]

However, the decision in *Kerrison* made clear that local councils are not required to consider human rights when making local laws. They can make local laws that are incompatible with human rights, and they are not required to consider human rights in their decisions about local laws. A person can challenge the acts or decisions of councils acting under a local law for unlawfulness under section 38(1) of the Charter. But, as shown in *Kerrison,* it is difficult to challenge the local laws themselves.[502] The Victorian Equal Opportunity and Human Rights Commission gave detailed consideration to these issues in its submission.[503] In my view, the present situation is inconsistent with local councils' status as public authorities and with the framework for human rights scrutiny that the Charter applies to Bills and subordinate legislation.

Making Charter incompatibility a ground for revocation of a local law

The Governor in Council can revoke local laws on the recommendation of the Minister for Local Government.[504] The Minister for Local Government may make this recommendation based on a 'substantial breach' of one of the grounds in Schedule 8 of the Local Government Act, including that the local law must not unduly trespass on rights and liberties of the person previously established by law.[505] The human rights compatibility of local laws would be enhanced if this ground for a ministerial recommendation referred to incompatibility with the human rights in the Charter. Councils would be required to consider the human rights in the Charter when making a local law, or risk the law later being revoked.

---

[497] *Kerrison v Melbourne City Council* [2014] FCAFC 130 (3 October 2014) [184].
[498] *Kerrison v Melbourne City Council* [2014] FCAFC 130 (3 October 2014) [187].
[499] Submission 61, Boroondara City Council, 1; Submission 90, Victorian Equal Opportunity and Human Rights Commission, 58.
[500] Victorian Equal Opportunity and Human Rights Commission, *The Charter of Human Rights and Responsibilities: Local Government and the Operation of the Charter 2012* (2013) 17.
[501] Victorian Equal Opportunity and Human Rights Commission, *The Charter of Human Rights and Responsibilities: Local Government and the Operation of the Charter 2012* (2013) 13-14.
[502] Under the Local Government Act, a local law must not be inconsistent with any Act or regulation, and is inoperative to the extent of any inconsistency. Arguably, a person could challenge the validity of a local law for being inconsistent with the Charter. As with statutory rules and legislative instruments, a local law could be held to be invalid for being beyond the power granted by the authorising Act if it is incompatible with the Charter and the authorising Act does not expressly permit the local law to be incompatible with human rights.
[503] Submission 90, 56-58.
[504] *Local Government Act 1989* (Vic) s 123.
[505] *Local Government Act 1989* (Vic) sch 8 item 2(f).

The Victorian Equal Opportunity and Human Rights Commission could notify the Minister if it became aware of a local law that was incompatible with the human rights in the Charter. Such notification would be consistent with the Commission's existing statutory function to report annually on the operation of the Charter—through which the Commission engages with the 79 local councils—and to advise the Attorney-General on anything relevant to the operation of the Charter (sections 41(a) and (f)).[506]

Recommendation 45: Local laws be made subject to the Charter by amending item 2(f) of Schedule 8 to the *Local Government Act 1989* (Vic) to refer to the human rights in the Charter, making incompatibility with the human rights in the Charter a factor for the Minister's consideration when deciding whether to recommend revocation of a local law.

[506] The Commission has a similar function under section 156(2) of the *Equal Opportunity Act 2010* (Vic), which requires it to notify the Attorney-General and relevant Minister if it becomes aware of any provision of an Act that discriminates against any person.

Term of reference 2(f): The need for the provision for an override declaration by Parliament under section 31

Overview

Section 31(1) of the Charter states Parliament may expressly declare an Act or a provision 'has effect despite being incompatible with one or more of the human rights in the Charter or despite anything else set out in the Charter'.[507] If an override declaration is made, then to the extent of the declaration, the Charter does not apply to that provision.[508]

This means the Parliament can declare it is intentionally passing a law that is not subject to the Charter. This kind of declaration signals to courts and other people interpreting and applying a law that, once the Bill becomes law, any provisions to which the override declaration applies do not need to be interpreted compatibly with human rights. It also means the provisions are not subject to judicial consideration by way of a declaration of inconsistent interpretation by the Supreme Court. Essentially, the declaration cloaks the provision with a Charter immunity or bypass. Under the Charter, the override lasts for five years and can be renewed.[509]

Section 31(4) states Parliament intends for an override declaration to be made only in exceptional circumstances. The Explanatory Memorandum for the Charter gives two examples of exceptional circumstances: threats to national security, and a state of emergency that threatens the safety, security and welfare of the people of Victoria.[510] A Member of Parliament who introduces a Bill containing an override declaration must make a statement to Parliament explaining the exceptional circumstances that justify the declaration.

The two override declarations made in Victoria to date seemingly did not meet the exceptional circumstances threshold. Submissions to this Review recommended repealing the override provision in the Charter, because it is not needed to maintain Parliamentary sovereignty, and because the override declaration has not been used in accordance with its recommended purpose. In this section, I recommend repealing section 31 of the Charter.

Why the override provision was included in the Charter

Section 31 of the Victorian Charter is similar to a provision of Canada's Charter of Rights and Freedoms,[511] but serves a different purpose in the Victorian context. Canada's Charter limits the sovereignty of all Canadian Parliaments by allowing Canada's courts to declare statutes are invalid because they are incompatible with human rights.[512] Canada's version of the override provision permits any Canadian Parliament to expressly declare a statute is valid notwithstanding its incompatibility with human rights. The Australian Capital Territory's Human Rights Act and the New Zealand Bill of Rights, which maintain parliamentary sovereignty (as in Victoria), do not contain provisions for override declarations.

[507] The declaration extends to any subordinate instrument made under the relevant Act or provision (section 31(2)).
[508] Section 31(6).
[509] Section 31(7), although in practice the time limit has been overridden by legislation.
[510] An explanatory memorandum is an aid to interpretation of a statutory provision: *Interpretation of Legislation Act 1984* (Vic) s 35(b)(iii).
[511] Constitution Act 1982 (Can) s 33.
[512] Constitution Act 1982 (Can) s 32.

The Victorian Parliament is supreme, and the Charter (as an ordinary statute) does not limit its power to legislate. Section 16 of the *Constitution Act 1975* (Vic) provides that '[t]he Parliament shall have power to make laws in and for Victoria in all cases whatsoever'. This power is limited only by the Australian Constitution. Parliament can pass laws that are incompatible with the Charter and has done several times without making an override declaration.[513]

Even though Parliament has the power to legislate incompatibly with human rights, in 2005 the Human Rights Consultation Committee thought there was value in including section 31 to indicate to Parliament that the power to override human rights should be exercised only in exceptional circumstances.[514]

Override declarations made in Victoria

Two override declarations have been made in Victoria. The first declaration was in the Legal Profession Uniform Law Application Bill 2013, which enacted a scheme for the consistent regulation of the Australian legal profession.[515] It was considered necessary to ensure interjurisdictional consistency in the application of the law and to prevent the extrajurisdictional application of the Charter—that is, to prevent regulatory bodies in other states and territories from being bound by the public authority obligations in the Charter and to avoid differences in the interpretation of the uniform law between states and territories.[516]

The second override declaration was made in the Corrections Amendment (Parole) Bill 2014, which imposed additional conditions on the making of a parole order for the prisoner Julian Knight.[517] In the override statement in the Bill's second reading speech, the Minister for Police and Emergency Services said '[a]lthough the government considers that the Bill is compatible with the Charter Act, it is possible that a court may take a different view'.[518] The override declaration was made to give effect to Parliament's intention that Julian Knight serve his full sentence and to avoid a court taking a different view because it interpreted the Bill's provisions compatibly with the human rights in the Charter.

Is there a need for the override provision in the Charter?

As SARC found in its 2011 review of the Charter, the role of override declarations in the Victorian Charter is very different from that in the Canadian Charter, because Victoria's Charter does not limit parliamentary sovereignty.[519] Regardless of whether an override declaration is made, the Victorian Parliament can enact any legislation, including legislation that it or a court regards as incompatible with human rights.

[513] *Summary Offences and Control of Weapons Amendment Act 2009* (Vic) and *Control of Weapons Amendment Act 2010* (Vic), which were each accompanied by statements of compatibility stating particular clauses were 'incompatible' with Charter rights.
[514] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 75.
[515] Victoria is the host jurisdiction and other participating jurisdictions apply the law of Victoria as a law of their own jurisdiction. At present, Victoria and New South Wales are the only participating jurisdictions.
[516] Explanatory Memorandum, Legal Profession Uniform Law Application Bill 2013.
[517] Julian Knight pleaded guilty to seven counts of murder and 46 counts of attempted murder following shootings at Clifton Hill on 9 August 1987. He was sentenced to seven life sentences with a non-parole period of 27 years, and was eligible for parole in May 2014.
[518] Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 2014, 746 (Kim Wells).
[519] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 99.

Several submissions were in favour of the override provision:

- Rosetta Moors considered although Parliament is sovereign and does not technically require an override power, an override declaration provides a powerful statement about human rights and should be retained.[520]

- Riley Baird called for the override declarations to be strengthened, saying that override declarations should take effect only if passed by a supermajority of both Houses of Parliament, should be in effect for no more than a year and should not be re-enacted without a referendum.[521]

- City of Darebin and Boroondara City Council considered the override valuable only if it forces Parliament to clearly and publicly announce its intention to pass incompatible laws.[522]

In its 2011 review of the Charter, SARC recommended (recommendation 21) section 31 of the Charter be repealed, as did a number of submissions to this Review.[523] The following are the main reasons in support of repealing section 31:

- Section 31 is not necessary in a statutory model of human rights protection. The Charter does not permit the courts to strike down legislation for Charter incompatibility, and Parliament remains sovereign without use of the override declaration.[524]

- Use of the override provision suppresses the judiciary's contribution to the dialogue model by preventing courts from commenting on the scope of protected rights, the justifiability of any limitation on rights, the interpretation of the law compatibly with the rights in the Charter and the need for a section 36 declaration on inconsistent interpretation.[525]

- An override declaration can be made without meeting the exceptional circumstances threshold and without the five-year time limit, undermining the safeguards in section 31.[526]

I recommend the section 31 provision for an override declaration be repealed, because: it does not serve the policy purpose of acting as a brake on limitations of human rights; it is not necessary to preserve parliamentary sovereignty; and it fails to make clear to the public that Parliament can enact human rights incompatible legislation without an override declaration.

[520] Submission 69.
[521] Submission 4.
[522] Submission 52, City of Darebin; Submission 61, Boroondara City Council.
[523] Submission 72, Dr Julie Debeljak; Submission 78, Law Institute of Victoria; Submission 90, Victorian Equal Opportunity and Human Rights Commission; Submission 92, Centre for Comparative Constitutional Studies; Submission 95, Human Rights Law Centre; Submission 96, Liberty Victoria.
[524] Submission 72, Dr Julie Debeljak; Submission 78, Law Institute of Victoria; Submission 90, Victorian Equal Opportunity and Human Rights Commission; Submission 92, Centre for Comparative Constitutional Studies; Submission 95, Human Rights Law Centre.
[525] Submission 90, Victorian Equal Opportunity and Human Rights Commission.
[526] Submission 78, Law Institute of Victoria; Submission 92, Centre for Comparative Constitutional Studies; Submission 95, Human Rights Law Centre. Peninsula Community Legal Centre noted 'exceptional circumstances' may be interpreted too broadly, allowing unwarranted override declarations: Submission 39.

It would be preferable to rely on statements of compatibility (noting any incompatibility), which provide a consistent, transparent and accountable process for the Government to identify how legislation may limit Charter rights or be incompatible with Charter rights. This process is just as transparent and public as the override process, and is preferable, because it keeps the courts involved in the human rights dialogue. Any declaration of incompatible interpretation[527] by the Supreme Court has no impact on the validity or application of the law. It simply acts as a flag for Parliament and requires the responsible Minister to report to Parliament. Parliament then decides whether to amend the law.

To enable Parliament's ongoing oversight of incompatible legislation, the responsible Minister could be required to report to Parliament every five years on the operation of a provision that was incompatible with human rights when passed. This approach would be stronger than the current approach, whereby legislation that is incompatible with human rights is passed without the requirement for ongoing oversight. SARC and the Victorian Equal Opportunity and Human Rights Commission report on statements of incompatibility in their annual reports. These reports would be useful for preparing the five-year report to Parliament.[528]

Could an override declaration ever be necessary for a national scheme or in times of emergency?

In relation to both national schemes and emergency situations, mechanisms other than the override declaration are available to manage interactions with the Charter.

In the case of national schemes, if there are concerns about public authorities in other states or territories being bound by the Charter under a national scheme, or Victorian public authorities being subject to a different standard than their counterparts in other states or territories, the *Charter of Human Rights and Responsibilities (Public Authorities*) *Regulations 2013* (Vic) can be used to exclude entities from the definition of 'public authority'.

If the national scheme were underpinned by Victorian legislation that was likely to be incompatible with human rights, and it was considered necessary to exclude the Supreme Court's ability to declare the legislation incompatible, the legislation could do this without the need for an override power in the Charter. That is, the override provision is not needed to ensure the effectiveness of national schemes. The application of the Charter to national schemes is discussed further in **Chapter 7** of this Report.

In the case of Victoria needing emergency legislation that would limit human rights, any limitation would likely be a reasonable and proportionate limitation in the circumstances.[529] This means that Parliament could pass laws in relation to a severe natural disaster or other emergency, for example, limiting people's Charter rights and those limits would likely be justifiable under section 7(2). There would be no need for an override declaration or even a statement of incompatibility:

[527] Chapter 5 of this Report recommends that the declaration of inconsistent interpretation in section 36 of the Charter be renamed 'declaration of *incompatible* interpretation', for consistency of language with related sections of the Charter.
[528] Victorian Equal Opportunity and Human Rights Commission, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities* (2015); Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Annual Review 2014* (2014); Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Annual Review 2013: Regulations and Legislative Instruments* (2014).
[529] SARC's view in its 2011 review: Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 99.

> *… due to the operation of section 7(2) of the Charter, if there is a genuine state of emergency then the performance of a limitations analysis would allow for the proper restriction of rights, taking into account the gravity of the situation the state faced.*
>
> Human Rights Law Centre, Submission 95

As noted by SARC in its 2011 review, emergency legislation is also likely to be accompanied by an explanation of its justification and sunset provisions.[530] Additionally, legislation may not be required if the emergency can be dealt with under existing emergency management powers or by Ministerial order.

Example: emergency legislation

In the case of a public emergency such as a toxic spill in Victoria, Parliament could pass emergency legislation to temporarily restrict people's freedom of movement, preventing them from entering the affected area. The statement of compatibility for the legislation might state that the limit on people's freedom of movement is justifiable under section 7(2) of the Charter, because it is in the interests of public safety and has been balanced against other rights, such as the rights to life, property and privacy of homeowners in the area.

The legislation would not be incompatible with the Charter and an override declaration would not be required. Even if Parliament considered a measure to be an unreasonable restriction on rights in the circumstances, it could still pass the legislation, noting its incompatibility, without an override declaration.[531]

Given the clear arguments in favour of repealing the override declaration, and the alternative arrangements that are available for dealing with national schemes and emergency situations, section 31 of the Charter should be repealed.

Recommendation 46: The provision for override declarations in section 31 of the Charter be repealed. The explanatory materials for the amending statute should note that Parliament has continuing authority to enact any statute (including statutes that are incompatible with human rights), and the statement of compatibility is the mechanism for noting this incompatibility. If legislation is passed that is incompatible with human rights, the responsible Minister should report to Parliament on its operation every five years.

[530] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 99.

[531] In practice, many emergency measures can be taken without the need for new legislation, through executive orders and existing powers in emergency management laws such as the *Country Fire Authority Act 1958* (Vic) and the *Victoria State Emergency Service Act 2005* (Vic). However, when new laws are required, this case study illustrates the Charter cannot restrict Parliament from making such laws. In addition, if a legislative instrument is made to respond to a public emergency, an urgent issue of public health or safety, or likely or actual significant damage to the environment, natural resources or the economy, the *Subordinate Legislation Act 1994* (Vic) exempts the legislative instrument from the requirement for a human rights certificate, so long as the instrument will be in place for no longer than 12 months (s 12D(3)).

Chapter 7

Emerging issues

Chapter 7 Emerging issues

Term of reference 2(i): Any other desirable amendments to improve the operation of the Charter

In this Chapter, I examine other issues that arose during the Review. This discussion addresses term of reference 2(i) on any other desirable amendments to improve the operation of the Charter. I identify three main areas for further attention:

(a) the application of the Charter to national schemes

(b) additional rights, including the right of Aboriginal Victorians to self-determination, additional rights found in the International Covenant on Civil and Political Rights (ICCPR), and economic, social and cultural rights

(c) the lack of clarity about the definition of 'discrimination' since the introduction of the *Equal Opportunity Act 2010* (Vic).

National schemes

Overview

National schemes are a feature of the Australian federation. They exist in a wide range of areas in which it is desirable to have uniform standards and regulation. Key policy goals in national schemes are usually the business benefits of consistent regulation, efficiency savings in regulatory bodies, and the regulatory benefits of standardised controls. National schemes have also been used to shift functions from the States to the Commonwealth, a process that is currently underway for the National Disability Insurance Scheme (NDIS).

So far, Victoria has not taken a coherent approach to human rights protections in national schemes, or to the Charter's interaction with the laws that establish a national scheme.

The application of the Charter is one of a number of areas of public law that Victoria needs to consider when negotiating a new national scheme. Other areas include privacy, freedom of information, public records, financial accountability, annual reporting, employment, judicial and merits review, and oversight authorities.

Human rights should be an integral part of the development of any new national scheme. For this reason, I recommend Victoria adopt a whole-of-government policy that, in developing a national scheme, the Charter should apply to the scheme in Victoria to the fullest extent possible, or alternatively the scheme should incorporate equivalent human rights protections.

I recognise, however, not all aspects of the Charter may be able to apply to a national scheme. Victoria should separately consider scrutiny of legislation, interpretation of legislation, public authority obligations, and monitoring and compliance mechanisms—the application of the Charter does not have to be all or nothing.

How national schemes operate

Unlike the human rights schemes in the United Kingdom, New Zealand, Canada and South Africa, the Victorian Charter is not a national law. It is a law of one state within a federation; Victoria and the Australian Capital Territory are the only Australian jurisdictions to have enacted human rights legislation. Further, the Charter applies only to matters on which the Victorian Parliament can legislate and is also subject to the Australian Constitution.

At the same time, Victoria participates in a wide range of national schemes with other Australian governments. The application of the Charter to these national schemes was raised a number of times during the Review.

So far, Victoria has not taken a coherent approach to human rights protections in national schemes, or to the Charter's interaction with the laws that establish a national scheme. Several submissions to the Review noted this issue in relation to the need for human rights protections under the NDIS:

> *For people with a disability there is a significant change underway with the full roll out of the National Disability Insurance Scheme however there are concerns that the Charter has no effect on federal government decisions and it is unclear how the Charter will operate under the National Disability Insurance Scheme.*
>
> Disability Advocacy Victoria Inc, Submission 46

Most national schemes are underpinned by an intergovernmental agreement at the political level. This agreement may include all participating jurisdictions, or the Commonwealth and a particular state. Generally, the Council of Australian Governments (COAG), which is the peak intergovernmental forum in Australia, is responsible for initiating, developing and monitoring the implementation of nationally significant policy reforms that require cooperative action by Australian governments.

The need to consider human rights during the negotiation of these agreements has been recognised. In 2013 the Australian Parliament's Joint Committee on Human Rights stated 'the issue of compatibility with human rights should be an integral part of the development of any national scheme'.[532]

Various legal mechanisms are used to establish national schemes. They include the enactment of mirror or model legislation, applied law schemes, and referral to the Commonwealth.

a. Model or mirror legislation

Under this type of scheme, one jurisdiction enacts a law that is enacted in the same or similar terms by other jurisdictions. The Parliament of each participating jurisdiction needs to separately amend the scheme, which can result in variations between the legislation in each jurisdiction increasing over time.

An example of this type of scheme was the *Therapeutic Goods (Victoria) Act 1994* (Vic), which was replaced with an applied law scheme in 2010. A current example is the Uniform Evidence Law, under which legislation in similar form to the *Evidence Act 1995* (Cth) has been enacted in some states and territories.[533]

The Charter applies to Victorian legislation enacted under this model, but not to legislation enacted in other jurisdictions.

[532] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills introduced 5-28 February 2013* (3rd Report of 2013) 33 [1.130] (in relation to the Marine Safety (Domestic Commercial Vessel) National Law Amendment Bill 2013). See also Parliamentary Counsel's Committee (Australia), *Protocol on Drafting National Uniform Legislation* (4th ed, 10 July 2014) 10.

[533] New South Wales, Victoria, Tasmania, the Northern Territory and the Australian Capital Territory.

b. Applied laws

Under an applied law scheme, one jurisdiction enacts a law on a topic that is then applied as law (as in force from time to time) by each of the other jurisdictions participating in the scheme. Amendments to these schemes can be made by the host Parliament and are automatically applied in the participating jurisdictions.

Examples of applied law schemes for which Victoria has been the host jurisdiction are the Education and Care Services National Law[534] and the Legal Profession Uniform Law.[535] Applied law schemes for which Victoria applies legislation that is hosted by another jurisdiction include the Health Practitioner Regulation National Law,[536] the Australian Consumer Law,[537] and the Marine Safety (Domestic Commercial Vessel) National Law.[538]

The administrative arrangements for applied law schemes are often complex and vary depending on the nature of the scheme and its administrative arrangements. Victorian bodies usually have a role in administering an applied law scheme in Victoria. Examples of this type of scheme are:

- The Legal Profession Uniform Law, which is administered in Victoria by local regulatory authorities, the Victorian Legal Admissions Board, the Victorian Legal Services Board and the Victorian Legal Services Commissioner. All of these authorities are established by Victorian legislation.

- The Health Practitioner Regulation National Law, which is administered by the Australian Health Practitioner Regulation Agency that supports the various National Health Practitioner Boards in their work. These bodies are created by a Queensland law that is applied in Victoria. Certain decisions made about Victorian health practitioners can be appealed to the Victorian Civil and Administrative Tribunal, which is the responsible tribunal in Victoria for the purposes of the Law.

- The Australian Maritime Safety Authority, which is established by Commonwealth legislation and is the National Regulator for the Marine Safety (Domestic Commercial Vessel) National Law. The National Regulator can delegate powers and functions under the Law to Victorian authorities, such as the Director, Transport Safety or a transport safety officer.

[534] A schedule to the *Education and Care Services National Law Act 2010* (Vic).
[535] Enacted by the *Legal Profession Uniform Law Application Act 2014* (Vic).
[536] A schedule to the *Health Practitioner Regulation National Law Act 2009* (Qld), which is applied in Victoria by the *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic).
[537] Schedule 2 to the *Competition and Consumer Act 2010* (Cth), which is applied in Victoria by the *Australian Consumer Law and Fair Trading Act 2012* (Vic).
[538] Schedule 1 to the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth), which is applied in Victoria by the *Marine (Domestic Commercial Vessel National Law Application) Act 2013* (Vic).

c. Referral to the Commonwealth

Section 51(xxxvii) of the Australian Constitution allows the Australian Parliament to make laws relating to 'matters referred' by the States that are otherwise outside the scope of Commonwealth legislative power. This model allows the Commonwealth to make a single law extending to all participating jurisdictions, which then 'plug in' to the broader federal system. Intergovernmental agreements generally underpin the legislative arrangements and establish a process for future amendments of the Commonwealth law, giving all participating jurisdictions a seat at the table. This mechanism has been used for important federal legislation such as the *Corporations Act 2001* (Cth)[539] and the *Fair Work Act 2009* (Cth).[540]

When legislative power is referred to the Australian Parliament, any resulting legislation is a law of the Commonwealth. The Charter does not apply to Commonwealth laws.

A variation on this model is when the Commonwealth assumes responsibility for something that is within its legislative power but was previously administered by states and territories. This transfer of responsibility is achieved mainly by Commonwealth legislation, underpinned by intergovernmental agreement. The national law may be administered by only the Commonwealth or both the Commonwealth and the States. The NDIS is an example of this model.

Example: National Disability Insurance Scheme (NDIS)

The NDIS is established under Commonwealth legislation—the *National Disability Insurance Scheme Act 2013* (Cth)—and managed by a Commonwealth entity, the National Disability Insurance Agency (NDIA). It is supported by intergovernmental agreements with the states, and full implementation in Victoria will require changes to Victorian laws to support its operation. The NDIS Act is expressed to give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities and other international human rights treaties.

The NDIS is being trialled in the Barwon Region in Victoria. The Bilateral Agreement for the NDIS launch between the Commonwealth and Victoria stated both Governments' aim for no diminution of Victoria's quality assurance system and safeguards as the NDIS transitions to a full national scheme.

There is in-principle agreement to start the transition to the full NDIS next year, although the bilateral agreement for Victoria has not yet been finalised. A three year transition period will run from 2016 to 2019.

Today, disability service providers that operate under contract to the Victorian Department of Health & Human Services have obligations under the Charter as public authorities. Under the NDIS, they will no longer have these obligations. Core public authorities such as the department will continue to be bound by the Charter. Private providers will no longer be performing public functions on behalf of the Victorian government, so will no longer have human rights obligations under the Charter after the full transition to the NDIS.

[539] The Victorian Parliament referred the relevant legislative power in the *Corporations (Commonwealth Powers) Act 2001* (Vic).
[540] The Victorian Parliament referred the relevant legislative power in the *Fair Work (Commonwealth Powers) Act 2009* (Vic).

Impact of the Charter on national schemes

The application of the Charter is one of a number of areas of public law that need to be considered when Victoria is negotiating a new national scheme. Other areas include privacy, freedom of information, public records, financial accountability, annual reporting, employment, judicial and merits review, and oversight authorities.

The Charter can be relevant to a national scheme via (a) scrutiny of legislation, (b) interpretation of legislation, (c) public authority obligations, and (d) oversight.

a. Scrutiny of legislation

The initial Victorian Bill to implement a national scheme must have a statement of compatibility as required by section 28 of the Charter. Unless the legislation specifically excludes the application of the Charter, amending Bills would also require a statement of compatibility, and human rights certificates would be required to accompany any Regulations made under the Victoria law.

For applied law schemes for which Victoria is not the host jurisdiction, no statement of compatibility is required by the Charter for the substantive law or for any amending legislation. Any Regulations made under a scheme by a non-Victorian host jurisdiction will not be accompanied by human rights certificates.

The Scrutiny of Acts and Regulations Committee's latest practice note states:

> *The Statement of Compatibility (or explanatory material) for a Bill that applies non-Victorian laws or refers powers to non-Victorian bodies should fully explain those laws' human rights impact. The Committee would prefer that the explanation have two components: First, the Statement of Compatibility may assess the human rights compatibility of all existing non-Victorian laws that are to be applied in Victoria. Second, the Statement of Compatibility (or explanatory material) may set out whether, and to what extent, the Charter's operative provisions (including its provisions for scrutiny, interpretation, declarations of inconsistent interpretation and obligations of public authorities) will apply under the national uniform legislation scheme*.[541]

Some other parliaments, notably the Australian Parliament and the legislature of the Australian Capital Territory, scrutinise legislation for compliance with human rights.

b. Interpretation of legislation

Whether the interpretive provisions of the Charter apply to a national scheme depends on the mechanism used to establish the scheme and the terms of the legislation. Section 32 of the Charter applies to Victorian legislation enacted as part of a mirror or model scheme, but not to legislation of other jurisdictions. This means the interpretive provisions of the Charter have no application to Commonwealth legislation based on referred Victorian legislative power.

The application of the Charter's interpretive obligation is more uncertain in the case of applied law schemes. When Victoria is the host jurisdiction, section 32 of the Charter would apply to the interpretation of the national law in Victorian courts, and may apply to the interpretation of the national law in other jurisdictions. When a national law is hosted by another state, and Victoria applies the law 'as if it were part of this Act', then the Charter's interpretive provisions may apply to that law in Victoria. The application of the interpretive obligation in section 32 of the Charter depends on the wording of the legislation.

[541] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Practice Note* (26 May 2014) 3.

When the Charter's interpretive obligation applies to legislation that enacts a national scheme, and the Victorian Supreme Court finds a provision to be incompatible with human rights, the Court may make a declaration of inconsistent interpretation under section 36 of the Charter. This declaration would not affect the validity of the provision, but would trigger a dialogue with the Victorian Parliament.

Concern exists that the application of section 32 of the Charter to the interpretation of a national law in Victoria may lead to inconsistencies in the application of the national law between Victoria and other jurisdictions. For this reason, the *Legal Profession Uniform Application Act 2013* (Vic) excluded the application of the Charter.[542] I note, however, the Charter does apply to a number of other national schemes, and I was not made aware that its application had caused inconsistency between Victoria and other participating jurisdictions. Further, legislation in all Australian jurisdictions is interpreted using the common law principle of legality, which does similar work to section 32 of the Charter.

In my view, to resolve the tension between promoting human rights compatible interpretation of legislation and promoting the uniform interpretation of national schemes, human rights compatibility should be addressed during the development of the national scheme and drafting of the legislation. This approach would make Victoria's Charter a minimum human rights standard to be applied to any national scheme in which Victoria participates.

c. Public authority obligations

National schemes can be administered variously by a Commonwealth authority, a body established by the law of another state, a Victorian authority, or a combination of Victorian and other bodies. Unless the Charter is specifically excluded, a Victorian body that helps administer a national scheme is a public authority under the Charter. Similarly, a body established under the law of another jurisdiction that performs functions under a national scheme in and for Victoria is likely to be a public authority under the Charter.

The Charter has been applied to public authorities administering national schemes in Victoria. It is not included in the Victorian legislation that is excluded from applying to a number of national schemes, including the Health Practitioner Regulation National Law,[543] the Occupational Licensing National Law[544] and the Heavy Vehicle National Law.[545] The *Marine (Domestic Commercial Vessel National Law Application) Act 2013* (Vic) expressly provides that various persons involved in administering the Marine Safety (Domestic Commercial Vessel) National Law in Victoria are public authorities under the Charter.

By contrast, the Legal Profession Uniform Law Application Act explicitly excludes the application of the Charter to that scheme. It provides that a body performing functions or exercising powers under the Legal Profession Uniform Law (Victoria) is not a public authority within the meaning of the Charter. The legislation did this by using the override power in section 31 of the Charter.

Compliance with the Charter is unlikely to present any practical difficulty for bodies that administer national schemes in Victoria. Policies and decisions that are compatible with human rights are likely also to comply with the laws of other participating jurisdictions. The Charter can establish a highest common denominator for the administration of national schemes.

---

[542] Victoria, *Parliamentary Debates*, Legislative Assembly, 12 December 2013, 4661 (Robert Clark, Attorney-General)—Statement of Compatibility, Legal Profession Uniform Application Bill 2013; Victoria, *Parliamentary Debates*, Legislative Assembly, 5 February 2014, 149-150 (Robert Clark, Attorney-General)—Override Statement, Legal Profession Uniform Application Bill 2013.
[543] *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic) s 7.
[544] *Occupational Licensing National Law Act 2010* (Vic) s 5.
[545] *Heavy Vehicle National Law Application Act 2013* (Vic) s 5.

d. Oversight

Some national schemes exclude the application of Victorian oversight legislation, including the *Ombudsman Act 1973* (Vic).[546] In this case, the Ombudsman cannot inquire into or report on whether any administrative action under these national schemes is incompatible with human rights. However, the Ombudsman Act applies to some other national schemes, at least when a Victorian entity exercises functions under those schemes.[547]

Charter Regulations

Section 46 of the Charter provides for making Regulations that prescribe entities to be, or not to be, public authorities under the Charter. Such Regulations have been made only to prescribe that the parole boards in Victoria are not public authorities. This power has not been used for a national scheme, either to declare entities under the scheme to be public authorities or not.

The future application of the Charter to national schemes

There is no guiding principle on how to apply the Charter to the national schemes in which Victoria participates. The Charter applies to some schemes, to some extent, and not at all to others. An increasing number of important matters are now regulated in Victoria through a national scheme, and the human rights protections the Charter provides Victorians must not be lost in the pursuit of national consistency. The issues arising in the current transition to the NDIS illustrate the need for attention to human rights early in the development of a new scheme.

I agree with the Parliamentary Joint Committee on Human Rights that compatibility with human rights should be integral to the development of any new national scheme. To achieve this outcome, I recommend Victoria adopt a whole-of-government policy that, in developing a national scheme, the Charter should apply to the scheme in Victoria to the fullest extent possible, or the scheme should incorporate equivalent human rights protections.

In making this recommendation, I recognise national schemes take various forms and that not all aspects of the Charter may be able to apply to a national scheme. The Victorian Government should separately consider scrutiny of legislation, interpretation of legislation, whether regulators and others involved in administering a national scheme in Victoria are public authorities, and monitoring and compliance mechanisms. The Charter's application does not need to be an all or nothing approach. The overall objective should be, however, to retain the Charter's level of human rights protections whenever Victoria participates in a national scheme.

Recommendation 47: The Victorian Government adopt a whole-of-government policy that, in developing a national scheme, the Charter should apply to the scheme in Victoria to the fullest extent possible. Alternatively, the national scheme should incorporate human rights protections equivalent to, or stronger than, the Charter. In developing a national scheme, the Government should consider separately the question of protection and promotion of human rights through scrutiny of legislation, the interpretation of legislation, whether regulators and others involved in administering a national scheme in Victoria are public authorities, and oversight and compliance mechanisms.

[546] For example the *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic) s 7(g), and the *Occupational Licensing National Law Act 2010* (Vic) s 5(f).
[547] *Heavy Vehicle National Law Application Act 2013* (Vic) s 5; *Legal Profession Uniform Law Application Act 2014* (Vic) s 5.

Additional rights

The human rights in the Charter are primarily drawn from the ICCPR.

However, not all rights in the ICCPR were incorporated into the Charter, because some related to federal areas of responsibility, some did not resonate with the Victorian context, and some were considered to be unclear in their application in a domestic law context.[548]

ICCPR rights that were excluded because they are within federal areas of responsibility include: genocide (article 6); the right to enter and leave your own country (article 12); unlawful aliens (article 13); marriage (article 23); and the nationality of children (article 24). However, some ICCPR rights that were originally excluded from the Charter can be relevant to the conduct of state authorities.

I consider in this Report the right to self-determination of Aboriginal Victorians; the right to birth registration; the requirement for legal protection from national, racial and religious hatred that constitutes incitement to discrimination, hostility or violence; and the requirement for government to respect the right of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

I also consider the application of economic, social and cultural rights in Victoria, because many community members who contributed to the Review raised health, housing and education as significant concerns.

The right to self-determination of Aboriginal Victorians

Overview

The right to self-determination is a principle of international law. Aboriginal Victorians are entitled to protection of their right to self-determination under international law. The Victorian Charter does not specifically include this right.

All Charter rights apply to Aboriginal people in Victoria, and the Charter Preamble recognises human rights have special importance for the Aboriginal people of Victoria, as descendants of Australia's first people. Section 19 of the Charter protects the cultural rights of Aboriginal Victorians. The Charter also protects the right to equality (section 8) and the right to participate in public life (section 18).

The inclusion or recognition of a right to self-determination in the Charter was considered when the Charter was established and again when it was reviewed after four years of operation by the Scrutiny of Acts and Regulations Committee. Submissions to this Review, and to the four-year review, expressed support for recognising a right to self-determination in the Charter.

I recommend amendments to the Charter to include self-determination and participation as principles in the Preamble. I also recommend the Victorian Government work with Victorian Aboriginal communities to promote, protect and respect self-determination and the empowerment of Aboriginal people. Any more detailed articulation of the right to self-determination in the Charter, and of a decision to subject it to interpretation and application by Victorian courts, should be driven by engagement between Victorian Aboriginal communities and the Victorian Government.

[548] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, 2-3.

What is the right to self-determination and what does it mean in practice?

All peoples have the right to self-determination, which is important because its realisation is essential for the effective guarantee of all other human rights.[549]

The right to self-determination is recognised in a number of international human rights instruments, including article 1 of the Charter of the United Nations, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Self-determination is one of the ICCPR rights that was not included in the Charter. The Explanatory Memorandum for the Charter of Human Rights and Responsibilities Bill 2006 explained the exclusion is 'because the right to self-determination is a collective right of peoples. Moreover, there is a lack of consensus both within Australia and internationally on what the right to self-determination comprises'.[550] Some submissions to this Review have suggested the time is now right to recognise the right to self-determination of Aboriginal Victorians in the Charter.[551]

UN Declaration on the Rights of Indigenous Peoples

The right to self-determination of Indigenous peoples is described in articles 3, 4, and 5 of the UN General Assembly Declaration on the Rights of Indigenous Peoples (UNDRIP):

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[552]

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.[553]

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.[554]

[549] UN Human Rights Committee (HRC), *CCPR General Comment No. 12: article 1 (Right to Self-determination), The Right to Self-determination of Peoples*, 13 March 1984 (Twenty-first session, 1984).
[550] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, 8.
[551] Submission 26, Castan Centre for Human Rights Law; Submission 39, Peninsula Community Legal Centre; Submission 64, Victorian Council of Social Service; Submission 78, Law Institute of Victoria; Submission 95, Human Rights Law Centre; Submission 98, Victorian Aboriginal Legal Service; Submission 99, Moreland City Council; Submission 101, Koori Caucus of the Aboriginal Justice Forum; Submission 102, Victorian Aboriginal Heritage Council; Submission 108, Federation of Victorian Traditional Owner Corporations; Submission 106, Maribyrnong City Council, 5.
[552] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, article 3.
[553] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, article 4.
[554] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, article 5.

Previous consideration of self-determination in the Charter

In 2005 the Human Rights Consultation Committee, when considering the creation of a Victorian Charter, recommended against the inclusion of a right to self-determination of Aboriginal Victorians at that time. The Committee noted a lack of consensus as to what the right to self-determination comprises, beyond participation in decision making.[555]

The Committee expressed concern 'in the absence of settled precedent about the content of the right as it pertains to Indigenous peoples, the inclusion of a right to self-determination may have unintended consequences. The Committee wants to ensure that any self-determination provision … reflects Indigenous communities' understanding of the term'.[556]

All Charter rights apply to all Aboriginal and Torres Strait Islander people in Victoria.

What does the Charter say now?

The specific rights of Aboriginal Victorians are recognised in the Preamble to the Charter, which states that the Charter is founded on certain principles, including:

… human rights have special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.[557]

Section 19 of the Charter also recognises the distinct cultural rights of Aboriginal Victorians:

(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community –

(a) to enjoy their identity and culture; and

(b) to maintain and use their language; and

(c) to maintain their kinship ties; and

(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

The four-year review in 2011 was required to consider whether to include the right to self-determination in the Charter (section 44(2)(b)). In that review, the Scrutiny of Acts and Regulations Committee (SARC) observed a lack of clarity about how the right to self-determination should be understood.[558] It considered the content of the right in international law is intentionally flexible.[559] Inclusion of the right in State law would require greater precision in defining the right's intended scope and operation.

[555] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 39.
[556] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 39.
[557] Charter Preamble.
[558] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 55.
[559] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 57-8.

SARC did not recommend the Charter include the right to self-determination, but recommended that the Victorian Government, in consultation with Victorian Aboriginal communities, continue to develop programs that foster improved outcomes for Aboriginal Victorians.[560]

A number of submissions to the 2015 Review supported the recognition of a right to self-determination,[561] or additional rights for Aboriginal Victorians.[562]

The Victorian Council of Social Service noted the need for a right to self-determination that emphasises the empowerment of Aboriginal Victorians, submitting:

> *There is also support within the Aboriginal community to adopt an empowerment framework which is based on the idea 'that Indigenous Australians have a right to development, which includes economic, social and cultural development as families, individuals and communities and as Indigenous peoples'. From this perspective, self-determination is a key concept, but is seen as part of a broader framework which incorporates mutual responsibility between government and Indigenous Australians, and subsidiarity, that is providing decision-making authority as close as possible to the people the decision is affecting.*[563]

The Victorian Aboriginal Heritage Council, the Victorian Aboriginal Legal Service and the Federation of Victorian Traditional Owner Corporations considered it is particularly important to consult Aboriginal Victorians on matters that concern their cultural rights,[564] and traditional lands.[565]

The Victorian Aboriginal Legal Service recommended the Charter be amended to require consultation of Aboriginal community organisations in the preparation of statements of compatibility, and of reports by SARC, when a proposed law engages the cultural rights of Aboriginal Victorians.[566]

The Koori Caucus of the Aboriginal Justice Forum recommended the Charter include the following additional rights for Aboriginal Victorians, being rights with the potential to further Aboriginal self-determination:

- the right to be heard by government
- the right to democratic representation at state and local level
- the right to community safety
- the right to respectful treatment
- the right to education

---

[560] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) recommendation 3.
[561] Submission 26, Castan Centre for Human Rights Law; Submission 39, Peninsula Community Legal Centre; Submission 64, Victorian Council of Social Services; Submission 78, Law Institute of Victoria; Submission 95, Human Rights Law Centre; Submission 98, Victorian Aboriginal Legal Service; Submission 99, Moreland City Council; Submission 101, Koori Caucus of the Aboriginal Justice Forum; Submission 102, Victorian Aboriginal Heritage Council; Submission 108, Federation of Victorian Traditional Owner Corporations.
[562] Submission 26, Liberty Victoria; Submission 108, Federation of Victorian Traditional Owner Corporations.
[563] Submission 64, Victorian Council of Social Service, 12.
[564] Submission 98, Victorian Aboriginal Legal Service; Submission 102, Victorian Aboriginal Heritage Council, Submission 108, Federation of Victorian Traditional Owner Corporations.
[565] Submission 98, Victorian Aboriginal Legal Service.
[566] Submission 98, Victorian Aboriginal Legal Service, recommendations 11, 12, 16.

- the right to economic use of Aboriginal-owned lands and waters
- the right to manage and protect cultural sites and the repatriation of Aboriginal remains and cultural artefacts.[567]

The meaning of the right to self-determination

Two reports commissioned by the Victorian Equal Opportunity and Human Rights Commission for the 2011 Charter review sought views from Aboriginal Victorians on self-determination:

- *Indigenous Self-determination and the Charter of Human Rights and Responsibilities—A Framework for Discussion*[568]
- *Talking Rights—Consulting with Victoria's Indigenous Community about the Right to Self-determination and the Charter*.[569]

Authors of the first report, Professor Larissa Behrendt and Dr Alison Vivian, noted:

> *It should be recognised from the outset that the concept of self-determination is not an easy one to define. While it generally may be agreed that it rests on a foundation of control of one's future destiny—whether as an individual or as a community—what that precisely involves depends upon the aspirations of the individual or group involved, making it difficult to pin down.*[570]

How can the Victorian Government recognise the right to self-determination?

The right to self-determination is an existing right held by Aboriginal Victorians under international law. It is particularly important to Aboriginal Victorians, given their experiences of dispossession and discrimination. The Charter recognising the right to self-determination could help facilitate the realisation of this right by requiring public authorities to consider the self-determination of Aboriginal Victorians when developing laws and policies, delivering services, and making other decisions that affect Aboriginal people.

The Victorian Government can promote respect for the right to self-determination in a range of ways. It was clear from my consultations that this right is not a foreign concept at the state government level, as shown by the following examples.

[567] Submission 101, Koori Caucus of the Aboriginal Justice Forum, 14.
[568] Professor Larissa Behrendt and Dr Alison Vivian, *Indigenous Self-determination and the Charter of Human Rights and Responsibilities—A Framework for Discussion* (2010).
[569] Ingenuity – SED Consulting, *Talking Rights—Consulting with Victoria's Indigenous Community about the Right to Self-determination and the Charter* (2011).
[570] Professor Larissa Behrendt and Dr Alison Vivian, *Indigenous Self-determination and the Charter of Human Rights and Responsibilities—A Framework for Discussion* (2010) 2.

Promoting the right to self-determination at the Victorian level

1. Traditional owner settlements: Aboriginal traditional owner groups can negotiate a settlement with the Victorian Government under the *Traditional Owner Settlement Act 2010* (Vic). Agreements can be made to: recognise traditional owners and certain traditional rights to Crown land; grant land in freehold title for cultural or economic purposes or Aboriginal title over land to be managed in partnership with the State; allow traditional owners to comment on or consent to certain activities on public land; provide funding to traditional owner corporations to manage their obligations and undertake economic development activities; recognise traditional owners' rights to take and use specific natural resources; and provide input to the management of land and resources.[571]

2. The Victorian Aboriginal Heritage Council: The Victorian Aboriginal Heritage Council was created under the *Aboriginal Heritage Act 2006* (Vic) to ensure Aboriginal Victorians play a central role in protecting and managing their heritage.[572] Comprised of traditional owners, the Council has the principal functions of making decisions on Registered Aboriginal Party applications,[573] advising the Minister and others about the protection management of cultural heritage, and promoting public awareness of Aboriginal cultural heritage.

3. Community involvement in decision making about Aboriginal children: Section 12 of the *Children, Youth and Families Act 2005* (Vic) includes an additional decision-making principle in relation to an Aboriginal child '[i]n recognition of the principle of Aboriginal self-management and self-determination'. This principle requires, when making a decision in relation to an Aboriginal child, 'an opportunity [to] be given, where relevant, to members of the Aboriginal community to which the child belongs and other respected Aboriginal persons to contribute their views'.

4. Aboriginal Justice Agreement: The Victorian Aboriginal Justice Agreement is a partnership between the Victorian Government and the Koori community to improve justice outcomes for Koories. A core principle of the Agreement is maximising participation of the Koori community in the design, development, delivery and implementation of policies and programs that impact on Koories. The Aboriginal Justice Forum is the peak body for overseeing the development, implementation and monitoring of the Agreement. It comprises senior Government representatives and members of the Koori community.

5. Koori Court: The Koori Court operates as a division of the Magistrates' Court, which sentences Aboriginal offenders. It provides an informal atmosphere and allows greater participation by the Aboriginal community in the court process. As a result, it helps reduce perceptions of cultural alienation, ensuring sentencing orders are culturally appropriate and helping address issues related to offending behaviour.

[571] Department of Justice & Regulation, *Traditional Owner Settlement Act,* accessed 17 July 2015, http://www.justice.vic.gov.au/home/your+rights/native+title/traditional+owner+settlement+act.
[572] Department of Premier and Cabinet, *Victorian Aboriginal Heritage Council,* accessed 17 July 2015, http://www.dpc.vic.gov.au/index.php/aboriginal-affairs/victorian-aboriginal-heritage-council.
[573] Registered Aboriginal Parties are the voice of Aboriginal people in the management and protection of Aboriginal cultural heritage in Victoria and have responsibility for the management of Aboriginal cultural heritage, including: evaluating Cultural Heritage Management Plans; advising on applications for Cultural Heritage Permits; deciding about Cultural Heritage Agreements; and advising on or applying for interim or ongoing Protection Declarations under the *Aboriginal Heritage Act 2006* (Vic).

In 2010 Professor Larissa Behrendt and Dr Alison Vivian from the Jumbunna Indigenous House of Learning suggested options for pursuing Aboriginal self-determination through the Charter:

- having the right specifically protected in the Charter
- adding several rights to the Charter that would help Aboriginal Victorians exercise the right to self-determination
- having a Charter Preamble that places self-determination as a key principle against which the rights within the Charter need to be interpreted
- having a mechanism that supports the enforcement of Charter rights that are central to self-determination.[574]

Recognising the right to self-determination in the Charter's principles

The principle of self-determination is recognised in the Children, Youth and Families Act. It should also be recognised in the Charter Preamble as a principle on which the State's central human rights law is founded. Further, the principles in the Preamble could be strengthened and support the empowerment of Aboriginal Victorians by recognising human rights require the participation of people in decisions that affect them, and proactive government action to help realise rights.

Recommendation 48: The principles in the Preamble to the Charter be amended to:

(a) recognise the need for public authorities to take steps to respect, protect and promote human rights

(b) recognise the importance of individuals and communities being able to have a say about policies, practices and decisions that affect their lives

(c) refer to self-determination having special importance for the Aboriginal people of Victoria, as descendants of Australia's first peoples.

Making existing Charter rights work better for Aboriginal Victorians

Making the Charter more effective overall will help to support self-determination and the empowerment of Aboriginal Victorians in practice.

For example, in **Chapter 6** I make recommendations to facilitate community input when laws are being developed and when SARC is considering the human rights compatibility of Bills. Specific action should be taken to facilitate input from Aboriginal people. This input is empowering for Aboriginal people and is needed to identify the human rights impact of an action or alternative options.

Making existing Charter rights work better is also part of making self-determination and the empowerment of Aboriginal people real in their everyday experiences. This connection came through strongly in my consultations.

[574] Professor Larissa Behrendt and Dr Alison Vivian, *Indigenous Self-determination and the Charter of Human Rights and Responsibilities—A Framework for Discussion* (2010) 26-27.

When people spoke to me about self-determination, many spoke about existing rights such as the right to equality (section 8), the protection of families and children (section 17), taking part in public life (section 18), and cultural rights (section 19). A number of Aboriginal people said realisation of these rights is needed to ensure they can exercise self-determination. However, Aboriginal people also spoke about the problem of putting these principles into practice.

For example, the Commission for Children and Young People noted the challenge of public authorities meeting their existing legal obligations. It 'has identified instances in which DHHS [the Department of Health & Human Services] has not given regard to the [Aboriginal Child Placement Principle], placing Aboriginal children in non-Aboriginal placements with no documented exploration of options within the Aboriginal community'.[575] The Victorian Aboriginal Legal Service also said 'without education, awareness, and clear avenues to ensure the application of Section 19(2), that the Charter will be of little use in either promoting or protecting the cultural rights of Aboriginal Victorians'.[576]

Acknowledging these issues, the Federation of Victorian Traditional Owner Corporations referred to the need for accessible, effective remedies for any breaches of cultural rights.[577]

I make recommendations elsewhere in this Report to more effectively raise awareness of Charter rights (**Chapter 1**), and to make it easier to raise a concern or enforce a Charter right when things go wrong (**Chapters 3 and 4**). I accept the submission of the Commission for Children and Young People that specific engagement strategies are required for some of the 'most at risk and vulnerable people, including Aboriginal communities … As an example, Aboriginal Community Controlled Organisations (ACCOS) may be an appropriate entry point and focus for working with the Aboriginal community to strengthen their experience of human rights protections'.[578]

Recognising a standalone right to self-determination in the Charter?

The Koori Caucus of the Aboriginal Justice Forum submitted the Charter should include a standalone right to self-determination, based on the outcomes of Professor Behrendt and Dr Vivan's 2010 consultation.[579] The Federation of Victorian Traditional Owner Corporations also considered that the Charter should include the right to self-determination, but with consultation on the wording of the provision.[580]

In making my recommendations, I am conscious of the need to make human rights practical and effective. This goal requires the Victorian Government to move beyond more 'consultation' to the hard work of negotiation and outcome. However, any detailed articulation of the right to self-determination in the Charter—particularly in a way that makes its meaning subject to application (and a potential narrow reading) by courts—should be driven by engagement between Victorian Aboriginal communities and the Victorian Government. This engagement is the only way the empowerment of Aboriginal communities will be practical rather than just another idealistic line in an Act. My independent Review, with its short statutory time-frame, is not the right vehicle for this dialogue.

[575] Submission 51, Commission for Children and Young People, 3.
[576] Submission 98, Victorian Aboriginal Legal Service, 3.
[577] Submission 108, Federation of Victorian Traditional Owner Corporations, 5, recommendation 5.
[578] Submission 51, Commission for Children and Young People, 2.
[579] Submission 101, Koori Caucus of the Aboriginal Justice Forum, 12.
[580] Submission 108, Federation of Victorian Traditional Owner Corporations, 3.

Professor Behrendt and Dr Vivian's work could serve as a model for broader research to inform this dialogue. Their initial interviews for their 2010 report focused on leaders of Melbourne-based organisations. One practical option for facilitating broader engagement may be an Australian Research Council Linkages Grant Project, which could bring together academics, community and government organisations for wider ranging research.

I also note the Victorian Government has committed to supporting Aboriginal Victorians to pursue self-determination and design solutions to the cultural, economic and social challenges that they face.[581] In summary, decisions on how to achieve this commitment, and on any further role of the Charter, should be informed by the engagement of Victorian Aboriginal communities and the Victorian Government.

> *At the moment, our definition of leadership is giving Aboriginal Victorians a seat at our table. But real leadership is about making it their table, too*.[582]
>
> **The Hon Daniel Andrews MP, Premier**

Decisions on how to achieve this, and any further role the Charter has to play, should be informed by the engagement of Victorian Aboriginal communities with the Victorian Government.

Recommendation 49: The Victorian Government work with Victorian Aboriginal communities to promote, protect and respect self-determination and the empowerment of Aboriginal people. This work could be pursued through existing forums, such as the Premier's meetings with members of the Aboriginal communities.

[581] Premier of Victoria, *Ceremony Marks Commencement of Native Title Settlement*, 3 July 2015, accessed 10 July 2015, http://www.premier.vic.gov.au/ceremony-marks-commencement-of-native-title-settlement.
[582] Premier of Victoria, *Closing the Gap – Premier's Speech*, 19 March 2015, accessed 10 July 2015, http://www.premier.vic.gov.au/closing-the-gap-premiers-speech.

Other rights raised during the Review

Overview

When the Human Rights Consultation Committee recommended enactment of the Charter, its recommendations for which rights to include were based largely on the rights in the ICCPR. Some ICCPR rights were omitted because the Committee thought they were no longer relevant in modern society, or because they dealt with areas that fell within Commonwealth areas of responsibility, so could not be included in state legislation.

In addition to the right to self-determination, some submissions to this Review considered other ICCPR articles should be reconsidered for inclusion in the Charter, including:

- the right to birth registration
- the requirement for legal prohibition of national, racial and religious hatred
- the requirement for government to respect the right of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

This section sets out my recommendations to Government on whether and how it should reconsider these three areas for inclusion in the Charter.

The right to birth registration

Article 24(2) of the ICCPR provides 'every child shall be registered immediately after birth and shall have a name'. This right was not included in the Charter. In its 2011 review of the Charter, SARC recommended the Government consider including remaining ICCPR rights in the Charter.[583]

Birth registration in Victoria has been treated as an issue of regulation rather than human rights. When a child is born in Victoria, the *Births, Deaths and Marriages Registration Act 1996* (Vic) requires parents to register the birth and it is an offence to not do so within 60 days.[584] A birth certificate is then available for a prescribed fee, which the Registrar has discretion to waive 'in appropriate cases'.[585]

In recommending the enactment of the Charter, the Human Rights Consultation Committee considered whether to include the right to birth registration, but concluded it is less relevant in modern society than it was in a post-World War II context.[586] However, the Castan Centre expressed concern that the right to birth registration is an ongoing human rights issue, and noted 'a lack of awareness of the problems that Indigenous people in Victoria are currently facing when it comes to birth registration'.[587]

[583] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 34, recommendation 1.
[584] *Births, Deaths and Marriages Registration Act 1996* (Vic) ss 13-15, 18. The current penalty for this is 10 penalty units, or $1,516.70. It is understood that this offence provision is not used in practice: Victorian Law Reform Commission, *Birth Registration and Birth Certificates: A Community Law Reform Project* (2013) 22.
[585] *Births, Deaths and Marriages Registration Act 1996* (Vic) ss 46, 49. The fee is 1.14 fee units or $15.50: *Births, Deaths and Marriages Registration Regulations 2008* (Vic) sch 1 item 6.
[586] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 45.
[587] Castan Centre for Human Rights Law submission to SARC's review of the Charter: Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011).

In 2005, 13 per cent of children born to Indigenous mothers in Victoria were not registered (a total of 1,300 children).[588] By comparison, the general birth registration rate in Victoria was more than 97 per cent.[589] In 2008 in Victoria, a majority of the 2.5 per cent of births that had never been registered were in areas with large Indigenous communities.[590]

Barriers preventing some Aboriginal people from registering their child's birth may include:

- a lack of confidence dealing with government agencies and marginalisation from mainstream services
- intergenerational trauma concerning the handling of children by government
- a lack of understanding of the requirements and benefits of birth registration
- poor literacy levels.[591]

The Victorian Equal Opportunity and Human Rights Commission also identified homeless people, people from non-English speaking backgrounds and people with disabilities as experiencing difficulties in the birth registration and certification process.[592]

For anyone whose birth is not registered, the issue is significant. Without registration a child cannot obtain a birth certificate, which makes it difficult (if not impossible) for them to fully participate in society and access their other human rights. As Dr Paula Gerber and Melissa Castan, Deputy Directors of the Castan Centre for Human Rights Law noted:

> *A person's ability to participate in contemporary society is seriously affected if their birth was never registered, or if they can't obtain their certificate because of cost, their literacy levels, their remoteness or their inability to satisfy ID requirements. Getting a driver's licence or tax file number, opening a bank account, enrolling in school or obtaining a passport can all be impossible without a birth certificate. Not having a birth certificate leads to a form of legal invisibility…*[593]

Birth registration is a 'gateway event' that establishes the relationship between a person and the State for life.[594] It is the necessary first step for realising the other human rights in the Charter, including:

- recognition as a person before the law (section 8)

[588] Joel Orenstein, 'Being Nobody—The Difficulties Faced by Aboriginal Victorians in Obtaining Identification' (Paper presented at the National Association of Community Legal Centres Conference, Perth, 18 September 2009), http://www.orenstein.com.au/NACLC%20conf%20paper.pdf.
[589] Paula Gerber and Melissa Castan, Castan Centre for Human Rights Law, 'Going to Jail for Not Having a Birth Certificate? It Happens', *Human Rights Report* (2015) 3.
[590] Paula Gerber, 'Making Indigenous Australians 'Disappear': Problems Arising from our Birth Registration Systems' (2009) 34(3) *Alternative Law Journal* 158, 158.
[591] Joel Orenstein, 'Being Nobody—The Difficulties Faced by Aboriginal Victorians in Obtaining Identification' (Paper presented at the National Association of Community Legal Centres Conference, Perth, 18 September 2009), http://www.orenstein.com.au/NACLC%20conf%20paper.pdf.
[592] Victorian Equal Opportunity and Human Rights Commission submission to Victorian Law Reform Commission, *Birth Registration and Birth Certificates: A Community Law Reform Project* (2013).
[593] Paula Gerber and Melissa Castan, 'Going to Jail for Not Having a Birth Certificate? It Happens' (2015) *Castan Centre Human Rights Report* 3.
[594] Paula Gerber, 'Making Visible the Problem of Invisibility' (2000) 6 *Monash University Law Research Series* 1, 1.

- particular protections for children, which they may lose if they cannot prove their age—for example, protection of children in their best interests (section 17) and the rights of children in the criminal process (sections 23, 25(3))

- freedom of movement, which includes the right to leave Victoria and may require identification such as a passport (section 12)

- taking part in public life, including the right to vote (section 18).

In their submissions, the Castan Centre and Liberty Victoria recommended including a new right in Part 2 of the Charter, providing for every child born in Victoria to have a name and be registered immediately after birth.[595] The Law Institute of Victoria, the Victorian Equal Opportunity and Human Rights Commission and Jamie Gardiner also submitted to the 2011 review that the Charter should include the right to birth registration. I agree with these submissions. Given the connection between the right to birth registration and the realisation of other rights, along with the particular barriers faced by vulnerable parts of the community, the Charter should expressly recognise this right. At present, the law places the burden for registration on parents, with a criminal penalty for non-compliance. But it is appropriate for the Charter to recognise the State's responsibility too.

Inclusion of the right to birth registration in the Charter should be done in consultation with the Registrar of Births, Deaths and Marriages. The Registrar has taken important steps to make registering a birth and obtaining a birth certificate as accessible as possible, including public education about the importance of these processes. In my view, a right to birth registration in the Charter could help the Registrar when developing policies and legislative proposals and developing cooperative arrangements with other agencies. The Charter can provide a framework for balancing different rights and interests. Including the right to birth registration in the Charter would help to ensure that other state agencies also take this right into account in their work.

I do not consider this right should impose on the Registrar any positive obligation to register a birth or name a child if the child's parents do not lodge a birth registration statement.

Birth registration is predominantly a children's right and is characterised in this way in the ICCPR. The Human Rights Committee of the United Nations has commented that the right to birth registration:

> *… should be interpreted as being closely linked to the provision concerning the right to special measures of protection and it is designed to promote recognition of the child's legal personality … The main purpose of the obligation to register children after birth is to reduce the danger of abduction, sale of or traffic in children, or of other types of treatment that are incompatible with the enjoyment of the rights provided for in the Covenant.*[596]

[595] Submission 26, Castan Centre for Human Rights Law, which adopted the Castan Centre's submission to the 2011 review of the Charter. The Castan Centre also recommended the right include being provided with a birth certificate immediately after a birth is registered.
[596] Human Rights Committee, *General Comment No 17: Article 24 (Rights of the Child*), 35th session, UN Doc HRI/GEN/1/Rev 6 at 144 (7 April 1989), http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/INT_CCPR_GEC_6623_E.doc.

It is important to retain this context if the right to birth registration is included in the Charter. I consider the right to birth registration should be included in a new clause to section 17, to make clear its relationship to the protection of families and to children's right to protection in their best interests. Noting some adults' births have never been registered, the right in the Charter should also extend protection to them. For this reason, I consider the right should provide for every *person* born in Victoria to have the right to a name and to be registered as soon as practicable after birth.

While the ICCPR provides for birth registration immediately after birth, I consider it more appropriate to provide for registration 'as soon as practicable' after birth. The ability of the State to register a birth depends on a birth registration statement being lodged by parents, so the Registry of Births, Deaths and Marriages may be unable to register a child immediately after birth. Use of the term 'as soon as practicable' would reflect the 60-day period within which parents must lodge the birth registration statement.

Recommendation 50: Section 17 of the Charter include a new provision that every person born in Victoria has the right to a name and to be registered as soon as practicable after birth.

As a final note, the ICCPR right also includes a right to acquire a nationality. This is a matter for the Commonwealth,[597] so I do not recommend the Charter include this aspect of the right.

National, racial and religious hatred

Article 20(2) of the ICCPR requires law to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The Human Rights Consultation Committee considered this article does not express a human right; rather, the article is a direction to government to ensure prohibitive legislation.[598] The Committee noted that the Victorian *Racial and Religious Tolerance Act 2001* (Vic) (RRTA) deals with these matters. Racial hatred is also prohibited by section 18C of the *Racial Discrimination Act 1975* (Cth). Because legislation prohibiting these acts was already in place when the Charter was enacted, article 20(2) of the ICCPR was omitted.

In its submission to this Review, the Castan Centre for Human Rights Law recommended that a right based on article 20(2) of the ICCPR be included in the Charter. In the Castan Centre's view, the existence of the RRTA does not mean the Charter should not include such a right, just as the existence of the *Equal Opportunity Act 2010* (Vic) did not prevent the inclusion of the right to equality.

Declaring in the Charter that law must prohibit national, racial and religious hatred may have symbolic effect. But the Charter places various obligations on a range of public authorities, courts and tribunals and others that do not have the power to legislate against national, racial and religious hatred, so it is difficult to envisage how this right would operate in the Charter in a general sense.

I consider the question of whether the RRTA and the federal Racial Discrimination Act give adequate effect to the right in ICCPR article 20(2) is a matter for any review of that legislation, not of the Charter.

[597] The High Court has affirmed the Commonwealth Parliament's power to legislate for citizenship. For discussion, see Sangeetha Pillai, 'The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis' 37 *Melbourne University Law Review* 736, https://www.law.unimelb.edu.au/files/dmfile/37_3_6.pdf.
[598] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 45.

Religious and moral education of children

Article 18(4) of the ICCPR requires States Parties to respect the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. Articles 18(1)–(2) relate to freedom of thought, conscience and religion and were included in section 14 of the Charter.[599] The Human Rights Consultation Committee omitted article 18(4), given concerns that its inclusion could unintentionally lead to an enforceable right to education (when it had recommended against inclusion of a right to education in the Charter's early stages).[600]

A number of submissions to this Review recommended the Charter include an equivalent provision to article 18(4):[601]

> *The omission of an equivalent provision to Article 18(4) creates a significant gap in the protections for human rights in Victoria. The ability of parents to ensure the religious and moral education of their children in conformity with their own convictions is an essential element of freedom of religion. It is recognised as such in the ICCPR and other international instruments. Without protection of these rights religious freedom is subject to considerable potential for constraint.*
>
> Australian Association of Christian Schools, Adventist Schools Australia and Christian Schools Australia Submission 35

The ACT Human Rights Act includes a version of article 18(4) in its right to education: to ensure the religious and moral education of a child in conformity with the convictions of the child's parent or guardian, the parent or guardian may choose schooling for the child (other than schooling provided by the government) that conforms to the minimum educational standards required by law. Public authorities in the ACT do not have to act compatibly with this right, but the right is considered for parliamentary scrutiny and when interpreting laws compatibly with human rights.[602]

Section 14 of the Charter gives every person the right to freedom of thought, conscience, religion or belief in worship, observance, practice or teaching in public and in private, and prohibits coercion or restriction that would prevent this. In accordance with this right, parents may teach their child about their religion or beliefs and involve their child in community observance of the religion or beliefs. The right prevents the State from interfering with parents' ability to choose religious instruction for their children in accordance with this right, unless any limitation on the right is reasonable and demonstrably justified under section 7(2).

If the Charter included a right based on article 18(4) of the ICCPR, it would be necessary to specify that it did not impose a positive obligation on government to provide religious education in public schools, to change the school curriculum or to fund religious education. Once the Charter had specified these exceptions, there would be little work for the right to do that freedom of religion in section 14 of the Charter does not already cover.

---

[599] Article 18(3) is a limitations clause that was replaced by section 7(2) of the Charter.
[600] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 44.
[601] Submission 32, Freedom 4 Faith; Submission 35, Australian Association of Christian Schools, Adventist Schools Australia and Christian Schools Australia; Submission 87, Australian Christian Lobby; Submission 107, Catholic Archdiocese of Melbourne.
[602] A Bill currently before the ACT Parliament includes a clause to extend public authority obligations to the right to education: Human Rights Amendment Bill 2015 (ACT) cl 8. The Bill is being considered by the Justice and Community Safety Committee, which is due to report by 24 September 2015.

For these reasons, I do not recommend inclusion of a new right based on article 18(4) of the ICCPR in the Charter.

Economic, social and cultural rights

Some submissions and people who contributed to my community consultations raised the need to access fundamental economic, social and cultural rights. The protection of economic, social and cultural rights is an important aspect of our community values of equality and a fair go.

What are economic, social and cultural rights?

Economic, social and cultural rights primarily come from the International Covenant on Economic, Social and Cultural Rights:

> *Many ESCR [economic, social and cultural rights] are the product of struggles in the nineteenth century by workers and other disadvantaged groups for social justice, including just, fair and safe conditions of employment, the right of workers to organise and the right to education for all. Recognition of these rights led to the policies of the social welfare states that emerged in various parts of Europe during the late nineteenth and early twentieth centuries.*[603]

The ICESCR includes rights to work, protection of the family, social security, an adequate standard of living, education, health and cultural life, for example.

The Universal Declaration of Human Rights also includes the right to own property alone, as well as in association with others, and the right not to be arbitrarily deprived of one's property (article 17).

Economic, social and cultural rights and the Charter

The Charter does not clearly divide civil and political rights from economic, social and cultural rights.

The existing Charter protections principally embody civil and political rights, which were largely adapted from the Universal Declaration of Human Rights and the ICCPR.

However, the Charter's rights to equality, cultural rights and the protection of families and children are reflected in the ICESCR. The property right in section 20 of the Charter is an economic right from the Universal Declaration of Human Rights.

The original Charter community consultation process demonstrated high levels of support for the inclusion of economic, social and cultural rights'. While the Human Rights Consultation Committee did not recommend including all economic, social and cultural rights in the Charter, it did recommend these rights be considered again in the first review of the Charter in 2011.

In that review, the SARC of Parliament determined 'the case for adding new categories of rights, reviews and proceedings to the existing Charter has not been made'.[604]

---

[603] Australian Capital Territory Economic, Social and Cultural Rights Research Project, *Australian Research Council Linkage Project Report* (September 2010) 43, http://regnet.anu.edu.au/sites/default/files/uploads/2015-05/ACTESCR_project_final_report.pdf.

[604] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) ix.

Some submissions to the 2015 Review endorsed the Charter reflecting Australia's full range of international law rights and obligations. For example, the Mornington Peninsula Human Rights Group contended:

> *… there has been a trend in treating political and civil rights as separate and distinct from economic and social rights, it is our submission that such a distinction is illusory and further hampers the proper realisation of the already recognised political and civil rights, which should be seen as similar and complementary.*[605]

The Salvation Army submitted the current rights constitute a 'minimal baseline' but the articles in the ICESCR should now be considered:

> *… we should aspire to more and this could include discussion about rights to things such as adequate healthcare, education and housing.*[606]

I note these submission and many others.[607] However, developments in domestic human rights law need to be embedded in the culture of the public sector over time. I conclude an independent cause of action is sufficient step for the next stage of the Charter's development. This should not be complicated by the challenge of also addressing new economic, social and cultural rights.

Inclusion in the Charter of additional economic, social and cultural rights should be considered as part of a future review.

[605] Submission 103, Mornington Peninsula Human Rights Group, 2.
[606] Submission 11, Salvation Army (Victoria), 2.
[607] For example: Submission 78, Law Institute of Victoria, 37; Submission 26, Castan Centre for Human Rights Law, 11; Submission 72, Dr Julie Debeljak, 21; Submission 36, YouthLaw, 13; Submission 7, Dr Liz Curran; Submission 22, Hobsons Bay City Council; Submission 41, Brimbank City Council; Submission 44, Leadership Plus; Submission 64, Victorian Council of Social Service; Submission 69, Rosetta Moors; Submission 74, Council to Homeless Persons; Submission 19, The Anne McDonald Centre; Submission 30, Yarra City Council; 76, Office of the Public Advocate; Submission 99, Moreland City Council; Submission 56, Footscray Community Legal Centre; Submission 75, Tenants Union of Victoria; Submission 79, Justice Connect Homeless Law; Submission 8, Professor Rosalind Dixon and Professor George Williams AO; Submission 101, Koori Caucus of the Aboriginal Justice Forum; Submission 97, Good Shepherd Australia New Zealand.

Clarifying the meaning of discrimination

The need to ensure human rights are enjoyed without discrimination was one of the strongest messages communicated during the original consultations for the Charter.[608] That commitment from the community has not changed.

When developing the Charter's protections from discrimination, the Human Rights Consultation Committee looked to international law and article 26 of the ICCPR, which states:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

In considering how to give effect to this right in the Victorian context, the Committee was mindful of the need for consistency between the Charter and the *Equal Opportunity Act 1995* (Vic), which prohibited discrimination based on a range of attributes. When enacting the Charter, Parliament decided to tie the definition of discrimination to the one used in the Equal Opportunity Act. The definition section of the Charter (section 3) states:

> ***discrimination,*** *in relation to a person, means discrimination (within the meaning of the* ***Equal Opportunity Act 2010)*** *on the basis of an attribute set out in section 6 of that Act.*

However, the scope of the term 'discrimination' in the Charter has been uncertain. This has been compounded by amendments following the introduction of the *Equal Opportunity Act 2010* (Vic).

When the 2010 Act was introduced, references in the Charter to the *Equal Opportunity Act 1995* (Vic) were updated to refer to the 2010 Act. However, discrimination is defined in a more comprehensive and nuanced way in the 2010 Act than it was in the 1995 Act. The definition of discrimination now extends to contraventions of positive obligations to accommodate a person's parental or carer responsibilities (sections 17, 19, 22, 32), make reasonable adjustments for a person with a disability (sections 20, 33, 40, 45) and allow assistance dogs and alterations in accommodation (sections 54, 55, 56).

The Charter does not make clear whether its reference to discrimination within the meaning of the Equal Opportunity Act adopts the new comprehensive definition with all its parts from the 2010 Act.

Several submissions to the Review addressed this definitional issue. Two submissions suggested replacing the current definition of discrimination (as being within the meaning of the Equal Opportunity Act) with the more general, open-ended meaning of the word such as appears in the ICCPR.[609]

However, the adoption of an open-ended definition of discrimination is not always straightforward. For example, in 2005, the authors of a commentary on the *New Zealand Bill of Rights Act 1990*, wrote:

---

[608] Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 34.
[609] Submission 20, Malcolm Harding, 18; Submission 90, Victorian Equal Opportunity and Human Rights Commission, 104.

> *New Zealand case law has failed to develop a consistent approach to the concept of discrimination. Basic ideas such as different treatment, indirect discrimination, the role of intention, causation and so on are not well thought through. Equally, the relationship between s 19 [freedom from discrimination] and s 5 [justified limitations] is not well thought through. … The result in our view, is that little can be taken to be judicially settled in New Zealand discrimination law.* [610]

Australia has had a similar experience with use of the words 'discrimination against' and 'discriminate between' in the *Fair Work Act 2009* (Cth), which continue to be contested.[611]

Two other submissions proposed adding 'or other status' to the list of attributes in section 6 of the Equal Opportunity Act.[612] With two of my objectives for this Review being clarity and practicality, I do not recommend changes that would allow judges to develop a list of attributes different from those that Parliament chose to protect in the Equal Opportunity Act. This may create inconsistencies and be difficult for public authorities to implement. However, it would be appropriate for the Government to periodically review the Equal Opportunity Act's list to ensure it reflects protections in international law and community standards. I note, for example, the inclusion of intersex status in federal and Tasmanian anti-discrimination law, which should be addressed in the Victorian context.[613]

In summary, I recommend the Charter's definition of discrimination be clarified by limiting it to 'direct or indirect discrimination' on the basis of a protected attribute in the Equal Opportunity Act. This is one of the options outlined in the Victorian Equal Opportunity and Human Rights Commission's submission, and it would allow the word to operate sensibly across all relevant provisions of the Charter.[614]

In making this recommendation, I note discrimination under the Charter is not limited by the areas of public life or exemptions or exceptions in the Equal Opportunity Act.[615] The term 'discrimination' is used in a different context in the Charter, and a number of Charter rights refer to it, not only the right to equality (sections 8, 17, 18, 25). The intent is not to duplicate the coverage of the Equal Opportunity Act, but instead to apply the principle of non-discrimination to the operation of the Charter and the conduct of public authorities. This duty is subject to reasonable limitations through section 7(2) of the Charter and does not require a public authority to act in conflict with other legal obligations (section 38(2)).

Recommendation 51: 'Discrimination' in the Charter be defined as 'direct and indirect discrimination' on the basis of a protected attribute in the *Equal Opportunity Act 2010* (Vic).

[610] Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, 2005) 499.
[611] *Fair Work Act 2009* (Cth) ss 153, 195, and 342(1), item 1(d). In relation to the meaning of 'discriminatory term' see *Australian Catholic University* [2011] FWA 3693 (10 June 2011) [11]-[14], compared to *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480 (11 May 2012) [53]-[57]. In relation to 'discriminate between' in the definition of 'adverse action', see *Hodkinson v Commonwealth* (2011) 248 FLR 409, *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 and *Construction, Forestry, Mining & Energy Union v Rio Tinto Coal Australia Pty Ltd* [2014] FCA 462 (9 May 2014).
[612] Submission 96, Liberty Victoria, 42; Submission 104, Jamie Gardiner, 2.
[613] Section 5C, *Sex Discrimination Act 1984* (Cth) and section 16(eb), *Anti-Discrimination Act 1998* (Tas).
[614] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 104.
[615] *Lifestyle Communities (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (22 September 2009) [31].

Chapter 8

The need for a further review

Chapter 8 The need for a further review

Term of reference 3: A recommendation under section 45(2) as to whether any further review of the Charter is necessary

Overview

Two statutory reviews were built into the Charter to allow the Government and the community to reflect on how the Act was working and to ensure it continues to reflect the values and aspirations of the Victorian community.

In my consultations, some people suggested further statutory reviews are necessary to ensure Victoria continues to build a community that respects human rights. Others suggested the Charter be treated as an ordinary law and be reviewed in the ordinary way, when initiated by the Government.

From conducting this Review, I conclude that while the Charter is an ordinary piece of legislation, it is foundational to the Government's work and its relationship with the community. Victoria should continue to reflect on its human rights practice and ensure the legislation meets the needs of the community into the future. I therefore recommend there be a review four years after the commencement of the proposed new complaints and remedies provision.

The Charter's requirement for review after four and eight years

The Charter sets out a timetable in the legislation for two statutory reviews, one after four years of operation (2011), and one after eight years of operation (2015) (sections 44 and 45).

These reviews were built into the legislation because the Charter was a new and developing law and the community conversation was ongoing about how the Charter should operate, and what it should cover.

> *The Charter can only be the beginning of a journey towards the better protection of human rights in Victoria. As such, regular reviews are necessary to assess whether the Charter is working effectively and to ensure that it continues to reflect the values and aspirations of the Victorian Community.*
>
> **Human Rights Consultation Committee, 2005**

The 2011 review was required to consider the Charter's first four years of operation and certain other aspects as identified in **Chapter 7**, including whether:

- additional rights should be included as human rights under the Charter, including rights under the ICCPR, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the right to self-determination
- regular auditing of public authorities to assess compliance with human rights should be mandatory
- the Charter should further provide for proceedings that may be brought or remedies that may be awarded in relation to public authority acts or decisions that are unlawful under the Charter.

This 2015 Review was required to consider the Charter's most recent four years of operation and recommend whether any further review of the Charter is necessary.

During my consultations, I heard many different views on this question.

Views that no further statutory review is necessary

The Victorian Bar did not support a further scheduled review 'for the reason that the jurisprudence on the Charter should be given time to develop in the normal course'.[616] Similarly, Victoria Legal Aid, the Human Rights Law Centre, the Victorian Equal Opportunity and Human Rights Commission, and Liberty Victoria did not consider further built-in reviews of the Charter necessary. The Commission noted '[h]aving a review built into the Charter can create an impression that the existence of the Charter, or parts of the Charter, may be open for reconsideration or dilution'.[617]

> *The Charter should not be viewed as something distinct or separate from the everyday legal obligations that govern the Victorian community. It should be afforded the same status as other key pieces of legislation—and therefore be subject to review, scrutiny, modification and improvement as any other piece of legislation when the circumstances of the day require it.*
>
> **Victoria Legal Aid, Submission 93**

The Australia Association of Christian Schools, Adventist Schools Australia and Christian Schools Australia suggested a further review, if required, could look at the costs and benefits of the Charter. But it also noted:

> *Given the lack of legislative response to the 2011 Review serious doubts can legitimately be raised in relation to the efficacy of these Reviews and whether further statutory reviews, outside the scope of normally* [sic] *parliamentary inquiries, are required.*[618]

Justice Connect Homeless Law supported regular reflection and consultation on the Charter, but did not consider those processes needed to be mandated in the legislation.[619]

[616] Submission 54, Victorian Bar, 21.
[617] Submission 90, Victorian Equal Opportunity and Human Rights Commission, 105; Submission 93, Victoria Legal Aid, 16; Submission 95, Human Rights Law Centre, 37; Submission 96, Liberty Victoria, 16.
[618] Submission 35, Australian Association of Christian Schools, Adventist Education Australia, Christian Schools Australia, 7.
[619] Submission 79, Justice Connect Homeless Law, 30.

The benefits of further reviews

Many others supported ongoing reviews of the Charter.[620]

> *The Charter should be subject to further, regular reviews. This is important to ensure that the Charter is not seen as a fixed, unchangeable instrument, but a work in progress that should be amended over time to reflect community values and to improve human rights protection.*
>
> Professor Rosalind Dixon and Professor George Williams AO
> Submission 8

The Commission for Children and Young People also noted 'further and ongoing reviews of the Charter are warranted and necessary to build a human rights culture … those who are vulnerable and without a voice, must be placed firmly in the public eye'.[621]

Lisa Peterson submitted a further review would allow for consideration of financial restitution when there are human rights breaches. She noted if a standalone cause of action without the possibility of damages were introduced following this Review, there would be a period of judgments and recommendations to consider.[622]

An opportunity to continue improving and strengthening the Charter

I carefully considered the benefits and disadvantages of a further review.

On the one hand, I acknowledge the four-year review had a destabilising effect on the Charter. Coming so soon after the Charter's introduction, and under a shadow of whether the Charter would be retained, the 2011 discussion of how to improve the Charter was challenging. Many people also described to me how the four-year review had a chilling effect on the Charter's implementation, particularly at the state government level.

On the other hand, I appreciate many laws do not receive the benefit of regular reflection and review if those processes are not statutorily required. I also appreciate the Charter, while an ordinary Act of Parliament, is not an ordinary law. It is foundational to the Government's work and its relationship with the community. I experienced the benefits produced by this Review in engaging people within government and in the community about human rights and the work that the Charter is and should be doing.

I recommend the Charter be amended to require a further review four years after the commencement of the proposed complaints and remedies provision.

The review should consider the operation of the Charter, the application of economic, social and cultural rights, and the availability of appropriate remedies when human rights are interfered with.

---

[620] For example: Submission 36, Youthlaw, 15; Submission 39, Peninsula Community Legal Centre, 3; Submission 48, Gippsland Community Legal Service, 3; Submission 50, Maureen Kirsch, 4; Submission 51, Commission for Children and Young People, 8; Submission 52, City of Darebin, 9; Submission 62, Victorian Trades Hall Council, 3; Submission 65, Independent Education Union Victoria Tasmania, 7; Submission 69, Rosetta Moors, 8; Submission 74, Council to Homeless Persons, 5; Submission 91, Federation of Community Legal Centres, 19; Submission 94, Assistant Commissioner for Privacy and Data Protection, 4.
[621] Submission 51, Commission for Children and Young People, 8.
[622] Submission 14, Lisa Peterson, 1.

> *The work from compliance to culture is a long one, and can be characterised as a 'learning journey' for both state and local government sectors in Victoria. … A regular, mandated review is important to support this learning over time.*
>
> **City of Darebin, Submission 52**

Recommendation 52: The Charter be amended to require the Attorney-General to cause there to be a further review of the Charter four years after the commencement of the proposed complaints and remedies provision. The review should consider the operation of the Charter and how it could be improved, including the application of economic, social and cultural rights and the range of remedies available when human rights are interfered with.

Appendix

Consultation and submissions

Appendix: Consultation and submissions

Call for submissions

The Attorney-General issued a media release on 24 April 2015 announcing the call for submissions to the Review. Supporting the call for submissions, a consultation paper and a background brief on the terms of reference were made available on the Review's website: www.charterreview.vic.gov.au.

The call for submissions was promoted through emails to government networks, the legal sector, academic institutions and community organisations. It was also promoted through social media. A reminder about the call for submissions was advertised in *The Age* and the *Herald Sun* on Saturday 16 May 2015.

The deadline for submissions was 4 June 2015. In total, I received 109 submissions to the Review. A list of submissions received is at **Appendix A**.

Because the terms of reference focused on many of the technical and operational provisions of the Charter, I made efforts to make the consultation process accessible to the general community. In particular, I made clear that a submission did not have to address all the terms of reference, and that a submission could be a person's ideas or opinions about the Charter—including a personal story about how a person used the Charter, a human rights concern, a description of how the law has affected a person (or how it could), or a researched paper.

The consultation paper asked people to think about the following issues when making a submission:

- your experience with the Charter, particularly between 2011 and 2015 (the period since the last review)
- what human rights are important to you
- key benefits and/or challenges of the Charter
- how the Victorian Government should promote and protect human rights
- how the Charter should help the Parliament and the Government to balance different rights and interests
- examples of effective ways to improve human rights outcomes in practice (including examples applying the Charter or examples from other jurisdictions/circumstances that we could learn from)
- what should happen if a person's human rights have been breached
- other suggestions you have for improving the Charter or other strategies for better protecting human rights in Victoria.

The preferred method of making a submission was through the Review's website. Submissions could also be made in writing via email or mail, over the phone, or on 'Have a say' pages available at the community forums.

Assistance was offered to people who required help in making a submission.

Community forums

As part of the community consultation, I hosted eight open community forums. The forums were promoted on the Review's website, through social media, with local community organisations and local councils, and in local newspapers.

Forums were held in:

- Bairnsdale, 12 May 2015
- Melbourne CBD, 13 May 2015
- Shepparton, 19 May 2015
- Mildura, 21 May 2015
- Warrnambool, 26 May 2015
- Werribee, 28 May 2015
- Springvale, 2 June 2015
- Coburg, 3 June 2015.

They focused on three key areas:

- What human rights issues are important in your community? What's been your experience?
- What's worked well to protect human rights at the local level?
- What could be improved? How do we get more people interested in human rights? How can government agencies get better at protecting human rights? How can the Charter be more effective in protecting human rights?

Assistance from the Victorian Equal Opportunity and Human Rights Commission

Under section 41(e), the Victorian Equal Opportunity and Human Rights Commission has a function to assist the Attorney-General in the review of the Charter. I thank the Commission for its detailed submission to this Review.

At my request, the Commission provided an education consultant to facilitate each of the eight community forums. I thank the Commission for this assistance, which helped make the forums an accessible and engaging process that covered the Review's key issues.

Human rights issues raised by community members

I am grateful to people who volunteered their time, and gave me the benefit of their views and experiences to help with the Review. Part of this sharing involved people telling me about their experiences with human rights, or worrying issues they saw in the community. This Report could not investigate all of these issues or experiences, because based on the terms of the reference the Review focused on the operation of the legislation at a more general level. But, below is an overview of the types of issue that I heard in the community.

These reflections are not a representative sample of the Victorian community and have not been investigated. They are summarised here to reflect the concerns expressed to me, and because it is important for an examination of the effectiveness of a human rights law to be informed by some reflections about people's experiences of human rights in everyday life.

Across the submissions and community consultations I found a high level of approval of the underlying objectives of the Charter:[623]

> *The Charter is an excellent support and guide to a democratic society such as exists in Victoria.*[624]

> *I am very pleased and proud to live in the only Australian state with a charter of human rights. The existing charter is not perfect, but it is the result of good work that benefits from refinement.*[625]

I also acknowledge the submissions and community forum participants who questioned the broader need for a human rights Charter and/or were fundamentally critical of the Charter itself.

> *Human rights are adequately protected without charters… Human rights charters are therefore unnecessary, but they also create problems. These include the interference with democratic policy making, blurring the separation of powers and creating an imbalance between the judiciary and legislature, undermining parliamentary sovereignty, and creating uncertainty or vagueness.*[626]

> *… what is the point of writing it and taunting people with a document that promises to uphold their rights when it does absolutely nothing?*[627]

Across the submissions and community forums, common themes emerged. I outline key themes in this section, and draw on specific examples captured through my consultation process.

Key themes

1. Equality and discrimination

Challenges relating to the definition and experience of equality, discrimination, Indigenous rights and cultural awareness were discussed at every community forum and across a range of submissions.[628] I note the significance and reach of the concerns raised, and the examples and case studies that have been recorded.

[623] Of the 109 written submissions, 87 generally supported the Charter, 19 offered no clear opinion, and the remaining three submissions did not support the need for or purpose of the Charter.
[624] Submission 23, Christian Schultink, 1.
[625] Submission 37, Jordan Fenton, 1.
[626] Submission 87, Australian Christian Lobby, 1.
[627] Submission 16, Confidential, 1.
[628] For example, Submission 20, Malcolm Harding; Submission 26, Castan Centre for Human Rights Law; Submission 64, Victorian Council of Social Service; Submission 96, Liberty Victoria; Submission 98, Victorian Aboriginal Legal Service; Submission 101, Koori Caucus of the Aboriginal Justice Forum; Submission 102, Victorian Aboriginal Heritage Council.

Specific issues highlighted include discrimination against Aboriginal Victorians and refugees, discrimination against lesbian, gay, bisexual, transgender and intersex groups and individuals,[629] the challenges faced by Victorians with mental health conditions,[630] and the need for culturally appropriate policy and services.[631]

For example:

- Instances of discrimination were documented by the Victorian Gay & Lesbian Rights Lobby, including the transgender women turned away from homeless shelters, pregnant girls exiting state care who are denied help by faith based welfare agencies, and a 12-year-old girl suspended from a religious school when she came out as same-sex attracted.[632]

- Beyond Blue outlined the complex relationship between mental health conditions and multiple forms of discrimination (direct, deliberate, and/or unintended), and the effect on access to healthcare, employment, education and other aspects of participation in public life.[633]

- Desire was expressed at the Springvale Community Forum for people of different backgrounds to be treated equally by police, hospitals and schools, to ensure equity for different cultural groups.[634]

- The Victorian Aboriginal Legal Service (VALS) cited the experience of 'Lorna', whose cultural rights were breached in the provision of a transitional housing possession order. VALS acknowledged the Charter has been helpful, leading to improvements in administrative decision making and enabling rights-based discussion in the process of law making.[635]

2. Economic, social and cultural rights

The day-to-day challenges facing Victorians were highlighted in a number of individual and advocacy group submissions, and across the community forums. The need to prioritise basic needs (such as housing, education, employment, transport and health) is clear.[636]

In particular, multiple submissions emphasised the need to better protect the economic, social and cultural rights of vulnerable, disadvantaged and marginalised Victorians.[637] They clearly stated the consequences for personal dignity and equal participation in the community when we do not protect basic economic, social and cultural rights:

[629] Submission 77, Victorian Gay & Lesbian Rights Lobby.
[630] Submission 6, Beyond Blue.
[631] Submission 102, Victorian Aboriginal Heritage Council.
[632] Submission 77, Victorian Gay & Lesbian Rights Lobby, 4. The submission recognises that independent schools are not generally considered public authorities, but cites the case to highlight the consequences for equality of religious exceptions under the Charter.
[633] Submission 6, Beyond Blue.
[634] Springvale Community Forum, 2 June 2015.
[635] Submission 98, Victorian Aboriginal Legal Service, 7.
[636] Thirty-eight written submissions express a need to extend the Charter to include economic, social and cultural rights in general, and housing and education rights in particular. Economic, social and cultural rights were also discussed at every community forum.
[637] For example, Submission 7, ANU College of Law; Submission 11, Salvation Army (Victoria); Submission 22, Hobsons Bay City Council; Submission 36, Youthlaw; Submission 41, Brimbank City Council; Submission 44, Leadership Plus; Submission 69, Rosetta Moors; Submission 74, Council to Homeless Persons.

> *Those in our community who suffer multiple levels of socio-economic disadvantage, including intergenerational unemployment, low levels of educational attainment, mental illness, homelessness and addictions are particularly vulnerable to violations of their human rights…*[638]

> *… every student with a disability in Victoria [should] have access to the same number of years of schooling as their non-disabled peers.*[639]

> *There are significant human rights concerns for people with disabilities not included in the Charter, such as health, housing, employment and education.*[640]

Among the economic, social and cultural rights, the issue of housing and homelessness received significant attention in the submissions and community forums.

The Mornington Peninsula Human Rights Group noted Victoria has the second highest homeless population in Australia.[641]

The Tenants Union of Victoria contended that '… the "home" is an integral human right'[642] and linked the inclusion of a right to housing with the health and well-being of Victorians. The Union expressed concern about the policy and process complexities in the context of housing decisions (and eviction challenges, in particular) that 'severely hinder the realisation of human rights under the Charter'.[643]

The Council to Homeless Persons highlighted the experience of homeless Victorians, who bear 'the brunt of entrenched social exclusion'.[644] They shared the personal stories of two Victorians, Joan and Peter, who were assisted by the Council's Homelessness Advocacy Service and the Charter to resolve community housing issues. Although the Charter helped Joan and Peter, the Council expressed concern that:

> *… consumers with mental health issues, substance misuse issues, intellectual disabilities and Acquired Brain Injuries (ABI) often have difficulty recalling dates or specific instances when [Charter] breaches have occurred. This poses a barrier to these individuals attempting to uphold their rights.*[645]

The Victorian Council of Social Service noted how the challenges of accessing health, housing and education increases the risk that disadvantaged Victorians will 'fall through the cracks'.[646] As an example, the personal experience of homelessness shared by Lisa Peterson highlighted the broader consequences of homelessness, including the difficulty of securing medical treatment and equitable access before the courts:

> *… under the current Charter … the absence of homeless people as requiring protection against discrimination perpetuates the myth and stereotype that homelessness is a choice—I feel very strongly that its omission is a breach of my human rights.*[647]

[638] Submission 11, Salvation Army (Victoria), 1.
[639] Submission 58, Anonymous, 1.
[640] Submission 44, Leadership Plus, 2.
[641] Submission 103, Mornington Peninsula Human Rights Group, 3.
[642] Submission 75, Tenants Union of Victoria, 1.
[643] Submission 75, Tenants Union of Victoria, 14.
[644] Submission 74, Council to Homeless Persons, 1.
[645] Submission 74, Council to Homeless Persons, 4.
[646] Submission 64, Victorian Council of Social Service, 11.
[647] Submission 14, Lisa Peterson, 1.

The challenge of securing affordable accommodation was highlighted in seven of the eight community forums. I note support for a Charter right to housing.[648]

3. People living with disabilities

Extending the general issues documented in relation to equality, discrimination and economic, social and cultural rights, some submissions raised concerns about human rights for Victorians living with disabilities. There were calls for the Charter to integrate the rights contained within the United Nations Convention on the Rights of Persons with Disabilities.[649]

Lifestyle in Supported Accommodation (LISA) highlighted human rights challenges facing people with disabilities. Its submission gave examples, such as the denial of proper residential tenancy rights for residents of group homes for people with intellectual and multiple disabilities, and the absence of effective independent support to evaluate decisions made on their behalf. LISA submitted:

> *We frequently say, 'Human rights is like pro-bono legal support—try getting some!'*[650]

> *'How dare people with disabilities and their families even consider they have rights? They should be eternally grateful for anything they are given!' This has been the culture of bureaucrats for years. It was rife in Institutions, and moved like a virus into the group homes which replaced Institutions.*[651]

The submission from Yarra City Council discussed the human rights implications of decision making on the administration of medication to clients who cannot self-administer. It argued for the right of people with disabilities to equal capacity under the law.[652]

A detailed personal submission by Matthew Potocnik shared a number of issues with disability compliance requirements. Particular concerns related to the disenfranchisement of Victorians living in supported accommodation from voting.[653]

The community forums also discussed issues relating to the discrimination of people with disabilities. The physical inaccessibility of commercial buildings and public toilets was noted, for example, as was the effect of practical exclusion from daily life.[654]

But in addition to the concerns that were shared, successes were also noted. Examples included improvements in the physical accessibility of buildings and community facilities, such as playgrounds and court rooms,[655] and the positive impact of Wyndham Council's Disability, Aged and Inclusive Co-ordinator.[656]

[648] Springvale Community Forum, 2 June 2015.
[649] Submission 19, The Anne McDonald Centre; Submission 30, Yarra City Council; Submission 41, Brimbank City Council; Submission 69, Rosetta Moors; Submission 76, Office of the Public Advocate; Submission 99, Moreland City Council.
[650] Submission 10, Lifestyle in Supported Accommodation, 1.
[651] Submission 10, Lifestyle in Supported Accommodation, 2.
[652] Submission 30, Yarra City Council, 1.
[653] Submission 73, Matthew Potocnik.
[654] Coburg Community Forum, 3 June 2015; Mildura Community Forum, 21 May 2015.
[655] Bairnsdale Community Forum, 12 May 2015.
[656] Werribee Community Forum, 28 May 2015.

4. Healthy environment

Issues were raised in relation to environmental justice, climate change, sustainable development and a healthy environment.[657]

In a personal submission, Maria Riedl shared her concern that the failure to include Charter rights in relation climate change and other environmental harms is:

> *… a huge and unacceptable omission, as our environment underpins the very existence of life on this planet.*[658]

In another personal submission, Chris Baulman considered the relationship between lifestyle choices and rights. He asserted the right to work 'directly with the gifts of nature' in the pursuit of living in 'peace, justice and security'.[659]

Finally, I note some submissions documented experiences relating to the roll-out of electricity smart meters across Victoria.[660] Stop Smart Meters Australia Inc submitted the consequences of electromagnetic exposure violates a range of rights in the Charter, and:

> *it does not appear that Victorians who have suffered an abuse of human rights in consequence of the rollout of smart meters have been able to avail themselves of the rights protected under the Charter.*[661]

The experiences noted in relation to smart meters fall within a broader call for the protection of the health and wellbeing of Victorians.

5. Family violence

The right of all family members to be safe was noted in a number of submissions and community forums.[662] Many members of the community felt it was important to address family violence as a human rights issue that raises the right to personal security, the right to equality and the protection of families and children.

One anonymous submission suggested:

> *… the development of a good and proper human rights culture would be deficient if family violence is not addressed.*[663]

Community safety[664] and 'the right of an individual to live a safe life'[665] were highlighted in submissions and community forums.

---

[657] Submission 2, Chris Baulman; Submission 28, Maria Riedl; Submission 42, Environmental Justice Australia; Submission 43, Stop Smart Meters Australia Inc.
[658] Submission 28, Maria Riedl, 3.
[659] Submission 2, Chris Baulman, 1.
[660] Submission 16, Confidential; Submission 43, Stop Smart Meters Australia Inc; Submission 50, Maureen Kirsch.
[661] Submission 43, Stop Smart Meters Australia Inc, 2.
[662] Submission 9, Anonymous; Submission 51, Commission for Children and Young People; Submission 67, Confidential; Submission 86, Confidential; Bairnsdale Community Forum, 12 May 2015; Warrnambool Community Forum, 26 May 2015.
[663] Submission 9, Anonymous.
[664] Shepparton Community Forum, 19 May 2015; Mildura Community Forum, 21 May 2015; Coburg Community Forum, 3 June 2015.
[665] Submission 85, Anonymous, 1.

On this matter, a range of submissions suggested the Charter include key provisions from the UN Convention on the Rights of the Child and the UN Convention on the Elimination of All Forms of Discrimination against Women.[666]

6. Human rights education

Submissions and community forums consistently called for a clear commitment to the Charter from government, public authorities and the community.[667]

Many of the personal challenges outlined in submissions and community forums suggest deficiencies regarding how public authority staff, community practitioners, legal advisors and other organisations and individuals understand the Charter. I recognise the frustration that is documented by members of the community.

The need for improved education is cited repeatedly as the best way to uphold and promote the principles and purpose of the Charter.[668]

I note the broad support for formal Charter education in schools,[669] and through public authorities, legal services and community facilities.[670] Participants at the Mildura Community Forum suggested human rights should be a compulsory subject at high school, and students should be examined on their knowledge and understanding of the Charter and human rights.[671]

I also acknowledge the ideas put forward to promote human rights more prominently in national and local media, and at community events.[672] I note the potential educational benefit of publicising human rights case studies and success stories.

7. Other issues

A number of submissions advocated for extending human rights to unborn children.[673] I note concerns expressed about abortion.

> *Human beings need to be respected and treated as a person from the very early moment of conception.*[674]
>
> *The Commission and the Government must lawfully acknowledge and legislate Equality for Unborn Persons.*[675]

[666] Submission 39, Peninsula Community Legal Centre; Submission 51, Commission for Children and Young People; Submission 65, Independent Education Union; Submission 97, Good Shepherd; Submission 98, Victorian Aboriginal Legal Service.
[667] For example, Melbourne CBD Community Forum, 13 May 2015; Shepparton Community Forum, 19 May 2015.
[668] Every community forum and 57 of the written submissions note the need for improved Charter education and training, across a range of contexts.
[669] For example, Shepparton Community Forum, 19 May 2015; Werribee Community Forum, 28 May 2015; Coburg Community Forum, 3 June 2015; Submission 51, Commission for Children and Young People; Submission 52, City of Darebin; Submission 69, Rosetta Moors.
[670] For example, Melbourne CBD Community Forum, 13 May 2015; Shepparton Community Forum, 19 May 2015; Werribee Community Forum, 28 May 2015.
[671] Mildura Community Forum, 21 May 2015.
[672] For example, Melbourne CBD Community Forum, 13 May 2015; Shepparton Community Forum, 19 May 2015; Warrnambool Community Forum, 26 May 2015.
[673] For example, Submission 13, Jeremy Orchard; Submission 21, Joanna Di Lorenzo; Submission 27, Frank Losonski; Submission 32, Freedom from Faith; Submission 40, Presbyterian Church of Victoria.
[674] Submission 21, Joanna Di Lorenzo, 2.
[675] Submission 13, Jeremy Orchard, 1.

Additional issues raised in the submissions and community forums included personal experiences of and concerns about the rights of refugees and migrant workers[676] and the challenge of accessing Charter-related justice.[677]

I thank everyone who participated in the Review and raised these important matters with me.

[676] Shepparton Community Forum, 19 May 2015; Mildura Community Forum, 21 May 2015; Werribee Community Forum, 28 May 2015.
[677] Submission 100, Fitzroy Legal Service.

Submissions

1. Andrew Oliver
2. Chris Baulman
3. Gwen Woodford
4. Riley Baird
5. Bruce Chen
6. Beyond Blue
7. Dr Liz Curran
8. Prof Rosalind Dixon and Prof George Williams AO
9. Anonymous
10. Lifestyle in Supported Accommodation
11. Salvation Army (Victoria)
12. Communication Rights Australia
13. Jeremy Orchard
14. Lisa Peterson
15. Gavin Downes
16. Confidential
17. Anonymous
18. Anonymous
19. Anne McDonald Centre
20. Malcolm Harding
21. Joanne Di Lorenzo
22. Hobsons Bay City Council
23. Christian Schultink
24. Springvale-Monash Legal Service and Monash University academics
25. Anonymous
26. Castan Centre for Human Rights Law
27. Frank Lonsonski
28. Maria Riedl
29. Mental Health Complaints Commissioner
30. Yarra City Council
31. Judicial College of Victoria
32. Freedom 4 Faith
33. Janine Truter
34. Dr Steven Tudor
35. Australian Association of Christian Schools, Adventist Schools Australia, and Christian Schools Australia
36. Youthlaw
37. Jordan Fenton
38. Voluntary Euthanasia Party (Vic)
39. Peninsula Community Legal Centre
40. Church and Nation Committee, Presbyterian Church of Victoria
41. Brimbank City Council
42. Environmental Justice Australia
43. Stop Smart Meters Australia
44. Leadership Plus
45. Community Housing Federation of Victoria
46. Disability Advocacy Victoria
47. Victorian Ombudsman
48. Gippsland Community Legal Service
49. cohealth
50. Maureen Kirsch
51. Commission for Children and Young People
52. City of Darebin
53. Elizabeth O'Shea, Maurice Blackburn Lawyers
54. Victorian Bar
55. Dying with Dignity Victoria
56. Footscray Community Legal Centre
57. Anonymous
58. Anonymous
59. Wally Zylberberg
60. Kerrie Keleher
61. Boroondara City Council
62. Victorian Trades Hall Council
63. Ethnic Communities' Council of Victoria

64. Victorian Council of Social Service

65. Independent Education Union – Victoria Tasmania

66. Anonymous

67. Anonymous

68. Confidential

69. Rosetta Moors

70. Disability Discrimination Legal Service

71. Anonymous

72. Dr Julie Debeljak

73. Matthew Potocnik

74. Council to Homeless Persons

75. Tenants Union of Victoria

76. Office of the Public Advocate

77. Victorian Gay & Lesbian Rights Lobby

78. Law Institute of Victoria

79. Justice Connect Homeless Law

80. Melbourne Catholic Lawyers' Association

81. Anonymous

82. Rosemarie Horner

83. Anonymous

84. Anonymous

85. Anonymous

86. Anonymous

87. Australian Christian Lobby

88. Municipal Association of Victoria

89. Wyndham City

90. Victorian Equal Opportunity and Human Rights Commission

91. Federation of Community Legal Centres

92. Centre for Comparative Constitutional Studies

93. Victoria Legal Aid

94. Assistant Commissioner for Privacy and Data Protection

95. Human Rights Law Centre

96. Liberty Victoria

97. Good Shepherd Australia New Zealand

98. Victorian Aboriginal Legal Service

99. Moreland City Council

100. Fitzroy Legal Service

101. Koori Caucus of the Aboriginal Justice Forum

102. Victorian Aboriginal Heritage Council

103. Mornington Peninsula Human Rights Group

104. Jamie Gardiner

105. Victoria Police

106. Maribyrnong City Council

107. Catholic Archdiocese of Melbourne

108. Federation of Victorian Traditional Owner Corporations

109. Eastern Community Legal Centre

Note: Government departments also provided information to inform the Review.